

**GOVERNMENT OF WESTERN AUSTRALIA**

# Disciplinary investigations

# under Part 5 of the *Public Sector Management Act 1994*

# A guide for agencies

**2** Disciplinary investigations under Part 5 of the PSM Act

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# Introduction

This disciplinary investigations guide is designed to provide assistance to public officers conducting investigative work relating to disciplinary processes carried out under Part 5 of the [*Public Sector Management Act 1994*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.html)(PSM Act), the [*Commissioner’s Instruction No. 3 – Discipline – general*](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-general)and the [*Commissioner’s Instruction No. 4 – Discipline – former employees*](https://www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employees).1

The guide is compiled from a variety of sources and takes into account legislation, Commissioner’s instructions, awards, industrial agreements and reports of decided cases relating to the discipline process applicable to the Western Australian public sector. The guide does not replace these documents, but provides practical advice in relation to conducting investigative practices. As such, this guide does not form part of the regulatory framework for discipline processes conducted under Part 5 of the PSM Act.

When reading the guide, it is important to be mindful of s. 82A(1) of the PSM Act:

1. In dealing with a disciplinary matter under this Division an employing authority —
	1. must proceed with as little formality and technicality as this Division, the Commissioner’s instructions and the circumstances of the matter permit; and
	2. is not bound by the rules of evidence; and
	3. may, subject to this Division and the Commissioner’s instructions, determine the procedure to be followed.

The fundamental requirement of a disciplinary investigation is that the three rules of procedural fairness are observed: all parties should be given adequate opportunity to state their case; all recommendations and subsequent findings should be based on logically compelling evidence; and the investigator should not hold, nor be perceived to hold, a vested interest in the outcome of the process.

It is particularly important for investigators to be guided by the requirement to minimise formality and technicality. While this guide outlines suggested practice for investigative processes, it is in no way prescriptive or binding.

1 When mentioned jointly, the *Commissioner’s Instructions No. 3* and *4* will be referred to as the ‘Commissioner’s instructions on discipline’.

Disciplinary investigations can be both time-consuming and emotionally taxing for the investigator and the other persons who are involved, either as the respondent or as a witness. As such, it is important that an investigation is approached with a high level of care and diligence, and that the rights of all parties are respected.

Not all alleged breaches of discipline require a formal investigation; however, all decisions and findings in relation to a disciplinary matter should be based on an assessment of evidence. The employee should also be given the opportunity to present their case.

The presumption of innocence must be maintained until the allegations have been substantiated or refuted by the evidence.

It should also be noted that the methodology summarised in this guide may be more appropriate for complex disciplinary matters which require in-depth investigation; for smaller matters, only some parts of the guide may be appropriate.

## Who is this guide for?

The guide is designed to provide assistance to public officers carrying out disciplinary investigations on behalf of employing authorities, as referred to in Part 5 of the PSM Act and the Commissioner’s instructions on discipline.

While parts of this guide may be applicable to other disciplinary and administrative investigations, officers conducting investigations which are unrelated to the PSM Act may need to refer to other resources or references.

The guide should be read in conjunction with the following:

* [*Public Sector Management Act 1994*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.htmlhttp%3A/www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_771_homepage.html)
* [Public Sector Management (General) Regulations 1994](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.htmlhttps%3A/www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.htmlhttp%3A/www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1959_homepage.html)
* *[Commissioner’s Instruction No. 3 – Discipline – general](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-generalhttp%3A/publicsector.wa.gov.au/document/commissioners-instruction-no-3-discipline-general)*
* *[Commissioner’s Instruction No. 4 – Discipline – former employees](https://www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employeeshttp%3A/publicsector.wa.gov.au/document/commissioners-instruction-no-4-discipline-former-employees)*
* [*A guide to the disciplinary provisions contained in Part 5 of the PSM Act*](https://www.wa.gov.au/organisation/public-sector-commission/managing-workplace-behaviourhttp%3A/www.publicsector.wa.gov.au/document/discipline-procedures-under-part-5-guidelines)
* [Public sector standards in human resource management, *Discipline Standard*](https://www.wa.gov.au/organisation/public-sector-commission/public-sector-standards-human-resource-management)

## The nature of administrative investigations

Administrative investigations, which include disciplinary investigations under the PSM Act, carry their own unique considerations and requirements. For example:

* the standard of proof necessary for an adverse finding is the balance of probabilities, that is, an act can be established on the evidence if it is found more likely than not to have occurred
* a finding does not normally have any consequences, protection or status outside of the employment relationship
* Investigations are normally carried out without any ability to summons witnesses, compel responses or subpoena documents
* there may be requirements outlined in legislation, policies or procedures which need to be considered.

## When might a disciplinary investigation occur?

Section 81(1)(a) of the PSM Act states:

If an employing authority of an employee is made aware, or becomes aware, by any means that the employee may have committed a breach of discipline, the employing authority may decide to deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner’s instructions.

Neither the PSM Act nor the Commissioner’s instructions on discipline describe an investigation or the investigative process, with the exception of a special disciplinary inquiry authorised by the Public Sector Commissioner.

Therefore, an investigation can be defined simply as ‘a process whereby the facts of a matter are established through the collection of evidence and the consideration of circumstances’.

The responsibility lies with the employing authority to ensure the employee is afforded procedural fairness when considering any allegations made against them. This may dictate some form of investigative process to determine the veracity of the statements or allegations made against the employee.

## The investigator’s responsibilities

Any investigative process relating to a breach of discipline can be time consuming and emotionally taxing on the person undertaking the process. For this reason, it is important that the investigator approaches the task bearing in mind the responsibilities of the role:

* The investigative process must be conducted with as little formality and technicality as the circumstances of the matter permit.
* The manner in which the investigative process is conducted should satisfy the elements of procedural fairness necessary for the circumstances of the matter.
* The employee must be informed of material evidence that might form the basis for an adverse finding.
* Reasonable opportunity must be afforded to the respondent to put forward their case.
* All submissions must be genuinely and carefully considered in the context that the employing authority will make the ultimate decision regarding a finding and any subsequent sanctions.

# The disciplinary investigations framework

This section outlines the different parts of the disciplinary investigations framework that will guide the investigator throughout the disciplinary investigation process. Should you be asked to carry out an investigation under Part 5, you should familiarise yourself with each part of the framework.

**Part 5 of the *Public Sector Management Act 1994***

Part 5 ‘Substandard performance and disciplinary matters’ of the PSM Act provides the statutory framework for the disciplinary process applicable to:

* public service officers appointed under Part 3 of the PSM Act
* ministerial officers appointed under Part 4 of the PSM Act
* members of teaching staff and persons appointed as ‘other officers’ under s. 239 of the *School Education Act 1999*
* any employees prescribed in the Public Sector Management (General) Regulations 1994.

## Commissioner’s instructions

The Commissioner’s instructions on discipline set the minimum procedural requirements for employing authorities in dealing with suspected breaches of discipline, disciplinary matters and the taking of disciplinary action under Part 5 of the PSM Act.

## Procedural fairness

There are three elements or ‘rules’ of procedural fairness that need to be applied when considering any disciplinary matter:

* **Bias rule**: the decision maker does not hold, nor is perceived to hold, a vested interest in the outcome of the process. An investigator should not approach a task entrusted to them with bias or apparent bias.
* **Hearing rule**: the employee is provided with a fair hearing. For example: the employee is given sufficient information relating to all of the allegations to form a response; the information is provided within a reasonable time frame; the employee is given the opportunity to make their response; and the response is genuinely considered.
* **Evidence rule**: recommendations made by an investigator (and subsequent decisions made by an employing authority) are based on logically compelling evidence, and irrelevant considerations are not taken into account when coming to a decision.

The requirements to satisfy procedural fairness will vary according to the circumstances of the matter.

## Discipline Standard

The *Discipline Standard*, one of the public sector standards in human resource management established under s. 21 of the PSM Act, applies to all disciplinary processes undertaken in the Public Sector—not just those conducted under Part 5 of the PSM

Act. It outlines a common standard for ensuring that procedural fairness is applied in all disciplinary matters.

The *Discipline Standard* requires that:

* decisions are based on a proper assessment of the facts and circumstances prevailing at the time of the suspected breach of discipline
* the employing authority ensures procedural fairness is applied to all parties
* decisions are impartial, transparent and capable of review.

Section 96 of the PSM Act sets out that relief is not available via the functions of the Public Sector Commissioner in relation to breaches of the public sector standards established

in respect of substandard performance or disciplinary matters. Essentially, this means that claims for breaches of these standards cannot be made to the Commission. There may, however, be instances in which the Commissioner chooses to monitor and report on agencies’ compliance with the *Discipline Standard*.

## Appeals

Appeals regarding decisions made in relation to Part 5 ‘Substandard performance and disciplinary matters’ can be made to the Western Australian Industrial Relations

Commission (WAIRC). The *Industrial Relations Act 1979* and s. 78 of the PSM Act provide appeal rights to certain disciplinary process decisions or findings made by the employing authority. The appeal is made to the Public Service Appeal Board (PSAB).

In some cases, the WAIRC or PSAB may determine that the principles of procedural fairness have not been appropriately applied to the circumstances of a particular case. It is then possible that the subsequent decision or finding in that case may be ruled invalid,

and that the employing authority must recommence proceedings at a point directed by the WAIRC or PSAB. The WAIRC and the PSAB may also determine a matter on its merits, despite the employing authority having failed to follow the rules of procedural fairness.

Steps in conducting an

investigation

The table below outlines the four phases of conducting a disciplinary investigation. Each of the steps will be described in the next section of this guide.

**Figure 1. The phases of a disciplinary investigation**

### Phase 1: Scoping and planning the investigation

* Step 1 – Establish the authority to undertake the investigation Step 2 – Consider the scope of the investigation
* Step 3 – Construct an investigation plan Step 4 – Draw up a chronology

### Phase 2: Collecting evidence

* Step 5 – Collect documentary evidence
* Step 6 – Organise and commence interviews Step 7 – Consider a site inspection

### Phase 3: Analysing and weighing the evidence

* Step 8 – Collate and analyse evidence
* Step 9 – Consider the need for further evidence
* Step 10 – Conduct further interviews or collect further documentation

### Phase 4: Finalising the investigation

* Step 11 – Write the report
* Step 12 – Once more consider the need for further evidence
* Step 13 – Finalise the report
* Step 14 – Present the report

### Recommendation

**Phase 1: Scoping and planning the investigation**

**Step 1 – Establish the authority to undertake the investigation**

Before an investigation commences, it is important to have the necessary authority to conduct the investigation. The authority to consider an employee’s workplace behaviour lies with the employing authority, and remains with the employing authority throughout an investigation. The employee who is subject to investigation is hereafter referred to as the ‘respondent’.

The authority for you as the investigator to carry out the investigation on behalf of the employing authority is conferred through the ‘Carltona principle’. This is a legal term used to describe the principle whereby a person in whom a power is vested can authorise another to exercise that power. As the investigator, you are exercising the power of the employing authority in conducting the investigative process.

The most important consideration is that you receive a clear direction to conduct the investigation, prior to commencing any investigatory work. Authorisation pursuant to the Carltona principle differs from delegation in that the authorised agent acts in the name of the person or body vested with a particular power, rather than in their own name. Authorisation pursuant to the Carltona principle can be express (such as set out in a written instrument of authorisation) or implied. However, a written instrument of authorisation, such as a letter directing you to conduct an investigation and setting out precisely what is required, should always be used.

It is advisable that you inform everyone you speak to in relation to the matter that you are conducting the investigation in the name of the employing authority, but are not exercising any powers connected to the usual functions of the agency.

**Step 2 – Consider the scope of the investigation**

The scope of the investigation determines what matters you will consider as the investigator. It should be limited to matters relating to the alleged breach of discipline. As the investigator, it is critical that you understand the scope of your investigation, as it will determine what evidence you need to gather and who you will need to interview.

If the allegations have not been articulated clearly, it may be necessary to request that the employing authority provide you with the allegations in writing. These will determine the scope of your investigation.

The scope of the investigation should be limited to matters which are relevant to the alleged

breach of discipline.

The discipline process should not be used as an opportunity to create a ‘dirt’ file

on an employee; nor is it a performance management tool. The distinction between the disciplinary process and performance management

lies in the different outcomes sought by these discrete processes. The goal of performance management is to improve and maintain performance, whereas the goal of the disciplinary process is to discourage unwanted or aberrant behaviour in the workplace.

At the time you commence your investigation, the employee may not yet be aware of the allegations or the investigation. However, the allegations must be provided to them in writing at some point prior to a finding being made by the employing authority, to

enable them to give an adequate response as set out in clause 1.4 of the *Commissioner’s*

*Instruction No. 3* (see example overleaf).

Procedural fairness dictates that the allegations should be specific enough to allow the employee to respond adequately—it is not sufficient to make broad or very general allegations. It is always preferable to give the employee specific times and dates where possible. It may also be necessary to include further clarification following an outline of the allegations, particularly where the behaviour may have been demonstrated on a number of occasions or in more than one way.

**Example correspondence**

It is alleged that you have acted carelessly in the performance of your duties by failing to provide the information requested of you by your Director General, as outlined in email correspondence on 22 April 2011 (see copy of email attached).

Specifically:

* The Director General requested that you provide information relating to your meeting with the lobbyist organisation known as ‘Undue Influence Pty Ltd’.
* The Director General also requested that you provide information relating to your meeting with the company trading as ‘Coercion Incorporated’.
* You failed to respond to the Director General, despite reminders sent to you on the following dates: 23 April 2011, 24 April 2011 and 25 April 2011 (copies attached).
* It is presented that you opened and viewed these emails as demonstrated in the attached email log.

**Step 3 – Construct an investigation plan**

It is recommended that you start your investigation by drawing up an investigation plan. This plan need not be overly complex or complicated, but will provide you with a general outline of how you think the investigation may unfold. Your plan can be used to allocate times for interviewing witnesses and the respondent, and also highlight critical dates or times where you may not be available due to other work commitments or absence.

The investigation plan will assist working out the estimated time it will take to complete the investigation. The time frames should allow sufficient time to plan, collect and analyse documents, interview the witnesses and the respondent, and write the report.

It is recommended that you start your investigation by drawing up an investigation plan to highlight interview times and critical dates.

An example of an investigation plan and time line is included in Appendix A.

At this point, it may be advisable to seek input from more experienced investigators. You can also contact the Conduct and Standards Directorate to help you determine what evidence you will require to substantiate the allegations.

The number of witnesses who will need to be interviewed will depend on the nature of the alleged breach of discipline. Once you have identified interviewees, it is best to allocate a separate day for each interview.

Planning interviews is important as witnesses may not be readily available—they may be busy with other work, on leave, or even hesitant to meet. You may also need to interview key witnesses or the respondent more than once as there may be too much material to cover in one interview, or as new information comes to light.

In more complex cases, it is important that you leave enough time between each interview to review the new information.

In more complex cases, it is important that

you allow yourself adequate time between each interview to review the information that was presented. This will help you determine if the information will alter or impact on the questions you will ask the remaining interviewees.

If it is necessary to have recordings of the interviews professionally transcribed, you may need to allow at least two to three days between interviews. It is desirable to have

transcription completed as soon as possible and transcripts included in the investigation report. It may not be necessary to have all interviews transcribed; however, it is advisable to at least digitally record all interviews. For further comments regarding the recording of interviews, see Phase 2 ‘Collecting evidence’.

**Step 4 – Draw up a chronology**

A chronology allows you to piece together the series of events that took place prior to, during and following the alleged breach of discipline. It will give you a broad overview of the matter and help you identify possible sources of evidence. It may also give matters context and some clues as to why those involved may have behaved in certain ways.

While you may start a chronology during the planning phase, understand that the full chronology may not be finalised until you have considered all documentary evidence and conducted all interviews. Even incomplete, however, the chronology will be useful to put new information in context during the investigation, and it will be helpful when you come to write the investigation report.

An example of a chronology is provided in Appendix B.

**Phase 2: Collecting evidence**

During the planning phase, consideration should be given to what types of evidence will be required and where it can be found. Once the investigation has been planned and scoped, collection of evidence can commence.

Disciplinary proceedings that occur under Part 5 of the PSM Act are not bound by the rules of evidence that apply to legal proceedings. As the investigator, you should be guided by the circumstances of the matter and the most reliable evidence available.

**Step 5 – Collect documentary evidence**

Depending on the nature of the alleged breach of discipline, a range of documents may be required to form a view as to whether the allegations can be substantiated. Consideration should be given to collecting the following documents:

* legislation, particularly
	+ the [*Public Sector Management Act 1994*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.htmlhttp%3A/www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_771_homepage.html)
	+ [the Public Sector Management (General) Regulations 1994](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.htmlhttps%3A/www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4721.htmlhttp%3A/www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1959_homepage.html)
	+ agency enabling legislation (if applicable, and especially if the respondent’s position is created by statute)
* Commissioner’s instructions, particularly
	+ [*No. 3 – Discipline – general*](https://www.wa.gov.au/government/publications/commissioners-instruction-no-3-discipline-generalhttp%3A/publicsector.wa.gov.au/document/commissioners-instruction-no-3-discipline-general)
	+ [*No. 4 – Discipline – former employees*](%E2%80%93%09https%3A/www.wa.gov.au/government/publications/commissioners-instruction-no-4-discipline-former-employees)
	+ *No.* [*40: Ethical Foundations*](https://www.wa.gov.au/government/publications/commissioners-instruction-40-ethical-foundations)
* the respondent’s job description form and performance agreement
* corporate values statement or Corporate Executive Charter
* operational plan for the respondent’s area of responsibility
* agency code of conduct
* previous investigation reports, such as written by the CCC or PSC or resulting from previous internal investigations
* letters of notification (if existing), such as
	+ written correspondence provided to the respondent notifying them of the suspected breach of discipline and outlining the allegations
	+ any correspondence notifying the respondent of the investigation
	+ any responses provided by the respondent
* any other background information or references to ensure adequate understanding of the matter, such as agency policies, processes and procedures. It is important to

ensure that all codes, policies and procedures gathered were current at the time of the alleged breach

* any other relevant documents that may contribute to the body of evidence in relation to the allegations, such as letters, briefing notes or memorandums
* emails, particularly those sent and received by the respondent and certain witnesses (this is especially relevant where there is a likelihood that they may establish a material particular relating to the possible breach).

Most agencies have provisions in place for the tracking and storage of emails, and also require that employees understand and agree to their Information and Communication Technology (ICT) usage policy. These policies generally state that the agency has

the authority to access and review their employees’ email communications at any stage. If you require access to emails and email systems, you should discuss this with the employing authority and obtain the necessary approvals. Care needs to be taken to ensure this process is done discreetly and confidentially.

An investigations running sheet is a useful tool to keep track of all actions and events occurring during the investigation.

Copies of documents are sufficient unless there is reason to doubt that the copy is a true

reflection of the original. Documentary evidence

should be systematically named, numbered and securely stored.

An investigations file should be created to contain all correspondence, file notes, records of interviews and any other documentary records created during the course of the

investigation. The file should provide a complete chronological record of the investigation. It will need to be used, moved and stored securely to maintain confidentiality and to reduce the risk of unauthorised access.

It is also useful to keep an investigation running sheet to keep track of all actions and events occurring during the investigation. This will provide a quick reference for dates of significant events, such as conversations with legal representatives and interviews with witnesses. An example of a running sheet is provided in Appendix C.

If possible, all documentary evidence should be reviewed carefully before interviews commence, as it may be necessary to provide copies of documents to interviewees. Interviewees may also wish to provide you with further documents they consider to be relevant.

Once you have reviewed all documentation, you may need to add new information to your chronology. It is useful to include references to relevant documents in the chronology to assist in recalling where you found and stored the information (see Appendix B).

**Step 6 – Organise and commence interviews**

Once you have identified witnesses and are confident you have gathered sufficient information to commence interviewing, you can begin to contact people to arrange suitable interview times.

When arranging interviews, there are several considerations to bear in mind:

* People may be hesitant to meet, so it is important to reassure them they are not the subject of disciplinary action. However, you may become aware of information during the process that indicates other individuals may have also committed breaches of discipline, and therefore no guarantee should be given about future action or processes.
* If people are unsure about meeting with you or have questions regarding your authority to conduct the investigation, it is advisable to direct them to speak with the employing authority.
* If employees are unwilling to meet but you feel their involvement will be critical for the process, you may need to consider speaking to the employing authority about a

lawful direction for that person to attend an interview. However, you need to be mindful of a person’s right to silence in instances where the possibility of self-incrimination

may arise. While it may be lawful for an employing authority to instruct an employee to attend an interview, it doesn’t necessarily follow that an employee will choose to volunteer information to an investigator, particularly if this information would in some way implicate them in any wrongdoing.

* When arranging interviews, it can be useful to remind people that the process is confidential, and that they may also request the presence of a support person (see clause 1.5 of the *Commissioner’s Instruction No. 3*). *A guide to the disciplinary provisions contained in Part 5 of the PSM Act* discusses considerations regarding

whether a support person or representative should be able to attend and the role they should take.

No undertaking should be given to an interviewee that their evidence or their identity will not be revealed to the respondent.

* If a person being interviewed intends to bring a support person, it is important to establish that person’s role prior to the interview. If that person is a witness or someone you may wish to speak to

separately about the matter, it is important they do not attend as a support person.

* No undertaking should be given to an interviewee that their evidence will not come to the attention of the respondent or that their identity will not be revealed. As a general rule, the respondent is entitled to the disclosure of all relevant evidence collected against them.
* The requirement of confidentiality should be subject to the need of the respondent to discuss issues with others, including fellow employees, insofar as those issues concern their response to the disciplinary process.
* It is also good practice to follow up any telephone conversations with some correspondence (such as an email) confirming the time and place of the interview and reminding the person of the confidential nature of the investigation.

**Professional or technical advice**

Before conducting interviews with key witnesses, it can be useful to speak to someone who has a broad knowledge of the particular area in which the respondent works, who can give you a summary of particular work processes, or who can explain the circumstances surrounding a particular issue. This will provide you with a broad overview of the context relating to the allegations, and can help to clarify issues such as reporting arrangements and work flow considerations.

You may also need to seek this ‘expert’ professional or technical advice in relation to the application of a particular policy, or to gain a better understanding of how a technical or complex work task is carried out.

**Witness interviews**

Disciplinary interviews can be quite stressful for all parties involved. There are a number of important considerations that can help you ensure interviews run as smoothly as possible:

* It is important to be well organised and have accurate information. Preparation and planning are essential.
* You should thoroughly review all background information and material prior to an interview.
* When preparing for an interview, it can be helpful to develop an interview plan noting the questions you want to ask and some possible lines of inquiry.
* When planning an interview, you should give some consideration to possible issues around the respondent’s gender, age, and intellectual and emotional capacity. At times, alternative ways of gathering evidence (other than a ‘formal’ interview) may be necessary or more appropriate.
* It is recommended that interviews do not exceed two hours as long interviews can be exhausting for both you and the interviewee. A long interview can also impact on the quality of the evidence as concentration levels drop. If there is a large amount of material to cover, you may need to interview witnesses or the respondent more than once.
* Your physical safety should be an important consideration when choosing the location of the interview and those persons to be present. An investigator should not presume that issues of safety can be discounted because the matter is administrative in nature.
* The order in which people are interviewed is important and should be considered when you create your investigation plan. Other witnesses should be interviewed before the respondent so that their information can be assessed for its relevance to the case, and presented to the respondent for comment if necessary.

It may be useful to have someone else ‘sit in’ and assist you with the interview. The role of this person may be to record the proceedings or be a formal witness, or simply to observe the interview and reflect upon any lines of inquiry the interviewer may have missed. If this is the first time you have conducted a disciplinary investigation or you are new to conducting interviews, it is strongly recommended that you ask a more experienced interviewer or investigator to assist you with the interviews (including preparation and planning).

It is also highly advisable that you plan the questions you will ask during interview and carefully arrange any documents or exhibits you wish to present to the interviewee. A series of planned questions will provide you with a logical structure to follow and can assist you to bring the interview ‘back on track’ should the interviewee digress onto other matters.

Having planned questions does not preclude you from exploring other lines of inquiry that may arise during the course of the interview; in fact, a certain degree of flexibility may be required as the interview progresses.

It is strongly recommended that you plan the questions you will ask during the interview.

There may be times when the interviewee brings up other matters that have limited or no

relevance to the investigation. In this case, you need to consider if you should redirect the interview back to relevant matters, or alter the direction of questioning. In some instances, it may be useful to let an interviewee digress and let them talk, even at length, about other matters. Often, important information can be gleaned while a person is speaking about matters which at first didn’t appear directly relevant to the investigation.

In most circumstances, it is appropriate for you to advise a witness prior to, or at the beginning, of an interview how their evidence might be used and whether the respondent will be provided with any information that might allow the witness to be identified. It may not always be possible for the identity of a witness to remain confidential, as it may be necessary to provide their evidence to other witnesses, to the respondent, or to the employing authority, depending on the nature of the allegations and circumstances of the case. If any witness testimony is likely to be provided to another authority such as the WA Police or the Corruption and Crime Commission (CCC), it may be appropriate to advise the witness of this prior to the interview.

**The presence of a support person**

Whether the respondent may bring a support person to an interview is ultimately at the discretion of the employing authority. Ensuring an appropriate level of procedural fairness is a key factor when exercising this discretion, and also when you determine what role the support person will play. A request for a support person should not be denied unless there is a good reason to do so.

The most important consideration is that a support person does not attempt to answer questions on behalf of the respondent. This can be difficult if the respondent brings along someone who may also be providing them with advice on the process, or is acting as their legal representative. While it may be unrealistic to expect the support person to be silent throughout the interview, you may need to reiterate that they may not speak on behalf of, or answer questions for, the respondent.

On rare occasions, the interviewee may need someone to articulate their answers for them, given a genuine inability to respond verbally (such as a disability). In these instances, the person responding is acting as a representative of the person being interviewed; however, this should not alter the fact that they are assisting the interviewee and are not being interviewed themselves.

**Recording interviews**

It is recommended that, where possible, you record all interviews with a digital recorder. Interviewees must be advised of the use of the device, although their consent is not required so long as they are notified. If the interviewee needs reassurance that it is appropriate for the interview to be recorded, you can outline some of the benefits; for example, recordings can increase the accuracy of the gathered information, and allow you to relax and engage with the interviewee instead of writing notes.

When recording the interview, it can be helpful to commence an interview by stating the following:

* the time and date of the interview

Recording interviews can increase the accuracy of the gathered information, and allow you to relax and engage with

the interviewee.

* your name (as the investigator)
* the name(s) of your assistant interviewer(s) or investigator(s)
* the interviewee’s full name and position
* the name(s) of any support person(s)
* the reason why you are conducting the interview.

It is also useful to give the interviewee an overview of important information at the beginning of the interview, such as:

* that you are carrying out the process on behalf of and by the authority of the employing authority that and all decisions regarding a finding and any subsequent sanctions will be made by the employing authority (not yourself)
* that the process is confidential; however, no guarantees can be made that the information they provide, including their identity, won’t be made available to another organisation or body authorised to access that information, such as the CCC or the WA Police
* an outline of the investigation process
* how the information the interviewee provides may be used
* the expected time frames of the investigation which are relevant to the interviewee (for example, in the case of the respondent, this could include the likely completion date of the investigation).

**Listening skills**

Well-developed listening skills are critical to the interviewing process. Careful listening can assist in building a rapport with the interviewee, and may encourage them to be open and honest with you. It is also very important that you allow sufficient time for the interviewee to answer questions.

Do not be uncomfortable with pauses in the interview. While long pauses may feel unnatural, it is important that the interviewee is given as much time as necessary to respond. You should also be careful not to pre-empt or finish an interviewee’s responses.

You should be careful not to pre-empt or finish an interviewee’s responses.

**Concluding the interview**

Once you have explored all relevant lines of inquiry and sought answers to all your questions, you should:

* invite the interviewee to provide any further information they feel is relevant, or to make any final comments
* offer an opportunity to your assisting interviewer (if present) to ask any questions they may have
* outline how the investigation will proceed from here
* remind the interviewee of the requirement for confidentiality
* thank them for their time and input
* provide your contact details in case they wish to provide more information or further discuss the process.

If an interviewee became upset or showed a high level of other emotional stress during the interview, it may be appropriate for you to mention other assistance available such as an employee assistance program.

**Step 7 – Consider a site inspection**

In addition to conducting formal interviews, you may consider conducting a site inspection.

While inspections are not overly common in administrative and disciplinary investigations in the public sector, they may assist you to better understand the environment in which the breach allegedly occurred and place the matter into a physical context. In some cases, you may also want to take photographs of the site (if appropriate), which can then be used as a reference, as evidence, or reproduced in the investigation report.

**Phase 3: Analysing and weighing the evidence**

**Step 8 – Collate and analyse evidence**

Once you have collected all the necessary documents and conducted interviews for all relevant lines of inquiry, it is recommended that you review the information you have obtained to ensure sufficient evidence has been gathered.

When analysing evidence, keep these important points in mind:

* Disputed facts should, where possible, be corroborated by other evidence.
* The veracity of witness evidence should be tested against other evidence, if available.
* Any value placed on hearsay evidence should be assessed carefully.
* The credibility of witnesses and their evidence should be considered.
* Understanding the possible motivations or intentions of the witnesses or the respondent is important; however, such considerations must be supported by evidence if relied upon in any way.
* Any responses provided by the respondent should be considered and included in the analysis.
* Possible defences and any mitigating factors should be considered and outlined.
* Although care should be taken to avoid assumptions, it is appropriate for an investigator to draw inferences to fill gaps in the evidence. Inferences are logical conclusions drawn from and consistent with the evidence already established. Inferences enable issues to be determined when there is insufficient direct evidence to form a factual finding.

**Step 9 – Consider the need for further evidence**

Your analysis may reveal that further information is required to clarify or confirm a particular issue. You should carefully consider if there are any gaps in the evidence, of if any inferences have been made for which relevant evidence could still be found. It may be tempting to make assumptions; however, all matters in dispute need to be proved on the balance of probabilities.

**Step 10 – Conduct further interviews or collect further documentation**

If further information is required, it may be necessary to source further documents or re- interview certain people. There may also be situations where the information which has already been gathered requires that additional people are interviewed.

**Phase 4: Finalising the investigation**

**Step 11 – Write the report**

Your investigation report will be the official record of the process you have undertaken, outlining the allegations, the evidence collected and any recommendations you make in regard to a finding (if required).

In a disciplinary process carried out under s. 81 and s. 82A of the PSM Act, the employing authority has the final responsibility to determine an appropriate finding and apply any subsequent sanctions. While you as the investigator may make recommendations in relation to a finding of a breach of discipline, the employing authority is not bound by those recommendations.

The following suggested structure may be helpful when writing your report:

**Example report structure**

* Index
* Executive summary (especially for lengthier reports)
* Background
	+ particulars of the allegation(s) and the scope of the investigation
	+ authority to investigate
* Methodology (how the investigation was undertaken)
* How the alleged behaviour or action might constitute a breach of discipline if proven in light of existing policies, applicable standards, codes etc.
* Evidence
	+ interview summaries
	+ documentary evidence
* Respondent’s explanation (written response, summary of interview and any other evidence provided by the respondent)
* Assessment and analysis of evidence
* Conclusions and recommendations (in your opinion as the investigator, was the breach substantiated or not?)
* Attachments
	+ interview transcripts

If this is the first time you have written a report on a disciplinary matter, it may be useful to read other reports prepared for previous investigations. Each investigation and the related circumstances are different, and therefore report structures and styles can vary. The most important consideration in writing an investigation report is that the evidence is presented in a logical and coherent way in order to form the basis for any recommendations.

While writing, you should be mindful that the respondent may be given a copy of the report in some form, either under a Freedom of Information request, or provided by the employing authority to aid procedural fairness. You will need to consider this especially when deciding if it is necessary to include direct references to witnesses and the information they provided. Care should be taken to protect the anonymity of witnesses where possible; however, this cannot be guaranteed in all cases, particularly where the information they provide forms the basis for a possible adverse finding.

**Step 12 – Once more consider the need for further evidence**

The process of writing the report can be used to check again if any issues have been overlooked or certain information is still required. To establish if this is the case, the following considerations should be kept in mind:

* The conclusions reached by the investigator should logically flow from the evidence and the subsequent analysis.
* If a clear conclusion cannot be established, further evidence or clarification of certain information may need to be sought to avoid making or relying upon assumptions.
* It may not be possible to draw a conclusion if enough evidence does not exist to support or refute a possibility.
* All allegations relating to the case will need to be considered and addressed.
* Sufficient evidence will need to be gathered for the allegations to be substantiated or invalidated based on the balance of probabilities.

**Step 13 – Finalise the report**

The final step in writing your report will be to draw your conclusion as to whether the allegations have been substantiated or not. While this is an important step and should be considered carefully, it is important to remember that the employing authority has the final responsibility to determine an appropriate finding, and is not bound by the recommendation.

In some cases, you may be asked to also provide your opinion regarding any appropriate sanctions which should be applied, based on your conclusions. In forming this opinion, you should consider these important factors:

* **Culpability**: the intent or motivation of the respondent, whether they admitted the breach of discipline, and whether they were aware of the required standard of behaviour that was breached and the consequences of breaching it
* **Experience**: the seniority of the respondent (including their number of years’ experience working in the public sector), their skills and position within the organisation, and other employment and behavioural history (including previous advice or counselling in relation to the same behaviour)
* **Effect**: the nature and seriousness of the incident (in context to the circumstances), the impact of the respondent’s actions on the agency and its reputation, and whether there is any ongoing risk to the public or colleagues.
* **Fairness**: whether or not the incident was isolated, any mitigating or extenuating circumstances, the likely impact of the sanction on the respondent, and how other employees have been treated in similar circumstances.

Once the report has been completed, it may be advisable to have it reviewed by a more experienced investigator, particularly if the matter was complex or sensitive. This will give you an opportunity to receive feedback on the report’s structure, and an objective view of your reasoning and conclusions.

It may be advisable to have your report reviewed by a more experienced investigator if the matter is complex or sensitive.

Where matters of law are involved, legal advice should also be sought at this point.

**Step 14 – Present the report**

Once you have received the feedback and have made any necessary refinements, you can now submit the report to the employing authority.

It is advisable to prepare a covering letter to accompany the report. Besides providing a brief context and overview of the report, a covering letter can also be used to outline any issues or concerns that have arisen during the investigation, but which are not directly relevant to the matter and are not addressed in the report (for example, questionable conduct by officers other than the respondent which came to light during the investigation).

External notifications

## WA Police, Corruption and Crime Commission and Public Sector Commission

The investigator needs to be mindful of any potential involvement by agencies such as the WA Police, Corruption and Crime Commission (CCC) or the Public Sector Commission (PSC). If possible, actions which would jeopardise the investigations of an independent agency should be avoided; however, the investigator’s primary duty is owed to the employing authority, who is entitled to deal with any disciplinary matter and take it to conclusion unless restrained by an external agency.

Although the police can potentially seriously affect the employment relationship by arresting an employee and removing them from the workplace, they rarely do so. Similarly, although the CCC can prohibit investigative action under s. 42 of the *Corruption, Crime and Misconduct Act 2003*, such action is also rare. In most cases, an employing authority is generally free to continue a disciplinary investigation and take action (including potential dismissal), despite any involvement of the police or the CCC.

Where, during the course of an investigation, information or evidence comes to light that suggests possible criminality or misconduct where it has not been suspected before, this may need to be provided to either the WA Police, the CCC or the PSC.

In certain circumstances the WA Police, the CCC or PSC may also request a copy of the investigator’s report.

Common pitfalls in conducting investigations

## Planning and preparation

**Scoping issues**

Problems may arise where an investigator makes conclusions or recommendations about matters that are outside of the scope of the investigation. Findings also cannot be made in relation to allegations which have not been put to the respondent.

**Lack of preparation**

Lack of planning, preparation and forethought on the part of the investigator can result in failure to obtain necessary evidence by not identifying individuals who need to be interviewed or not securing important documentary evidence.

**Lack of resources**

A lack of resources, particularly of time, can hamper or delay an investigation, or seriously compromise its effectiveness. As many of the administrative processes associated with an investigation are time consuming, the risk is increased where the investigating officer has other competing duties. If sufficient time is not made available to conduct an effective investigation, concerns can arise regarding the provision of procedural fairness to the respondent.

## Procedural issues

**Failure to provide procedural fairness**

The following common mistakes can result in a lack of procedural fairness:

* failure to comply with the requirements of the Commissioner’s instructions on discipline
* failure to communicate all allegations to the respondent
* failure to provide all relevant evidence to the respondent, especially if it may form the basis for an adverse finding
* failure to notify the respondent if the allegations change or are modified through the course of the investigation
* failure to collect sufficient evidence or to identify the most compelling evidence (for example, where not all necessary witnesses were interviewed to obtain the best evidence available, due to being unavailable or unwilling to be interviewed).

**Failure to consider evidence that supports a defence**

Any evidence or information which casts doubt on the veracity of the allegations must be carefully considered. The presumption of innocence is integral to the process and a fair hearing must be afforded to the respondent. If it appears an investigator has overlooked evidence that may support a defence, then an apprehension of bias could be raised and the findings and sanctions overturned on appeal.

**Making findings not supported by evidence**

Adequate collection and careful consideration of evidence must form the basis for any conclusions or findings. A finding insufficiently supported by evidence cannot be reasoned on the balance of probabilities.

## Investigator competence

**Lack of contextual understanding**

It is important to have an adequate understanding of the particular workplace environment and organisational culture when considering a matter. A decision may appear unreasonable or even wrong when considered out of context, but may be defensible when considered in context.

**Lack of objectivity**

Bias, both actual and perceived, must be avoided. Conclusions should not be reached without evidence. A ‘feeling’ or ‘hunch’ about a matter, without evidence, should not be relied upon in any way when forming an opinion or conclusion on a matter.

**Lack of knowledge**

An investigator must have knowledge of the applicable legislation, policies, procedures and standards relevant to the disciplinary process, as well as some knowledge of industry practice and protocols with regard to investigative procedures.

**Poor recordkeeping practices**

The Western Australian Industrial Relations Commission has previously commented on the poor recordkeeping practices of investigators carrying out disciplinary investigations in the public sector. Therefore, care should be taken to prepare and securely store documentation relating to the disciplinary process to provide a level of probity and transparency that will enable an adequate review of decisions and findings.

Appendix A – Sample investigation plan

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Task Name** | **Duration** | **Week 1** | **Week 2** | **Week 3** |
|  | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** |
| **Phase 1: Scoping and planning the investigation** | **7 days** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Meet Director General | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Provide agency with information requirements | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Make initial contact with respondent | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Develop event chronology | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Identify persons of interest | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review with manager and confirm interviewee list | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Phase 2: Collecting evidence** | **38 days** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Gather relevant public sector policies | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review public sector policies | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Agency to find and provide policies, emails and documents | 7 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review agency information | 3 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Make appointments | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Design questions | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review with manager and make changes if required | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Prepare progress report for Director General | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Submit progress report | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interview witness #1 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Post interview admin and refine questions for witness #2 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interview witness #2 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Post interview admin and refine questions for witness #3 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interview witness #3 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Post interview admin and refine questions for witness #4 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interview witness #4 | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Post interview admin | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Follow-up interviews (if required) | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Provide respondent with list of documents under consideration | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Refine questions for respondent and review with manager | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Make any changes | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Interview respondent | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Follow-up interview (if required) | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Post interview admin | 1 day |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Phase 3: Analysing and weighing the evidence** | **10 days** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Analyse evidence and update event chronology | 5 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Draw conclusions and make findings | 5 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **Phase 4: Finalising the investigation** | **29 days** |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Prepare first draft of investigation report | 8 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review first draft with manager | 3 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Make changes | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review second draft with legal input | 8 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Make changes | 3 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Review final draft with manager | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Prepare final report | 2 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Provide final report to agency | 1 days |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |

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| **Week 4** | **Week 5** | **Week 6** | **Week 7** | **Week 8** | **Week 9** | **Week 10** |
| **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** | **M** | **T** | **W** | **T** | **F** |
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Appendix B – Sample chronology

**Investigation chronology**

Respondent: Mr Bloggs

Corporate File: W12345678

|  |  |  |  |
| --- | --- | --- | --- |
| **Date** | **Event/incident** | **Significance/ comment** | **Reference** |
| Wed, 29 July2009 | Mr Bloggs contacted Mr Smith by email concerning Cabinet decision on site development | Possible breach of Cabinet confidentiality | Email record ref. no. 12 |
| Thu, 30 July2009 | Mr Smith forwarded Mr Blogg’s email to local newspaper | Possible breach of Cabinet confidentiality | Email record ref. no. 13 |
| Sat,1 August 2009 | Local newspaper runs story stating local developers won’t be given opportunity to submit tenders for work | Local developers contact Minister’s office regarding article | p. 3*The Daily News*Saturday, 1August 2009 |
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Appendix C – Sample running sheet

**Investigation running sheet**

Respondent: Mr Bloggs

Corporate File: W12345678

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| --- | --- | --- | --- |
| **Number** | **Date/time** | **Event/incident** | **Action taken** |
| 1 | Mon, 10August 2009 | Received letter of direction to investigate | Investigation commenced |
| 2 | Thu, 13August 2009 | Rang and spoke to respondent |  |
| 3 | Fri, 14 August2009 | Meeting with senior staff of agency to discuss investigation | Awaiting delivery of agency files |
| 4 | Wed, 19August 2009 | Was contacted by lawyer acting on behalf of Mr Bloggs—he requested a copy of all documents being considered | Undertook to provide a list of documents to be considered |
| 5 | Fri, 31 August2009 | Rang and spoke to witness #1 and organised to meet for interview on 8 September |  |
| 6 |  |  |  |
| 7 |  |  |  |
| 8 |  |  |  |
| 9 |  |  |  |
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