

## 5 Key considerations for public officials and investigators

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### Confidentiality

Public officials and investigators have a duty of confidentiality in relation to complaints about corrupt conduct under various statutory and contractual provisions. Unauthorised disclosure of confidential information will also generally be proscribed by your UPA's code of conduct.

Your confidentiality obligation extends to the identity of the person making the complaint, the person who is the subject of the complaint, and sometimes even the existence of the complaint.

You may also need to consider whether the complainant is making a public interest disclosure, and is therefore subject to the provisions of the *Public Interest Disclosure Act 2010* (see "Public interest disclosures" below).

### What to keep confidential

You should do everything in your power to keep confidential:

- **the identity of the source of information (including the names of any disclosers)**

This means taking care not to release any information that might reveal that person's identity, including indirect information such as a physical description, location or other personal data unique to the person. Doing so can have detrimental effects on the source and may reduce the trust that people have in you. Discuss with the source any fears they may have if their identity is revealed, for example, as part of a criminal prosecution (see also "No guarantees" below). Even if the source consents to their identity being revealed, keep it confidential wherever possible.
- **the identity of those involved in the investigation, especially the person under investigation and witnesses**

The identity of the person under investigation, any other person involved in the investigation, and even the subject of the investigation should be kept confidential. While it may be necessary during the course of the investigation to discuss aspects with different witnesses, you must never lose sight of the fact that the enquiry is not complete until a report is prepared.
- **any documents gathered during the course of the investigation**

This includes details of a complaint and records of interview taken during any investigation. Some internal documents may also be confidential (e.g. personnel records). It is important not to misuse any information that is gathered during an investigation (see "Documents" in chapter 7).

Preserving confidentiality is important because it minimises the risk of harm to all parties involved, including the workplace — and, in some rural and regional areas, the local community — and ensures the integrity of any investigation. If a potential witness feels that they are unable to trust your discretion, they will be more reluctant to come forward with relevant information. Keeping material confidential reduces the risk of contamination of evidence. Accordingly, before interviewing any witness, ask whether that person has discussed the case with anyone else, and advise them not to discuss it with other witnesses or third parties after the interview.

This does not necessarily mean that you should exclude the manager of the relevant workplace from the process — unless the manager is also a subject of the investigation. In most cases, the manager will need to be made aware of the complaint so that they can deal in a timely way with any workplace issues that arise from the complaint, for example, workplace health and safety issues, or workplace standards that need to be re-established through appropriate training.

## No guarantees

Although you must try to maintain confidentiality at all times, you must not promise anonymity to the person who has made the complaint or to any witnesses. At some stage their names may need to be disclosed, for example:

- in a criminal prosecution
- under right to information legislation
- because procedural fairness requires it (see “Procedural fairness” below).

Despite your best efforts, the fact that a complaint has been made may become known within your workplace or to people outside. It is important for you to manage this by giving careful consideration to what you can tell different stakeholders (e.g. complainant, subject officer, discloser).

### Risks to confidentiality

Avoid:

- putting information on an unsecured computer
- interviewing people where they can be seen or heard
- giving confidential information to others to copy or type, or to address or send
- leaving names, addresses or phone numbers on some documents when they should have been blacked out
- leaving messages on desks or a phone service
- sending sensitive material by mail
- leaving documents on the photocopier or fax machine.

## If and when to tell the subject officer

### Before an investigation

It is not appropriate to inform the subject officer before notifying the CCC. Indeed, it is not necessary to tell the subject officer anything before starting an investigation — “natural justice” does not require you to do so (see “Procedural fairness” below).

When referring a complaint to you, the CCC may include advice on when it will be appropriate to advise the subject officer and what you can tell them. Otherwise, you can seek advice directly from the CCC.

### During an investigation

Whether the investigator should inform the subject officer of the allegations will depend on the scope of the brief.

If you are the investigator, and you are only collecting information to give to a final decision-maker, the investigation itself will not directly affect the subject officer’s rights or interests so there is no need to inform them. However, if the scope of your investigation includes making findings and recommendations about the case, you need to consider procedural fairness (see “Procedural fairness” below).

Certainly, no final decision can be made affecting a person’s rights, interests or legitimate expectations without first providing them with an opportunity to respond. The right to be informed about the substance of allegations or adverse comment, and the opportunity to be heard, must be given before any final decision is made, or any detrimental document is placed on the person’s file (see “Detrimental employee records” and “Procedural fairness” below).

So when the subject officer is informed of the allegations will depend on the circumstances of each case (see also “Interviewing the subject officer” in chapter 8).

In the absence of clear statutory direction, the CCC suggests that the following basic principles be followed:

- In circumstances where preliminary enquiries or the early stages of an investigation reveal that there is no case to answer, it may not be necessary to inform the subject officer at all if they are unaware of the investigation. This may save the person from suffering unnecessary stress. However, if anything is to be recorded on their file, they may need to be told.
- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer is unknown, no-one needs to be notified of the allegations, unless evidence emerges against a particular officer.
- Where the subject officer is to be interviewed, there is no requirement to provide them with all, or specific, details of the allegations before the interview. It could be appropriate to delay informing them of the substance of the allegations until the interview, if it appears that evidence could be tampered with or witnesses approached (see also “Preserving evidence” in chapter 6).

### Detrimental employee records

Section 12 of the Public Service Regulation 2008 states that detrimental employee records cannot be used or placed on an employee’s file without the employee having an opportunity to read the record and respond to its contents. However, section 10(2)(d) of the Regulation states that a document about the employee concerning suspected corrupt conduct under the CC Act, or its investigation, is not an employee record, and therefore does not go on the employee’s file.

It is important to note that the exemption under the Regulation relates to documents about an employee’s *suspected*, as opposed to *established*, corrupt conduct.

This view should not be confused with access to any information held about an employee under the *Right to Information Act 2009*. Any request in accordance with that Act should be treated on its merits and in accordance with the provisions of that Act.

### Public interest disclosures

You may need to consider whether the complainant is making a public interest disclosure (PID) under the provisions of the *Public Interest Disclosure Act 2010* (PID Act). A person does not have to declare that they are a discloser or are making a PID to come within the provisions of the Act.

You should have procedures for dealing with PIDs and strategies to protect the discloser, as severe penalties apply for breaches of the PID Act.

You should take care to manage a complaint of a discloser. A poorly managed PID can take years to resolve, incur a considerable financial burden and have an adverse effect both on the discloser and on the workplace. It may also result in a loss of public confidence in your UPA.

The Queensland Ombudsman has responsibility for administering the PID Act. In that role, the Ombudsman reviews the management of PIDs; reviews the way public sector entities deal with PIDs; and undertakes an educational and advisory role about PIDs.

More information about PIDs can be found on the Ombudsman’s website at [www.ombudsman.qld.gov.au](http://www.ombudsman.qld.gov.au).

## Conflicts of interest

All complaints must be dealt with, and investigations conducted, impartially. You must not have, and must not be perceived to have, any conflict of interest in relation to the complaint, or to the people, the conduct, or the policies and procedures that are the subject of the complaint.

Generally speaking, there can be no confidence in the outcome of an investigation where the process is tainted by actual or perceived conflict of interest. Arguments made by the subject officer or the complainant about the integrity of the process can never be satisfactorily or totally rebutted.

Conflicts of interest can occur, or be perceived, on the part of either the investigator or the decision-maker. The allegation may be that, as a result of the conflict of interest, the investigator failed to collect all relevant facts, or ask the necessary questions, or otherwise carry out a proper investigation. Alternatively, it could be alleged that the decision-maker ignored or overlooked key evidence, or was too lenient (or too harsh) in the final decision.

It is not always easy to identify a conflict of interest, particularly where the conflict is such that it may produce bias (see “Avoiding bias” below.) It is not realistic to expect that you will be totally independent with no prior connection with the subject officer.

Simple acquaintance with the person being investigated or the fact that you have worked with that person (whether in a supervisory or other capacity) are not sufficient to justify an allegation of conflict — it must be based on something particular to the investigation.

As noted in earlier chapters, to avoid any suggestion of conflict of interest, you should think carefully before appointing the subject officer’s supervisor as the investigator, and you should not deal with any complaint against yourself if you are the public official.

If you are in doubt about whether a conflict exists, you should seek advice from a supervisor or manager, or from your legal unit, and ensure that the process is documented. If you have been asked to investigate a complaint or make a decision and do not believe you are an appropriate person to do this, somebody else should be assigned (see also “Actual or perceived conflict of interest” in chapter 10 in relation to retrieving an investigation when a conflict of interest becomes apparent).

Be aware that, even if you step down from the position of investigator or decision-maker, you may still be bound by confidentiality provisions for information received from the complainant or other sources.

## Procedural fairness

### What is procedural fairness?

Procedural fairness — also referred to as “natural justice” — applies to any decision that can affect the rights, interests or expectations of individuals in a direct or immediate way. Procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected (see also “Failure of procedural fairness” in chapter 10 in relation to retrieving an investigation when natural justice is not adhered to).

As a public official or investigator, procedural fairness is an integral element in the way you deal with complaints, and serves a number of related functions:

- It is an important means of checking facts and identifying issues.
- The comments made by the subject officer might expose weaknesses in the investigation.
- It also provides advance warning of the basis on which the investigation report is likely to be challenged.

Depending on the circumstances, procedural fairness may require you to:

- inform people against whose interests a decision may be made of the substance of any allegations against them, or grounds for adverse comment about them
- give people a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
- hear all relevant parties and consider submissions from them
- make reasonable enquiries or investigations before making a decision
- ensure that no person decides a case in which they have a direct interest
- act fairly and without bias
- conduct any investigation without undue delay.

## The rules of procedural fairness

The rules of procedural fairness, which have been developed to ensure that decision-making is fair and reasonable, are simple:

- Avoid bias.
- Give a fair hearing.

### Avoid bias

Being unbiased is a crucial aspect of procedural fairness. Bias can arise in a number of ways, including:

- being partial (favouring one person over another)
- being closed-minded (not listening to or taking into account what someone has to say)
- potentially gaining some personal advantage or avoiding a personal disadvantage based on the outcome of the investigation (see also “Conflicts of interest” above).

However, the law goes beyond looking for actual bias — it also looks for the perception of bias by asking: “Is there anything about the investigator or decision-maker, or their conduct, that might give rise (in the mind of a fair-minded member of the public) to a reasonable suspicion that the investigator or decision-maker may draw a conclusion based on self-interest?” If so, the law will generally state that the person should not conduct the investigation or make the decision.

During an investigation, circumstances may become apparent that increase the potential for bias on your part. It is important for you to recognise such potential, and remove yourself from the case as early as possible. Record your reasons and provide that record to your supervisor, or the officer who appointed you to investigate. Make sure this record is kept secure with the investigation material.

To avoid allegations that you are biased because of prejudice or prejudgment, and in the interests of confidentiality, do not comment on the case or engage in idle conversation about any aspect. If you don’t say anything during the investigation about those involved (except, of course, when you interview or write a report), then people won’t be able to make allegations that you said something that indicates bias on your part.

To ensure an impartial decision, the roles of decision-maker and investigator should be undertaken by different people.

### Risks to an impartial investigation

Be mindful of the potential for bias or a conflict of interest between your role in the case and matters personal to you. Ask yourself:

- Do I have a personal or professional relationship with any of the people involved that might make me an inappropriate person to investigate this case or make a decision? Mere knowledge of a person, or the fact that you have worked with them, is not enough to make out a case of bias on your part. You should look to see whether your personal relationship with the person is based on a close friendship and favouritism, or based on animosity.
- Am I prejudiced in any way towards or against a person involved, or does my behaviour or comment suggest that I may have prejudged issues or people?
- Would I, or anyone associated with me, benefit or suffer from any findings resulting from this investigation?
- Was I a participant in any of the issues involved? If you witnessed something, or managed or supervised the area concerned, you should not be enquiring into those issues.
- Do I have a financial interest in anything involved? If you or family members are likely to gain or lose money from a decision you make or a finding of your investigation, you should not be a part of it.
- Was I directly involved in developing or approving policies, procedures or practices that are the subject of this complaint?

### Give a fair hearing to the subject officer

The law of procedural fairness requires a decision-maker to listen to, and take into account, someone's point of view on anything that adversely affects them. A corrupt conduct allegation can certainly affect an individual, especially in relation to their reputation and their employment. In order to comply with the law, as a decision-maker or investigator, you will usually need to seek out a person's version of events and give them a chance to comment on any facts that might be detrimental or adverse to them (see also "If and when to tell the subject officer").

In considering a case involving disciplinary proceedings against a public service employee, the Queensland Supreme Court stated that natural justice does not require that the subject of an investigation be given access to every document seen by, or information given to, an external investigator, but it did say that a person must be made "aware of what he or she is accused of and by whom, with sufficient particularity to be able to answer the allegations, and be given the opportunity to answer the allegations" (*Ivers v McCubbin* [2004] QSC 342 at paragraph 31). (A subsequent appeal on this decision concerned matters unrelated to this principle – *Ivers v McCubbin & Ors* [2005] QCA 200).

So if your investigation report contains adverse comment about a person, or if, as decision-maker, you have been provided with such a report for a final decision, procedural fairness requires that the subject officer must at the very least know the case against them and be given an opportunity to respond to those adverse comments before any decision is made.

If this information has been put to the person during an interview, it is not necessary to do this again before finalising the report or making the decision. However, if the subject officer has only been told some of the grounds, or if any significant changes to the grounds have occurred since the interview, you must make them aware of the other grounds being relied on, as their response may influence your recommendations or suggest other avenues of enquiry.

The natural justice right of the subject officer to be told *who* has made the allegations needs to be balanced against the confidentiality and PID provisions discussed earlier in this chapter. It may not be necessary to disclose the name of the complainant or "whistleblower" if the evidence relied on does not come directly from that person — it will depend on the nature of the allegations and the grounds or evidence relied on.

Therefore each case should be considered on its merits, with particular weight being given to the information or documents that would best enable the subject officer to answer the allegations against them.

## Managing the impact of a corrupt conduct investigation

Very few investigations will have a major impact on your UPA, but whether an investigation ultimately uncovers corrupt conduct or not, they all require action on the part of your UPA's managers and supervisors, particularly within the work unit where the subject officer works, or where the corrupt conduct is alleged to have occurred.

Agencies differ, as do the circumstances of each investigation, so it is not possible to provide an all-purpose strategy. However, there are two key questions for you to consider when preparing a strategy to handle any particular investigation: "What factors can influence the impact of an investigation on my agency?" and "How are staff likely to react to the investigation?"

Managing the impact means:

- anticipating where the impact will be greatest
- considering how the investigation is likely to affect staff
- devising strategies to minimise the adverse effects.

## Factors influencing the impact of an investigation

There are many factors, but some important ones are:

- the nature and extent of the allegations being investigated
- the extent to which staff knew of the allegations before the investigation began
- who is implicated, and what their relationship is with the rest of the staff and with the community
- the nature and breadth of the investigation
- the culture of your UPA
- the attitudes of you and your senior officers
- the outcome of the investigation
- staff perceptions of how their managers have handled the investigation process
- the expectation that things will change as a result of the investigation, or that they will go on as before.

As an investigator, you may need access to material from the work unit — such as files, data, other documents and electronic systems — that are used on a daily basis. This may cause some temporary disruption to work in that area, and you should liaise with management from the unit about ways to minimise this disruption, including:

- notifying managers of any intended visit to give them time to collect the records they require and to make arrangements for handling the impact
- making arrangements to ensure that the staff have access to material that is essential for day-to-day operations
- making photocopies of documents or creating a backup of a computer's hard drive contents before it is removed.

## The release of information

Subject to any confidentiality requirements, you may well have to inform staff generally about allegations being investigated at some point during or after the investigation. Importantly, if the information is going to become public, all staff should be told before the media reports it.

Be fully prepared with detailed information and support structures. Consider setting up an internal group with representatives from legal, internal audit, policy, misconduct prevention, unions and any other relevant areas.

Alert staff to the release of any public final report and give them a copy. In many cases, it is not until the report on the investigation is released that staff are convinced there is evidence of the subject officer's corrupt conduct, or conversely that the subject officer is innocent of the allegations.

It is also a good idea to provide staff with a formal response from management to the key issues and recommendations of the report. A media statement will also show both staff and the community at large that you have identified, and are managing, the conditions that allowed the corrupt conduct to occur.

For the agency as a whole, the impact of an investigation may be such that specific public relations strategies should be developed. If the report is made public, you may experience some difficulties in recruiting staff or securing contracts for services, and will need to work out a plan for dealing with these issues.

## Investigations conducted by the CCC

Because of the CCC's focus on the more serious or systemic cases of corrupt conduct, it does not conduct many investigations by itself of UPAs, but these also need to be managed in order to minimise disruption and maximise benefits. When you are informed that a CCC investigation is taking place in your UPA, you will also be informed of the person to contact at the CCC for information about the investigation.

The same issues that arise with any internal investigation will arise with a CCC investigation of your UPA, and wherever possible, CCC investigators will try to minimise disruption by liaising with management, just as an internal investigator might. At any point during the investigation, you may consult officers from the CCC investigation team if you are unclear about whether any proposed management strategies might compromise the investigation.

If an investigation is likely to become public knowledge — for example, a public hearing is to be conducted or a public report is to be released — the CCC will discuss with you when and how to inform staff. This may include arranging to have sufficient CCC information available to staff when they are first briefed, or arranging for CCC officers to brief staff in person about what stages are involved, what powers are available to the CCC and how it uses them, and how staff can assist the investigation.

Some staff may consider the involvement of the CCC as an imposition, while others will experience relief at the CCC's involvement, seeing it as a sign that something is finally being done.

In those rare instances when a CCC investigation progresses to a public hearing, the impact on the workplace will be greater because a public hearing will increase community, parliamentary and media scrutiny of your UPA.

As with internal investigations, if the CCC is to report publicly on the outcome of an investigation, be sure to alert staff to the release of the final report and provide adequate access to a copy. A media statement is again a good idea, although you should consult the CCC on the nature and timing of the statement. In some cases it may be appropriate for both the CCC and your UPA to issue a media release. This will demonstrate that problems are being dealt with collaboratively.

## Managing the end of the investigation

An investigation report — either internal or CCC — may recommend remedial action that your UPA should take to reduce the opportunity for corruption to recur. Even if there is no evidence of corruption, the report may reveal evidence of poor administrative procedures, and recommend cultural and procedural improvements.

To allow smooth implementation of any recommendations, you should:

- identify the kinds of changes required to satisfy the recommendations
- plan and manage the change process
- communicate honestly and openly with all those likely to be affected by the changes
- encourage participation by those who will be affected, which can reduce staff resistance to change.