

# COLLECTING EVIDENCE

FS18

Stage 2  
Investigation

Evidence is not limited to witness statements. Be broad minded in considering the types of evidence that may be available.

During a disciplinary investigation, you are not limited by the formal evidence rules that apply in court. This means that, in a disciplinary investigation, you can rely on evidence that you could not use in a court of law. These kinds of evidence – such as 'hearsay' and 'opinion' evidence – are discussed further in [\[FS20\]](#).

The nature of the allegations will dictate the amount of evidence you collect, and the extent you go to in order to collect that evidence. The more serious the allegations, the more thorough and extensive your evidence collection should be. In any case, you need to collect enough evidence to make logical and defensible findings of fact.

## Types of evidence

Some evidence may have been collected as part of the preliminary assessment. [\[FS3\]](#)

Making a chronology of events can help you to identify the evidence you need to collect.

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| <ul style="list-style-type: none"><li>• Site inspections – including taking photographs and drawing diagrams.</li><li>• Photographs.</li><li>• Letters and emails – it may be possible for you to access employee email accounts.</li><li>• Briefing notes and internal records.</li><li>• Rosters and timesheets.</li><li>• Access logs and audit results.</li><li>• Training records.</li><li>• Telephone records and computers – make sure you get expert IT and legal advice if necessary.</li><li>• Statements and written responses to questions.</li></ul> | <ul style="list-style-type: none"><li>• Values statements, codes of conduct and customer service charters.</li><li>• Interviews.</li><li>• CCTV footage.</li><li>• Personnel records.</li><li>• Position descriptions, policies, legislation.</li><li>• Technical or expert evidence – for example, legal, human resources, medical, IT, accountants, and document and handwriting examiners.</li><li>• Medical records – make sure you get the person's permission before you request these.</li><li>• Recordings – though be wary of recordings offered to you by witnesses, and make sure that any material you use has not been collected in breach of the <i>Listening Devices Act 1991</i> (<a href="#">Tas</a>).</li></ul> |
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Character evidence is not usually relevant to whether misconduct has occurred, so it is not normally worthwhile pursuing for the investigator. If you are given written character references, the decision maker may take these into account when deciding on outcomes if relevant.

## When to collect evidence

You should try to collect evidence as soon as possible. This is to avoid the risk of it being corrupted, destroyed or lost. For instance, CCTV footage is usually only stored for a limited time.

To avoid the risk of memories fading, you should try to obtain witness evidence as soon as possible. You should, however, make sure you are adequately prepared before you contact a witness.

You should evaluate your evidence as the investigation progresses. Do not be reluctant to collect more evidence if necessary. You may need to go back to a witness to query them about contradictory material that emerges after they give evidence. It is important that you get all obtainable and relevant evidence.

Where counter-allegations are made, these need to be considered and included in the investigation if warranted. [\[FS12\]](#)

## How to store evidence

Copies of documents are generally sufficient. You should obtain original documents if you think the original may be destroyed or if you have reason to doubt the authenticity of the copy.

Records should be made as soon as evidence is collected. This is particularly the case with records of meetings, phone calls and interviews.

Evidence should be securely stored in an area or database with restricted access. As you collect evidence, you should note how and when you received it on the running sheet or a separate evidence register. It is a good idea to keep a separate list of evidence stating:

- how it was received
- the form in which it was received
- when and from whom it was received, and
- how and where it is stored.

Consider using a system to number and register each item of evidence. [\[FS7\]](#)

## Acting with integrity

Investigators should act with integrity at all times. You should not lie or deceive people to obtain evidence, no matter how valuable that evidence is. You may, however, withhold information if that is necessary to maintain the confidentiality or effectiveness of the investigation.

An investigator is supposed to be an objective party whose task is to uncover the facts. It is not the investigator's role to act as a sympathetic ear, a mediator, or a counsellor. It is not the job of the investigator to resolve the issue.

You may, however, take into account issues such as a power imbalance, the emotions of parties, and the impact of organisational structures and systems in planning your investigation and approach.

## Using evidence collected by the Integrity Commission

You may be referred a matter by the Integrity Commission that has already been 'assessed' or 'investigated' under the *Integrity Commission Act 2009* (Tas).

The Integrity Commission cannot make misconduct findings in its assessments and investigations. It can only make such findings after an 'integrity tribunal'. Similarly, the Commission does not make decisions about disciplinary action.

However, referred assessment and investigation reports may include findings of fact. They may also include evidence such as interview transcripts and copies of emails.

In taking disciplinary action, the decision maker needs to come to their own conclusions about factual and misconduct findings. Procedural fairness requirements will need to be met before disciplinary action is taken.

Otherwise, the Commission believes that public sector organisations following an administrative process should be able to use and rely on information and evidence gathered by the Commission during an assessment, investigation or integrity tribunal. An investigator may still need to be appointed to determine the facts and to meet procedural requirements, but they should be able to use and rely on Integrity Commission material.

## Collecting witness and respondent evidence

It is very likely that you will need to speak to witnesses as part of the investigation. At a minimum, you will need to put the allegations to the respondent.

The form in which evidence is collected from witnesses should vary with the importance of the evidence and the seriousness of the alleged conduct.

At the lowest end of the scale, the evidence may be your notes about a short phone call. If the evidence you require is minimal and very specific, you may request it verbally. For instance, you may contact a supervisor and ask if a person was at work on a particular date.

Evidence may be received via email, or in a more formal written response. Where the allegations are serious and the response is important, you may request it in the form of a [statutory declaration](#). For most serious matters, a formal interview of at least one party (the respondent) is usually required. [\[FS19\]](#)

At least three working days should be allowed for written responses. The potential drawbacks of formal written responses are that they:

- provide opportunities for collusion
- are time consuming and can cause delays
- are difficult for people with low literacy skills, and
- pose a risk to confidentiality.

You should try to gather witness evidence in a sequence that means you do not have to speak to a witness more than once. The first witness contacted should usually be the source (if there is one). This may have already happened during the preliminary assessment. The respondent's evidence should be gathered last, so that all relevant material can be put to them.

If necessary, witnesses should be provided with support options. If the investigation is delayed, you should let the source and the respondent

(once they are aware of the investigation) know that it is still ongoing.

*Make sure that all witnesses are aware of their confidentiality obligations. You may need to give them a formal direction. Remember the need to know principle when dealing with witnesses. [FS4]*

*Unless there is a particular reason to do so, you should let witnesses (other than the source and the respondent) know that they will not be told the outcomes. [FS24]*

### Nominated witnesses

You should ask the respondent and the source as soon as possible if they can nominate any witnesses. Where relevant, you should also ask this question of other witnesses.

Nominated witnesses should usually be approached by the investigator or another appropriate person, not by the person who nominated the witness. If you choose not to contact a nominated witness, you should explain why you made this decision in the investigation report. Depending on the circumstances, you may also need to explain this decision directly to the person who nominated that witness. [FS4]

### Privacy

Tasmanian public sector organisations fall under either or both the *Personal Information Protection Act 2004 (Tas)* and the *Privacy Act 1988 (Cth)*. Make sure that you comply with the privacy legislation applicable to your organisation in collecting, recording, storing and releasing personal information.

When collecting evidence that may contain personal information, as a matter of good practice and to comply with privacy legislation, you should tell the person:

- the purposes of the investigation (an inquisitorial disciplinary investigation)
- that any evidence they give may be used for the purposes of the investigation and its outcome, and
- that their evidence may be provided to others – including the respondent – if required. For example, for the purposes of procedural fairness.

Consent to release personal information may be obtained at the start of an interview.

*You may need to inform third parties that you have collected information about them, or give a party an opportunity to comment before releasing their personal information.*

## What to do if someone refuses or fails to provide evidence

### General

Tell them that this is their opportunity to have their views heard. Make them aware that findings will be made regardless of whether they give evidence.

As per *Susan Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775, employees have a duty to be 'open, frank and honest' with their employer about 'serious issues in the workplace'. The Fair Work Commission has upheld dismissals of employees that have been uncooperative and dishonest during disciplinary investigations.

*A witness may be busy, may not think their evidence is important, or may forget. These scenarios are most likely with external professional witnesses.*

*You should be persistent in your requests. But also be realistic about getting the evidence. If it is not possible to obtain it, you will have to make do without.*

Consider whether you can legally direct the person to attend an interview, answer reasonable questions, or produce a document that they are refusing to provide. This applies to both internal witnesses and the respondent.

If you are unsure if you can do this, you should seek legal advice before issuing a direction. Keep in mind that you cannot usually direct an employee to answer questions that may incriminate them or expose them to sanction.

If you do direct an employee to participate and they still fail to do so, that is potentially an act of misconduct that could result in disciplinary action. [FS14]

### Respondent

You should highlight to the respondent the delays that have or will be caused if they choose to respond at a later stage in the process.

If the respondent still refuses to participate, and if they do not have a reasonable excuse for that refusal, you can continue with your investigation.

You should be especially careful to record every offer to participate and their response. These records will be of critical importance if they later challenge the decision on the basis of a breach of procedural fairness. [FS16]

If the respondent refuses to respond to the allegations during the investigation, you should ask them to respond to the investigation report. [FS16]

Failure to respond cannot be taken as proof of misconduct. However, you **may** be able to draw adverse inferences from a respondent's failure to participate or to answer particular questions. You should seek advice on this if you are unsure. Make sure that you do take into account any reasonable explanation provided by the respondent before drawing such inferences.

*If someone internal fails to participate for medical reasons, make sure they provide a medical certificate.*

### Witness

Where a witness refuses to provide evidence, you should consider why they may have refused. It may be because they fear victimisation or repercussions. Try approaching them from a supportive angle and see if you can provide reassurance or support, including information about any legal protections you can offer them. [FS2]

Some people may refuse for other reasons, such as allegiance to the respondent. Having a written request from the decision maker asking for the full cooperation of employees may help. [FS14]