

When embarking on an investigation, how far down the rabbit-hole should an investigator go when requesting documentation? Prior to making a request for documentation beyond what the parties have initially provided, an investigator should ask themselves some preliminary questions.

Documentation 101: Best Practices for Investigators

1. Identify the scope of the investigation.

What is your mandate? Are you being asked to investigate an isolated case of harassment and deliver factual findings on whether the incident occurred? Will your examination include a review of broader hiring practices to determine whether they are discriminatory? Stick to the parameters of the investigation - often articulated in a retainer agreement if a third party investigator is brought in.

The originating document is typically the best place to start. If an investigation is initiated by a written complaint, this would be an important piece of documentary evidence. Other types of originating documents may include incident reports or whistleblower hotline transcriptions.

If a complainant took notes soon after an incident occurred, these may also be important documents to review. As an example, the memos of former FBI director, James Comey, written after his one-on-one meetings with President Trump, were relevant because they were contemporaneous details of conversations that were not audio recorded. The closer that notes are taken to the time of the incident, the higher the evidentiary value in an investigation.

For allegations that involve text messages or emails between parties, go to the source. Obtain these records directly from the complainant or respondent. Attempting to have a party to an investigation recall the content of a text or email is not as reliable or persuasive as

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March 7, 2018 in Toronto

What makes a bystander tick?

In this half-day session, participants will learn about the importance of bystanders in creating healthy and inclusive workplaces along with the underlying workplace dynamics that keep victims from speaking up and making complaints about harassment, discrimination and bullying in the workplace.

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reviewing the actual document. A print-out or screenshot of texts and emails can also provide insight that could not be gleaned from an oral account, such as date/time of transmission and use of punctuation, caps lock, and emojis.

2. For every document request, make a relevancy assessment.

A clearly identified scope can assist in assessing a document for relevance. An investigator should ask themselves, does this document have a connection or nexus to the allegations being investigated? Does a prior unsubstantiated incident report alleging an employer sexually harassed an employee pertain to a current investigation of harassment involving the same individual? Does the fact that an employee took an extended leave, supported by a doctor's note, affect an examination into whether she was overlooked for a promotion?

It may be tempting for an investigator to request documents such as incident reports, internal meeting notes and other personnel records. An assessment of relevancy is especially important here. Not only can these documents be voluminous, but they can also be prejudicial. Obtaining a list of prior complaints and workplace conflicts can be inflammatory and have the unintended consequence of biasing the investigator against a complainant or respondent.

Other documentation may be provided by the complainant, respondent, and witnesses during the investigation. If new information is obtained during document review, this may require redefinition of the initial scope or it may be determined that the information is best dealt with separately.

Part of an investigator's mandate may also include determining whether there have been any violations of employer policies or the applicable legislation. There are several workplace policies that Ontario employers must have in place such as workplace violence and harassment policies, and others that are recommended, like social media policies.

3. Ensure that complainants and respondents have an opportunity to review and respond to relevant documents.

One of the most important considerations in reviewing documentation is whether parties have had an opportunity to respond to relevant information that informs an investigative

New for 2018 Conducting Workplace Violence Investigations

May 17, 2018 in
Toronto

An employee tells you that a co-worker said something that made them upset, but also that they fear for their personal safety. You're well-versed in dealing with complaints about harassment and bullying. What about complaints that raise a risk of someone getting injured?

This course provides a framework for assessing complaints to determine whether they meet the definition of workplace violence and teaches participants how to maintain the safety of employees and conduct a meaningful investigation.

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report. This is part of the duty of fairness in investigations. The Supreme Court of Canada decision of *Syndicat des Employés de Production d Québec et l'Acadie v. Canada* (Canadian Human Rights Commission), 1989 CanLII 44 (SCC) specifies that there is “a duty to inform parties of the substance of evidence obtained by the investigator”, which is being put before a decision-maker. Parties must also be given “the opportunity to respond to this evidence and make all relevant representations in relation thereto.”

In a recent Labour Arbitration Board case from British Columbia (discussed by my colleague Will Goldbloom in his blog), *Fraser Health Authority and BCNU (Gaucher), Re*, 2017 CarswellBC 2784, the employer did not give the nurse an opportunity to review a privacy audit prior to interviewing her regarding privacy breaches. The nurse’s response to the allegations was that she could not recall accessing patient files. The arbitrator determined that the employer’s decision to suspend the nurse, in part, because of her dishonesty during the interview was not justified. The employer ought to have allowed the nurse to review the audit before the interview.

This also applies for documentation received directly from the parties. If a respondent provides information to an investigator that refutes the allegations, it would be prudent to show this to the complainant to allow them an opportunity to respond.

Consider the following takeaways when making documentation requests:

- Prior to starting an investigation, clearly identify the scope of the investigation and nature of the allegations.
- Asking for too much at the outset may risk expanding the investigation beyond what you are being asked to do.
- Be mindful of requesting employee records from an employer.
- Make efforts to obtain documents directly from the source of the information.
- Prior to concluding an investigation, ensure that parties have an opportunity to review and respond to relevant documents.
- Continue to make assessments of relevancy throughout the investigative process.

Respect, Diversity and Change in the Workplace Series

Part 1: Navigating ‘Difference’
9am - 12 noon

Part 2: Modelling Respect 1pm - 4pm

June 26, 2018 in Toronto

In this one-day, two-part course, we provide a framework for how to approach cultural differences in the workplace in a way that allows you to be both comfortable and engaged with your colleagues, and addresses the natural fear of saying the wrong thing at the wrong time.

Once you understand how to manage and navigate the expression of ‘difference’ in the workplace, we then go on to examine how to incorporate respect as part and parcel of enhancing the diversity of Canadian workplaces.

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