

## 10 Retrieving an investigation when things go wrong

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### Putting an investigation at risk

To avoid putting your investigation at risk, you should:

- ensure due process (e.g. as outlined in these guidelines) is followed — document any action or inaction that is contrary to best practice
- document all your investigative actions, as well as reasons for deviating from your investigation plan
- follow all relevant disciplinary procedures, particularly if they are contained in an Act or Regulation — take care not to omit any steps
- be careful about adopting the findings of another investigator — any disciplinary outcome should be based on your independent investigation
- ensure that the outcome of your investigation is firmly supported by the evidence — don't make any recommendation that can't or won't be defended
- check that your evidence is complete, with all available witnesses interviewed and all documentary evidence gathered.

Nevertheless, even with the best-laid plans for an investigation, from time to time things may go wrong. However, the situation is usually retrievable if swift and appropriate action is taken to remedy the problem.

### Act immediately

You need to be aware of what might go wrong in an investigation so that you can be prepared to take action if it shows signs of faltering.

- Acknowledge the problem as soon as it is discovered, and consider who else should be notified. Depending on the nature of the investigation and of the problem, this may involve notifying the person who authorised the investigation, or notifying the CCC. Usually anyone who has been unfairly prejudiced as a consequence of the problem should also be notified, but this does not apply if notification would have the effect of exacerbating the problem or compromising the investigation.
- Act to fix the specific problem immediately. Unfortunately, this will not always be possible, and in some cases you will be unable to recover the investigation.
- Fix the general problem by examining your investigation procedures. If the problem is procedural, you should act to rectify the problem across the board.

### Actual or perceived conflict of interest

A conflict of interest may be discovered or alleged when the investigation is already under way (see “Conflicts of interest” in chapter 5). You may become aware of facts or circumstances indicating a conflict of interest which were not apparent at the outset, or an allegation of a conflict of interest might be levelled by someone else after your investigation has started. Retrieving an investigation in these circumstances can be complex.

Under no circumstances should you make a judgment about the existence of an actual or perceived conflict of interest.

Responsibility for determining whether a conflict of interest exists will usually lie with the person who authorised the investigation. As soon as a conflict becomes apparent or is alleged, the person who appointed you and, where practical and appropriate, the complainant and the subject officer should be told about it and their views ascertained. The potential conflict of interest should only be withheld from the subject officer in exceptional circumstances (e.g. if advice would compromise any future investigation, or the current investigation if it is retrievable).

The preferred course of action is for you to be removed from the investigation and a new investigator appointed. In practice, however, this might not be feasible, due to the passage of time, available resources, or the state of the investigation (e.g. witnesses or other evidence may no longer be available).

It may be necessary to bring in a third party to oversee or cross-check the investigation; and, if it is impossible to re-interview a witness, this third party may review the electronically recorded interviews. Some aspects of the investigation may be able to be separated and treated differently —the factual material already obtained might be used, but other aspects of the investigation (such as interviewing witnesses) might need to be done again from scratch. A probity auditor might need to be appointed to vet the investigation report, or advice could be sought from an appropriate source such as Crown Law.

In determining whether an investigation tainted by conflict of interest can be salvaged, consider:

- the nature of the conflict
- the remoteness of the actual or perceived conflict
- the seriousness of the allegations being investigated (the more serious the allegations under investigation, the more important it is that there is no actual or perceived conflict of interest).

If you continue with the investigation, or if material collected or produced by you is to be relied on by a different investigator, the consent of all relevant parties should be obtained if possible, otherwise the credibility of the concluding report will be diminished. All decisions and actions must be documented.

## Excessive delay

Claims of excessive delay in completing an investigation may come from either the subject officer or the complainant.

### Steps to be taken

The usual procedure for reactivating an investigation that has been excessively delayed is to:

- advise the person who authorised the investigation and your supervisor
- explain the reason for the delay
- review the investigation plan to see if it can be streamlined
- develop a timetable and meet those time commitments
- document the reasons for the delay and how the problem has been approached
- finish the investigation.

The seriousness of the allegations being investigated must be taken into account whenever consideration is being given to discontinuing an investigation. The more serious the allegations, the more disinclined you should be to drop it.

## Role of your supervisor

However the delay has been identified, your supervisor may need to act to rectify the problem and reactivate the investigation by:

- advising the person who authorised the investigation
- advising all other parties concerned
- closely monitoring and supervising the completion of the investigation
- investigating the reason for the delay
- determining, in consultation with the person who authorised the investigation, whether it would be fair to proceed with the investigation or whether, in the interests of natural justice, it should be dropped
- if the investigation is to proceed, considering whether a new investigator should be appointed or the case reallocated
- determining whether any urgent action needs to be taken and prioritising it
- setting a timetable for completion
- reviewing the investigation plan to see if it can be streamlined in any way.

## Information leaks

Despite your best efforts to keep an investigation confidential, word can still leak out about it. In this case, you should:

- report the leak to the person who authorised the investigation
- ascertain the source of the leak, if possible
- take steps to ensure that witnesses are not harassed
- where appropriate, meet with relevant parties and decide ground rules
- determine the effect that the loss of secrecy has had, or will have, on the investigation
- in the areas where the investigation has been compromised, undertake a risk assessment, including an examination of the prospects of successful completion
- if the investigation is to continue, adjust or redesign the investigation plan.

## Failure of procedural fairness

At relevant stages of the investigation, there may have been a failure to adhere to the principles of procedural fairness (see chapter 5). This can sometimes be remedied by going back and affording the procedural fairness that has been denied.

Then, if possible, somebody else should reconsider all relevant facts of the case and any submissions made by those affected, to avoid any perception of prejudice.

In practice it will not always be possible to remedy a denial of procedural fairness. It may then be advisable not to act on any recommendations contained in a report, but instead to hand all relevant information to a new investigator who provides procedural fairness, makes a new finding and produces a fresh report (which may in practice be based largely on the original report).

## Loss of documents

A situation may arise where a document is lost (e.g. a document or record obtained from a witness, a document not electronically saved, or a receipt). You should:

- attempt to find it
- record the loss on the file
- check whether any copies are available (copies should be made of all documents integral to your investigation)
- try to present the evidence in some other way.

In the case of a lost receipt or similarly unreproducible document, investigators should draw up a statement indicating that they have seen it, that it was previously in their possession, and what it said, including corroboration from any other witnesses.

## Loss of a highly confidential document

If a highly confidential document is inadvertently lost rather than merely misplaced, there may be potential for it to fall into the hands of third parties. If so, in addition to the steps above for the loss of a document, you should also:

- identify who might be prejudiced, embarrassed or adversely affected by the loss, and alert them that it has been lost
- undertake a risk assessment of the likely consequences of the loss, and take appropriate remedial action
- demonstrate that there was no impropriety in its disappearance
- look at any systems failure that may have contributed to the loss, and implement necessary changes.

## Failure to identify unrelated criminal matters

An investigation may uncover evidence of criminal conduct unrelated to the allegations being investigated. For example, an analysis of an employee's work computer during an investigation into possible invoice fraud may indicate that the employee has downloaded child pornography.

If evidence of unrelated criminal conduct is found, the most appropriate response is to stop the investigation immediately and advise the person who appointed you. The new information should be referred to the CCC or the QPS by you, the person who appointed you, or your UPA's CCC liaison officer.

The main thing is to avoid any action that could prejudice the investigation of the unrelated criminal conduct. Once the allegations of unrelated criminal conduct have been appropriately referred and the necessary evidence secured, your original investigation can proceed.

## Investigation becoming too complex or losing focus

If you feel out of your depth due to the complexity of an investigation, you should:

- acknowledge the fact
- revisit your investigation plan
- seek advice or additional resources from the person who authorised the investigation.

## **Investigation going off track or losing focus**

You may not be aware that your investigation has gone off track until it is raised with someone senior to you by a party affected by the investigation, or even when you report to management.

This situation calls for a strong supervisory role by your CEO. It may be possible for the investigation to be brought back on track by the two of you getting together and talking through the issues. You could revisit the investigation plan, identify where, why and how the investigation has lost track, and formulate the future direction of the investigation.

If the investigation is beyond your competence or capability, it will be necessary to replace you. If the course that you have taken has irreparably compromised the investigation, it may be necessary to abandon it entirely.