

INVESTIGATIONS 401

Advanced Issues in Government Workplace Investigations

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Part 1: Pre-Investigation Decisions

Investigator Selection • Privilege • Interim Measures



Selecting the Investigator

Pre-Investigation

Internal Investigator: HR, Internal Affairs, Professional Standards

Pro: Fast, low cost, good for routine policy matters

Con: No privilege or confidentiality unless directed by counsel; may lack specialized knowledge for complicated matters

External Investigator: Independent Investigator or Attorney

Pro: Independent, specialized knowledge and guidance, strong privilege arguments if counsel involved

Con: Higher cost; non-attorney investigator must be licensed

- Cost and expertise — Match the investigator to the stakes of the matter
- Independence — Can the result withstand scrutiny from a jury, arbitrator, or press?
- Political sensitivity — High-profile subjects and city leadership usually require someone outside the organization
- Likelihood of litigation — Higher risk favors an attorney investigator

Lawyer as Witness — Investigator vs. Advisor

- **Rule 3.08:** May not serve as trial advocate if you may be a necessary witness
- Investigator role: Authors the report — becomes a potential fact witness
- Counsel role: Guides the process without authoring findings
- Separate the roles on front end, not after lawsuit filed

Attorney-Client Privilege in Investigations

Pre-Investigation

- Attorney-led does not automatically mean privileged — purpose controls
- Legal advice must be the primary purpose, not just fact-finding
 - Document “fact-finding for the purpose of providing legal advice” in engagement letter
- Waiver risks: broad distribution or combining legal and HR reports; *Upjohn* warnings required
- Non-privileged investigations are generally public information

Interim Measures During Investigation

Pre-Investigation

- Administrative leave: paid vs. unpaid
 - Consider coverage, building/system access
- No-contact directives: scope carefully — overbroad directives invite retaliation claims
- Document every measure as investigative or protective in nature, not punitive
- Use the minimum necessary to protect the City, involved parties, and integrity of investigation

Part 2: Investigating Leadership & Elected Officials

Independence • Who Is the Client? • City Council



Scenario: The City Manager Complaint

Leadership Investigations

- The Public Works Manager reports favoritism, harassment, and retaliation by the City Manager
- HR calls the City Attorney: “What do we do?”
- Stop — before answering: Who is your client?

Organization as a Client — Who Is the Client?

- Your client is The City — not the complainant, HR, or the City Manager
 - Escalate to Council and assign the investigation out
- Individual employees and officers are constituents, not clients
- Rule 1.13(e): When interests conflict, you must disclose that you represent the City and do not and cannot represent them
- *Upjohn* warning to the City Manager at interview satisfies Rule 1.13(e)

City Council Involvement

Leadership Investigations

Council's Role

- Council (not City Manager) authorizes the investigation
- Attorney reports to council or a designated sub-committee
- Council receives findings and makes final remedial action decisions

Executive Session

- Closed session under §551.074 (personnel) and §551.071 (legal counsel)
- Post under §551.071 or both whenever possible
- Open session votes – consider political implications of language

- Council conflict or split; high-visibility situations
- Reporting structure: decide who gets updates and the final report before you start; designate one primary contact to assist with logistics
- Remedial action for elected officials usually cannot be terminated — censure, referral, and public record are the tools
- Witness fear is heightened — address retaliation concerns explicitly at the outset

Part 3: Due Process & Public Information

Loudermill • Garrity • Chapter 614 • PIA



Due Process and Loudermill Rights

Due Process

- Even if formal requirements do not strictly apply, the fairness and neutrality of your investigation can become an issue
- *Loudermill*: Pre-termination hearing required when there is a property interest in employment
- Required: notice of charges + genuine opportunity to respond
- At-will employees: no *Loudermill* right — but best practices still apply

Garrity Warnings

Due Process

- Protects public employees from compelled self-incrimination
- Applies when employee is ordered to answer — not merely asked... but in most cases, they are “ordered”
- Compelled statements cannot be used in a criminal prosecution (independently-derived evidence can)
- If parallel criminal investigation, consider coordination with prosecutor or law enforcement investigators

- Applies to: peace officers, firefighters, detention officers, jailers
- Complaints must be written and signed — verbal or anonymous complaints cannot support discipline
- Copy of signed complaint must be provided within a 'reasonable time'
- May not term without an investigation + evidence to prove the allegation of misconduct
- One missed step can void otherwise justified discipline

Comparison: Loudermill, Garrity & Chapter 614

Issue	Loudermill	Garrity	Chapter 614
Primary Purpose	Due process before discipline	Protect against compelled self-incrimination	Procedural requirements for certain complaints
Applies To	Employees with a protected property interest	Public employees subject to compelled questioning	Peace officers and firefighters
Trigger	Potential discipline affecting employment rights	Employee ordered to answer under threat of discipline	Investigation of a covered complaint
What Is Required?	Notice of allegations; opportunity to respond	Warning and administrative compulsion	Compliance with Ch. 614 procedures
Common Mistake	Inadequate notice or opportunity to respond	Using Garrity unnecessarily or incorrectly	Failing technical statutory requirements
Consequence	Due process challenge	Constitutional challenge; evidentiary issues	Discipline vulnerable to challenge
Relevant Period	Before discipline is imposed	During compelled interviews; prosecution	Throughout the complaint process

How Much to Disclose — and When?

Due Process

- Initial notice: allegation category — not the full complaint or witness names
- During investigation: general allegations only — protect witness identities to extent possible
- Pre-discipline (*Loudermill*): enough detail for a meaningful opportunity to respond
- Reasonable Time (Ch. 614): copy of signed complaint
- Post-investigation: outcome and closure — not necessarily the full report

Public Information Act: Investigation Files

PIA

- Non-privileged investigations are generally public information (§552.022)
- Attorney-Client Privilege & Work Product (§552.107): attorney investigation must have been conducted for purpose of providing legal advice
- Agency Memoranda (§552.111): attorney work product in anticipation of litigation (substantial chance of litigation)
- Confidential Information (§552.101): no discretion to release; includes common law privacy
 - Highly intimate and embarrassing, no public need to know (can mitigate by releasing summary without private details)
- Litigation Exception (§552.103): available when litigation is reasonably anticipated
- Consider purpose and impact of every communication and document created

Part 4: Interview Complexities

Upjohn Warnings • Representatives • Recordings



ETHICS SPOTLIGHT

TDRPC Rules 1.13 & 4.03

Upjohn Warnings

- Employees may believe that interviewer is their attorney and what they say is privileged and confidential between you.
- Must clarify at the start: you represent the City, not the employee, and anything they tell you may be shared with the City as needed.
 - Rule 1.13 : the organization is your client
 - Rule 4.03: if the employee misunderstands your role, you must correct it
- Written, signed acknowledgment: best practice — satisfies both rules

Witness Representatives

Due Process

- If you have special rules that create more protection, those control
- Once a **subject** retains counsel: Rule 4.02 governs contact
 - Including non-substantive, no hallway conversations
- For unrepresented parties: Rule 4.03 requires clarifying your role
- Representatives: err towards allowing them, but set ground rules at start and enforce them

Recording Interviews

Interviewing

Recording the Interview

- Creates a clear record — useful when credibility is contested
- May chill witness candor, especially complainants
- Do not secretly record
- Audio recordings may be subject to PIA disclosure

Secret Recordings by Employees

- Texas: one-party consent state (Tex. Penal Code §16.02) — generally legal
- Workplace policies can restrict recording if crafted properly
- Employee recordings may be public records under PIA
- May corroborate or undercut witness accounts — evaluate carefully and consider completeness

Part 5: Assessing Evidence

Digital Evidence • Anonymous Complaints • Credibility



Digital Evidence & Disappearing Communications

Evidence

- Issue a litigation hold as soon as litigation anticipated
 - Include personal devices if used for City business
- Signal / auto-delete apps: deletion after notice can support adverse inference
- Technology changes necessitate a critical eye for manipulation
- Anonymous complaints
 - Investigate what you can
 - Corroboration of allegation can validate even without knowing the source

Credibility Assessment

Evidence

Factor	Increases Credibility	Decreases Credibility
Corroboration	Supported by documents, emails, texts, or other witnesses	No corroboration where corroboration should exist
Consistency	Account remains materially consistent over time	Significant unexplained changes in material facts
Plausibility	Version of events makes sense in context	Conflicts with established facts or common experience
Motive / Bias	No apparent personal interest in outcome	Personal, political, financial, or relationship-based motive
Contemporaneous Evidence	Notes, emails, texts, reports created near the event	Evidence created only after complaint or investigation begins
Admissions	Acknowledges unfavorable facts when appropriate	Denies indisputable facts
Responsiveness	Answers questions directly and specifically	Evasive, nonresponsive, or selective memory on key issues

Part 6: Concluding the Investigation

Scope Creep • Report Design • Communicating Outcomes



Preventing Scope Creep

Concluding

- Define scope in writing at the outset — revisit only when new information is material
- Witness becomes a complainant / complainant becomes a respondent: document separately
- 'While you're here' complaints: decide consciously whether to expand — and document the decision
- Multi-complainant culture investigations require different approach

Preparing a Report

Concluding

Format Options

- Detailed findings: best for contested matters and litigation risk
- Executive summary: condensed, less exposure if disclosed
- Verbal report: maximum confidentiality, but no record; can be good starting point to refine scope of written report

Write for Your Audience

- Judges/juries: factual, logical, no advocacy
- HR/Leadership/Council: readable and decisive
- Press/Public: consider strategic inclusion of background information
- Always separate facts from conclusions

Lawyer as Witness at the Report Stage

- The attorney who authored the report is a potential fact witness in any challenge
- A thorough, well-reasoned report reduces — but does not eliminate — the need for testimony
- Attorney notes and drafts may be discoverable — protect work product from the start
- Separate the investigator from the litigating attorney before the report is final

Communicating Outcomes

Concluding

Who Gets What

- Decision makers: full report or detailed briefing
- Complainants: closure and general outcome, not specific discipline
- Respondents: findings notice before discipline
- Public: 'Appropriate action was taken'

Post-Investigation

- Personnel file: be consistent about what goes in
- Address workplace dysfunction proactively
- ORR strategy: ready before the request arrives
- Document lessons learned — demonstrates good faith

Ethics Rules Quick Reference · TDRPC

Rule 1.13 Organization as Client

Your client is the City. Constituents are not clients. Escalate internally when leadership is the problem.

Rule 3.08 Lawyer as Witness

If you investigate, you may not be able to litigate. Separate roles before the investigation is complete.

Rule 4.02 Represented Persons

Once a subject or witness retains counsel, all attorney contact goes through their attorney.

Rule 4.03 Unrepresented Persons

Clarify your role at the start of every interview. Upjohn warnings satisfy both this rule and privilege protection.

Questions & Discussion

Thank You

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