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## CHAPTER 7

### PLANNING AND CONDUCTING THE INVESTIGATION

#### 7-1 INTRODUCTION

This chapter focuses on planning and conducting the investigation. The investigation of a complaint filed under Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (hereafter Title VIII or the Act), consists of gathering and analyzing facts regarding a complainant's allegations and the respondent's defenses with respect to the alleged discriminatory housing practice or policy to determine whether there is reasonable cause to believe that the respondent violated the Fair Housing Act (the "Act"). Investigators gather evidence by interviewing complainants, respondents and witnesses, and analyzing their respective statements; collecting, organizing and analyzing related documents and records; and inspecting and/or measuring the subject dwelling and environment. The fact-finding portion of the investigation can be concluded whenever an investigator has collected sufficient evidence to determine that reasonable cause or no reasonable cause exists to believe that the respondent violated the Act.

All Title VIII investigations should be well planned at the earliest stages. Title VIII complaints often begin with a tangle of accusations--some relevant and some that may be completely irrelevant to the prohibitions of the Act. The complainant and the respondent may offer accounts of events that are directly contradictory, and it may be impossible at the outset of the investigation to discern which party is more credible. It is the responsibility of the investigator to use logic, clear and critical thinking, the principles outlined in this manual, assistance and direction from supervisors and seek legal advice from Regional Counsel to identify and collect statements, documents and records that will reveal the facts of the case. Early involvement of Regional Counsel will assist investigators in the development of an investigation plan and help investigators focus on the information necessary to prove or disprove allegations of discrimination.

The HUD investigator is a fact-finder whose only function is to objectively gather the facts from appropriate and credible sources that pertain to the complainant's allegations and respondent's defenses, and any other questions that should be answered to determine whether there is reasonable cause to believe that the respondent violated the Act. The investigator observes, collects and records evidence accurately.

#### 7-2 REVIEW OF THE CASE FILE

The planning of an investigation begins with a review of the case file that the intake unit has developed. When the assigned investigator receives the case file, he or she should review the file to determine whether it contains the following:

- A signed complaint form;
- Documents received from complainant or other interested persons;

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- Sufficient information to initially establish jurisdiction (e.g., agency referral letters, letters from substantially equivalent state and local agencies waiving jurisdiction back to the Department);
  - Entries in TEAPOTS in the intake and jurisdiction folders as well as the case management notes;
  - Reports of any interviews or investigation conducted during intake, including testing results and their summaries in TEAPOTS; and
  - Notification letters and proofs of service (Generally, a case file that has been forwarded from Intake to Investigations may not contain the Return Receipt, which proves service of the complaint. Intake personnel and the investigator share the responsibility to obtain the Receipt and place that Receipt in the case file).

Chapter 10, Preparation of the Case File, describes how documents, interview notes and other evidence should be tabbed and referenced and where the evidence should be placed in the case file.

### **7-3 REVIEW OF JURISDICTIONAL MATERIALS**

It is important that the investigator verify whether the Department has jurisdiction over a given fact situation before commencing an investigation. If the case file or TEAPOTS indicates that there may be some question regarding jurisdiction under the Act, the investigator should immediately resolve those issues or, in the alternative, consult with a supervisor. Specifically, the investigator should ensure that the following conditions are met:

- The complaint was filed in a timely manner (within one year of the most recent act of alleged discrimination);
- The complainant has standing (the complainant claims that he or she has been injured or will be injured by a discriminatory housing practice);
- Neither the dwelling nor the respondent(s) are exempt;
- All of the known respondents have been properly named and served; and
- The complaint alleges a violation of the Act (e.g., refusal to rent, sell, etc.), and there is a prohibited basis for the alleged discriminatory conduct, (i.e., race, color, religion, sex, national origin, familial status or handicap).

(For a full discussion of these issues, see Chapter 3, Jurisdiction, and Chapter 4, Complaint Intake).

The case file also should contain proof that all named respondents and complainants have been properly served with notification of the complaint. At this point in the investigation, appropriate documentation includes the white proof of mailing that Intake prepares contemporaneously with green Return Receipts, certificates of personal service, or correspondence that indicates actual receipt/knowledge, such as responding to the complaint and referencing the notification letters. Within a reasonable time after receipt

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of the case file, the investigator should receive the actual signed Return Receipt that the mail carrier delivered with certified mail.

In virtually all cases the investigator should conduct a property search to verify who owns the subject property. If the case file does not indicate that all parties have been properly served with the complaint, the investigator must take steps to ensure that the parties have been properly served. This means that if a party has a registered agent, the investigator will send the complaint to the registered agent. The case file should be updated to show this has been done.

#### **7-4 DOCUMENTING THE INVESTIGATION**

The investigator must document every phase of the investigation. Detailed notes should be taken of each interview conducted with complainants, respondents and witnesses who have information relevant to the complaint. After an interview has been recorded in TEAPOTS, the investigator's notes should be retained in the Evidentiary Section of the case file. See also Chapter 10, Preparation of the Case File.

The source of all documents must be recorded on the Document Control Cover Sheet. The original documents must be preserved in the condition in which they were received. This means that an investigator shall not alter or change the original document by adding comments or identifying critical information with a pen, pencil or highlighter. The investigator should describe on the Document Control Cover Sheet whether handwritten markings were on the produced document and, if possible, who made the markings. For example, if a respondent produces tenant files that have handwritten markings, the investigator should note that the handwriting was on the copy provided or the original, and ask if the respondent can identify who made the handwritten notations on the document. Observations must be recorded accurately and placed in the Deliberative Section of the case file.

Ultimately, notes from the investigation and the summaries of the statements, documents, records, other factual information and all other data collected during the investigation, will be recorded in TEAPOTS, and placed in the Evidentiary and Deliberative sections, as appropriate. It is, therefore, vital that the case file be accurate and complete. Investigators will have a much easier time with the assembly of the case file if the materials are collected and properly filed as the investigation progresses, rather than at the conclusion of the investigation. At any given point in the investigation, the investigator and the supervisor should be able to look at the record of the investigation contained in TEAPOTS and in the case file to determine the issues and the status of the investigation. Supervisory instructions and electronic mail messages and memoranda from Regional Counsel regarding a particular case should be included in the Deliberative Section of the case file. Timely entry of all information and activity during the investigation, as well as a well-organized case file, is essential.

#### **7-5 BASIC STEPS IN AN INVESTIGATION**

Investigations follow a series of steps that are designed to culminate in a recommendation of reasonable cause or no reasonable cause. However, the sequence of the steps may

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vary depending on the individual case. For example, a complaint that a local governmental body discriminated against a class of people protected under the Act when it denied a zoning variance for a group home may prompt a different sequence of steps in the investigative process than would a complaint that alleged that an owner refused to rent on the basis of race. If the complainant adds new allegations or if new parties are discovered the complaint should be promptly amended and investigative steps may need to be altered.

The basic approach in most investigations is as follows:

A. Initial Outline of an Investigation Plan

The investigator conducts a preliminary review including the complainant's initial statement of the events, issues and bases of the complaint. The investigator begins identifying the information needed to investigate the allegations, and drafts an initial plan for collecting evidence.

B. Interview of the Complainant

During the initial interview of the complainant, the investigator explains the enforcement and conciliation process to the complainant, informs the complainant of his or her rights in the enforcement process, reviews the allegations, and obtains information to verify the complainant's allegations.

C. Receipt and Review of Respondent's Defenses

The investigator receives the respondent's response to notification of the complaint. Although the response may be accepted orally or in writing, written defenses generally minimize future misunderstandings.

D. Development of the Investigation Plan

Based upon the respondent's defense(s), the investigator determines the theory he or she will proceed under and develops an Investigation Plan which, when effectively implemented, factually establishes the presence or absence of a valid prima facie case of discrimination and the validity of any claimed defense. The investigator and his or her supervisor should consult with Regional Counsel during the development of the investigation plan. The investigation plan will be updated as the investigation continues. Supervisors and investigators are responsible for ensuring that the scope of the investigation is carefully tailored to ensure adequate investigation of all claims made in the complaint (and any other issue which might be apparent from a review of the complaint and a knowledge of civil rights requirements). However, "over-investigation" of claims can and should be prevented by careful planning.

E. Data Request

The investigator sends written requests for information and documents to the parties in the case. The responses to these requests will assist the investigator in preparing for interviews and in furthering the investigation.

F. Respondent Interview

The investigator seeks statements, witnesses and documents, and obtains other evidence relevant to the allegations of the complaint from the respondent that responds to each of

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the complainant's allegations, and solicits explanations and corroborative information for each defense.

#### G. On-Site or Off-Site Investigation

The investigator physically examines records and other documents relevant to the case, on-site or off-site, and interviews the parties and witnesses.

#### H. Analysis

The investigator examines, compares, and evaluates the evidence gathered and determines whether further investigation is needed for a recommendation in the case.

#### I. Final Interviews of the Complainant and the Respondent

The investigator requests responses to, or clarification of all of the evidence collected in the case from the complainant and the respondent. If a no reasonable cause determination is recommended, the investigator must review the respondent's defenses and the evidence supporting those defenses with the complainant to determine if the complainant has additional information that would prove the defense(s) operate to conceal unlawful discrimination. If a reasonable cause determination is recommended, the investigator must summarize the evidence of the investigation and solicit any rebuttal evidence from the respondent. Whenever a respondent or complainant provides additional information, the other party should be given an opportunity to respond to the new information or evidence.

Throughout the investigation, the investigator should be entering data reflecting the information obtained and other activity related to the investigation in a timely manner in TEAPOTS. Additionally, the investigator should be updating the investigative file. Finally, the investigator should be consulting on a regular basis with his or her supervisor on the progress of the investigation and any obstacles or unexpected developments that may occur.

In consultation with his or her supervisor, the investigator must consult with Regional Counsel at all stages of the processing of a fair housing complaint. These consultations must occur frequently during the process and must include significant involvement at complaint intake, in determinations of jurisdiction, in investigation plan development, in conducting investigations, in the effort to resolve the case informally through conciliation and in making determinations of reasonable cause.

### **7-6 PREPARATION OF THE PRELIMINARY INVESTIGATION PLAN**

The first step in preparing to investigate a complaint is the creation of the Investigation Plan. The Investigation Plan is a living document that should be continually evaluated and revised as unexpected developments in the complaint investigation alter the theories that are controlling the investigation. The Investigation Plan is a road map for the investigation based on careful analysis of the complaint, the known facts and the provisions of the Act. It helps the investigator avoid dead ends and keeps the investigation on track and on schedule.

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The Investigation Plan, unlike the Final Investigative Report, is not mandated by statute. Nonetheless, an Investigation Plan is critical to ensuring efficient and effective completion of the investigation. An Investigation Plan format is contained in the investigative folder in TEAPOTS. The Investigation Plan must be placed and maintained in the Deliberative Section of the case file as referenced in Chapter 10, Preparation of the Case File.

The contents of an Investigation Plan should be sufficiently comprehensive to ensure that the investigator gathers the evidence necessary to determine whether the respondent violated the Act. The investigator and his or her supervisor may use the Investigation Plan section in TEAPOTS in a flexible manner to produce a meaningful guide for the conduct of the investigation.

#### A. Contents of the Investigation Plan

An Investigation Plan should include, but not necessarily be limited to:

- A description of the allegations, issues and bases;
- A statement of the defense(s) raised by each respondent;
- The facts to be gathered in order to prove or disprove the allegations;
- A list of persons to be interviewed;
- A list of documents and records to be obtained;
- A list of other sources of information and evidence; and
- A projected timetable for completion of the various steps in the investigation.

#### B. Organization and Headings of the Investigation Plan

There are four phases involved in the investigation of a discrimination case:

- Ensuring that the Department has jurisdiction over the complaint;
- Investigating whether or not the facts establish a prima facie case of discrimination;
- Obtaining, recording and understanding the respondent's defenses or rebuttal; and
- Investigating whether or not the facts support each of the respondent's defenses, or show the respondent's defenses are pretext that try to conceal unlawful discrimination.

1. Jurisdictional Elements. The investigator should review information to verify that: the complainant has been injured or will be injured by a discriminatory housing practice that is about to occur; each respondent is covered by the Act and each respondent, if there is more than one, may be responsible for the action, if proven; the property is not exempt; the complaint is timely filed; and the subject matter of the complaint alleges a discriminatory housing practice covered by the Act.

2. Statement of the Problem (Allegations). After jurisdiction is established, the investigator should develop a statement of the allegations to be

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investigated. The information needed to do this will be on the intake complaint form, the reports of the intake interview with the complainant, and the respondent's answer to the complaint, if it has been received. The investigator should start by identifying the conduct complained of (e.g., refusal to sell or rent, refusal to permit reasonable modification, etc.), the alleged basis for the conduct (e.g., race, religion, national origin, etc.), and the section of the Act and regulations pertaining to the alleged violation. All allegations should be included. The investigator should create a timeline of actions taken by the complainant and the respondent, if timing is an issue in the investigation.

3. Theory of the Case. Identify the theory or theories of discrimination appropriate to the complainant's allegations. This creates a structure within which to investigate and analyze the case. The appropriate theory depends upon the cause of the alleged discrimination. (See Chapter 2, Theories of Discrimination, for a complete discussion of discrimination theories and their application.)
4. Evidence and Elements Required for a Prima Facie Case. List the elements that will be required for the complainant to establish a prima facie case of discrimination. Identify as specifically as possible the documents or testimony which will determine whether the prima facie case stands or fails. The elements of the prima facie case depend upon the discrimination theory used and the transaction at issue (see Chapter 2, Theories of Discrimination, and Chapter 8, Analysis of Specific Cases, for the prima facie elements of various types of cases). An example of the elements of a prima facie case of discrimination in a refusal to rent case are:
  - The complainant belongs to a class of persons that the Act protects from unlawful discrimination;
  - The complainant applied to rent an available apartment from the respondent;
  - The complainant met the respondent's minimum qualifications for approval of the application to rent the apartment;
  - With knowledge that the complainant belonged to a protected class of persons, the respondent refused to rent the apartment to the complainant; and
  - After the respondent refused to rent to the complainant, a person not of the complainant's class rented the apartment or the apartment remained available.

During the investigation, the investigator must collect sufficient evidence on each of the elements of a prima facie case of discrimination. If one element of a prima facie case cannot be established during the investigation, a no reasonable cause determination will be made.

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1. Defense(s). If there are specific defenses which have been raised or can be anticipated (such as local occupancy codes, a claim that the complainant violated his or her lease, denial that the respondent took the alleged action or made a statement, or receipt of a better purchase offer) the defenses should be set forth in the Investigation Plan. (See Chapter 2, Theories of Discrimination, and Chapter 8, Analysis of Specific Cases, for the defenses to various types of cases).
  2. Analysis of Defenses. After receiving the respondent's defense(s), the investigator must examine and evaluate each defense.
  3. Persons to be interviewed. The complainant and the respondent will always head the list of persons to be interviewed. In addition, list the witnesses named by the complainant and the witnesses named by the respondent. Under "other witnesses," list those witnesses identified from a review of the response to any Data Requests, other documents in the case file, and during the investigation that should be interviewed. Witnesses are essential to corroborate or refute statements by the parties and other witnesses. Also, indicate whether an expert witness will be required in the case.
  4. Documents and Records. List documents and records that may be necessary or helpful in resolving the case. Leases, purchase agreements, homeowner association and cooperative by-laws, articles of incorporation, documentation of the type of legal entity (limited partnership, general partnership, limited liability corporation, corporation) involved, copies of zoning ordinances, written occupancy policies and tenant selection and assignment procedures are some of the documents that may be necessary in a given case. Identify from whom and where to locate each item and how to acquire it.
  5. Other Physical Evidence. Note whether the investigation will require any measurements, specific observations or any pictures or drawings, etc., of the subject property. If measurements are required, as in a case involving an occupancy standard, be sure to obtain the size of each bedroom and the overall size of the unit, or arrange to have the measurements taken by a third person who is not a party to the case, and has no interests in the outcome of the case. It also is advisable to prepare a drawing of the overall configuration of the unit. Materials published by the respondent should be carefully evaluated. Some housing providers will include patio or closet space in their statements about total living area in promotional materials.

#### C. Sequence of Events.

List the major tasks to be performed in order to complete the information required under each heading on the Investigation Plan. List the sequence in which they will be undertaken. Also, estimate the time each activity will take and the time required for the total investigation, keeping in mind the statutory obligation to complete investigations within 100 days, unless impracticable to do so. Establish milestones and track the progress of the investigation to ensure that it stays on schedule.



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#### D. Adjustments to the Investigative Plan

After completing interviews with the complainant, the complainant's witnesses, and the respondent, and reviewing any documents that are available, the investigator should make any required adjustments to the Investigation Plan. The investigator should re-evaluate which discrimination theory applies to the case and whether the investigation has produced sufficient factual information to establish a prima facie case of discrimination. The investigator may add witnesses to interview, documents to locate, records to review and analyses to perform.

### 7-7 EXAMINING THE RESPONDENT'S DEFENSES

The nature of the complainant's allegations, the defenses raised by the respondent, and the analytical framework applicable to the allegations and the defenses all determine the type and quantity of evidence the investigator must gather to complete the investigation in a given case.

Once the respondent has answered the allegations of the complaint, the investigator should analyze the nature of the "defense" offered before proceeding further in planning the investigation. The defenses that respondents raise in fair housing complaints generally can be grouped into three broad categories:

- Claim of exemption
- Denial or dispute of complainant's facts
- Dispute over the Act's requirements

#### A. Claims of Exemption

Respondents sometimes claim that they cannot be held liable for a violation of the Act because they are exempt from its provisions. A common example of this type of defense is in familial status cases involving a defense that the respondent provides "housing for older persons." Other cases in which a claim of exemption has been raised have involved private clubs, private pool clubs and private individuals renting out space within their own homes. In such cases, the respondents may acknowledge that they have adopted and enforced a discriminatory policy, but maintain that the Act does not apply to them. (See a more detailed discussion on exemptions in Chapter 3, Jurisdiction, and Chapter 4, Complaint Intake.)

#### B. Denial or Dispute of Complainant's Facts

A respondent may defend against an allegation of discrimination by stating that the complainant's description of events is false. Alternatively, a respondent may acknowledge the accuracy of some of the complainant's allegations, but dispute a single fact or set of facts that are critical to a finding of discrimination.

A respondent may provide reasons why the complainant did not receive a housing opportunity or benefit, home financing, a reasonable accommodation or modification or was treated differently. A respondent may justify his or her action by identifying a policy or practice that operated to exclude or deny the complainant. A respondent may justify

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his or her action by identifying a local ordinance upon which he or she was relying. The investigator must ask a respondent for documentation, witnesses or other evidence to evaluate the respondent's defense. Every defense should be verified, corroborated, disproved or discredited. This may be done in a variety of ways:

- Interview the complainant's and the respondent's witnesses and ask questions about the defenses raised by the respondent;
- Obtain and review documents such as tenant records, applications, financial records and leases;
- Compile and compare demographic or financial data on current tenants or applicants;
- Review local laws to determine if they are applicable;
- Obtain an expert witness to assist in evaluating whether it was impracticable to make a site accessible; or
- Take any other logical steps that are applicable to the defense that has been raised.

For a specific discussion of defenses see Chapter 2, Theories of Discrimination.

**Example:** The complainant alleged a prima facie case of discrimination in that the respondent refused to rent to her because of her race (African-American). The respondent acknowledges that he rented the unit to a Caucasian applicant, but he denies that he discriminated against the complainant. He states that he has other African-American tenants, the complainant did not provide a security deposit with her application, and the complainant did not have a good credit history. The investigator must evaluate all these defenses. The investigator should interview the successful Caucasian applicant and compare the successful applicant's application experience with the complainant's application experience. The investigator must also review the records of the successful Caucasian applicant, and compare the successful Caucasian applicant's records with the respondent's policy and the complainant's records to verify that the successful applicant paid the security deposit and had a demonstrably better credit history. The investigator must also review and obtain records of the race of the tenants in respondent's building, review tenant files and talk to tenants to determine whether other applicants were required to provide a security deposit with their applications and whether the complainant was informed of this alleged requirement, and must review tenant files to determine whether the respondent did credit checks of all applicants and whether he rented to non-African-American applicants with similar or poorer credit than the complainant.

### C. Dispute Over the Act's Requirements

Another defense that a respondent may assert is that his or her actions are not prohibited by the Act. That is, a respondent may admit that the events described by the complainant are accurate, but deny that these actions constitute a violation of the Act. For example, a respondent may contend that the Act does not require him or her to admit assistance animals in the housing. A respondent may admit that he or she did not rent to a family with children, but allege that he or she maintains a development that qualifies as Housing for Older Persons under the Act. In these cases, the investigation into the facts of the

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defense may be brief and readily accomplished. The legal questions raised by the case may be simple or novel and complex. The investigator should confirm the specifics of the respondent's contention, request the reasons for that contention and obtain any supporting documents or interpretations for the contention. The investigator should then refer the issue to the intake supervisor for resolution through consultation with Regional Counsel.

## **7-8 DETERMINING THE SCOPE OF THE INVESTIGATION**

One of the most important decisions an investigator makes in planning an investigation is determining the scope of the investigation. For example, the investigator must decide for what time period to seek evidence (the temporal scope), and what buildings, facilities or institutions to examine (the geographic scope). Additionally, the investigator must determine the extent to which the circumstances of other potentially aggrieved persons merit examination and whether to treat the allegations as systemic or "pattern or practice" complaints.

The investigator must make these decisions on a case-by-case basis in consultation with his or her supervisor. Additionally, as the investigation progresses, the initial decisions about the scope of the investigation and necessary adjustments must be re-evaluated.

### **A. Determining the Time Frame of the Investigation**

One question that an investigator faces is determining the period of time prior to the date of the alleged discrimination for which evidence of relevant events should be collected. In answering that question, the investigator should consider the following factors as well as any other factors raised by the facts of the case:

1. Is the alleged discrimination continuing in nature? That is, if the analysis of the information suggests that an unlawful practice of discrimination has occurred over a period of years, and has continued up to the filing of the complaint, the investigation could extend to all of the alleged unlawful acts, under the theory of continuing violations. However, it is important for the investigator to examine all of the events complained of to make sure they are continuing unlawful acts. See also Chapter 3, Jurisdiction.
2. How frequently have events similar to those underlying the allegations occurred? If, for example, the complainant alleges a respondent's failure to rent, initial data may show that there were very few vacancies within the six months prior to complainant's application. In that case, the investigator may need to expand the time period during which records are requested in order to find relevant comparative or statistical data.
3. Have the conditions under which the alleged discrimination occurred been subject to change? For example, if the respondent management had changed some time prior to an alleged discriminatory eviction, or if the respondent had revised its rental terms, then tenant evictions that occurred prior to those changes may not be relevant to the issues raised in the complaint. Only evictions that occurred under the rules or policies that existed at the time of the alleged discrimination would be

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probative of discrimination (unless the complainant claims that the rule changes themselves were discriminatory).

4. Should events that occurred subsequent to the alleged discriminatory act be included in the scope of the inquiry? The investigator should keep in mind that actions that a respondent takes after receiving notice of the discrimination complaint might not be probative of whether the complainant was a victim of discrimination. For example, if a complainant alleged that a respondent failed to rent to him because the complainant is mobility impaired, the fact that the respondent rented a unit to a person in a wheelchair after having received notice of the complaint would have limited probative value.

On the other hand, in some cases, evidence of later events is very relevant to the proof of a complaint. For example, if a respondent maintains that he or she rejected the complainant because of bad credit, evidence that the respondent accepted applicants with bad credit both before and after the alleged discrimination would be relevant. Evidence that the respondent did not rent to persons with bad credit after receiving notice of the complaint would have little relevance.

#### B. Geographic Scope of Investigation

In cases where the respondent owns or operates facilities at several locations, the investigator must decide which facilities to include in the investigation. In many instances, it will be appropriate to limit the investigation to the location of the alleged discriminatory event, e.g., the apartment complex or subdivision where the complainant sought housing or resided, or the bank branch where the complainant applied for financing, etc. However, in some cases it will be appropriate for the investigator to expand the geographic scope of the investigation to other locations under the respondent's control. Factors that will influence that decision include:

1. The Location of Responsibility for Decision-Making. Whether the local respondent representatives had the right to exercise some independence or discretion, or whether they followed a centrally controlled policy or practice;
2. The Boundaries of the Pool from Which Similarly Situated Persons can be Drawn for Comparison. Whether the respondent would consider the complainant for housing only at the site in question or would automatically consider him or her at other locations as well;
3. Determining the Likelihood of Other Persons Having Been Affected by the Same Conditions that Affected the Complainant. Whether the respondent claims that the actions complained of were in keeping with standard procedures or were the result of the isolated unauthorized act of a local respondent representative; and
4. Analyzing the Scope of the Complainant's Allegations. Whether the complainant limited his or her allegations to events occurring at one facility or whether the events implicated other facilities as well (e.g., complainant was steered to a certain development).

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## **7-9 IDENTIFYING INDIVIDUALS FOR COMPARISON IN DISPARATE TREATMENT CASES**

### **A. Defining Similarly Situated Individuals**

This section covers how to identify individuals who can be compared to the complainant and each other in disparate treatment cases. See also Chapter 2, Theories of Discrimination.

Many investigations of allegations of disparate treatment rely heavily upon comparative evidence. The quality of a disparate treatment investigation is greatly affected by the investigator's identification of those persons who should be compared to the complainant and each other. The effective and successful resolution of disparate treatment cases requires the investigator to:

- Examine and analyze comparative evidence;
- Identify differences in treatment that resulted from the comparison between the complainant and other similarly situated persons in the comparable class;
- Decide whether different standards have been applied to the complainant versus the similarly situated persons; and
- Ultimately, decide whether any differences in treatment resulted from unlawful discrimination.

For comparative evidence to be valid and probative of the presence or absence of discrimination, it is critical that the individuals identified or chosen for the comparison be similarly situated, in reference to the complainant. Similarly situated means that, when compared to the complainant, the persons and records examined by the investigator possess or reveal similarities (not mirror images) to the complainant in most, if not all, relevant aspects that influenced the respondent's decision, except the bases of the individuals examined by the investigator, will be the opposite of the basis identified by the complainant.

In selecting similarly situated individuals for comparison to the complainant, the investigator, to the extent possible and practical, must include persons whose basis can be viewed as the opposite of the complainant's protected basis, and when available, persons who share the same protected basis as the complainant. In determining whether another person satisfies the criteria for a "good" comparison, the investigator should ask himself or herself whether the individual is similarly situated in terms of:

- General qualifications (tenant rental history and references, income, length of employment, employment history and credit history);
- Location (Refers to those persons who pursued or enjoyed housing opportunities comparable to the complainant at or near the location of the alleged discriminatory act, including locations under the control of the respondent that offered comparable housing opportunities to the housing opportunity pursued or enjoyed by the complainant); and

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- Timing (Refers to those persons who pursued or enjoyed housing opportunities comparable to the complainant at or near the time of the alleged discriminatory act).

For example, if an African American family alleged that they were denied an apartment because of their race, the investigator would identify individuals for comparison who are not African-American persons or families with similar qualifications as the complainant in terms of prior tenancy, income, employment and credit history (general qualifications); and who applied for an apartment at the subject property, or if appropriate, another property owned and managed by the same respondent within a period of from six months to one or more years prior to the filing of the complaint, depending upon the turnover and the consistency in management personnel making the application decisions.

The investigator should also examine the application and acceptance move-in activity of similarly situated African-American families who applied and either moved in or were rejected during the same period. This information can be helpful in establishing whether what happened between the complainant and respondent is attributable to the complainant's race.

Before concluding that the Act has been violated because the respondent treated one or more of the individual chosen for the comparison differently than the complainant, the investigator should consider whether there are other factors that could explain the difference in treatment.

## B. Testing

Testing is one method of eliciting comparative evidence. The usefulness of testing to an investigation lies in the ability of test planners to construct two or more situations that are very comparable except for the protected bases of the testers with respect to the prohibited factor under examination. Effective testing is most frequently done before service of the complaint. The premise that underlies testing and other techniques of comparative evidence gathering and analysis is that applicants, tenants or home-buyers who differ only in terms of race, color, religion, etc., should be treated in a nearly identical manner unless the housing provider intended to treat one of the individuals less favorably because of the prohibited factor.

For a further discussion of testing, see the Testing Guidance located on FHEO's website at <http://hudweb.hud.gov/po/e/enforce/enforceguidance.htm>.

During the Intake stage, the Equal Opportunity Specialist will have obtained information from a private fair housing organization concerning any tests performed by that organization in connection with a complaint filed by an individual referred to HUD or by the agency itself. The investigator should review that information thoroughly and make sure that it is accurately summarized in the documents section of TEAPOTS.

To enable HUD to accurately evaluate the full evidentiary weight of testing, the investigator may request complainants and testing organizations to provide copies of the following testing material to HUD: tester profiles, test reports, test coordinator logs, debriefing forms, test narratives, any materials a tester received from the tested housing provider and other documents related to tests. These documents should be placed in the Evidentiary Section of the case file. See also Chapter 10, Preparation of the Case File.

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The fair housing organization may redact these documents in order to protect the identities of its testers. The investigator also may request a fair housing organization to produce its testing methodology, i.e., site and respondent selection criteria, choice of type of test conducted, tester training materials and tester procedures, particularly with respect to complaints filed by the organization itself. The testing methodology, as well as the tester identities, shall be placed in the Deliberative Section of the case file.

Investigators must conduct an independent analysis of all evidence, including testing material, regardless of whether a testing organization has provided its own analysis of that material. Furthermore, the investigator must interview all testers and test coordinators. The investigator's questions about testing methodology and the test coordinators' answers will be placed in the Deliberative Section of the investigative file. No discussion of the complainant or organization's testing methodology will be included in the Final Investigative Report or the Determination.

To protect the identity of testers during investigation, testers will be treated as "anonymous witnesses." Tester interview reports will be maintained in the Evidentiary Section but those reports must be redacted to omit the name, address, telephone number and title of the tester. Information that would reveal the identity of testers must be placed in the Deliberative Section of the case file.

#### **7-10 INVESTIGATING DISPARATE TREATMENT WHERE THERE ARE NO SIMILARLY SITUATED PERSONS FOR COMPARISON**

Allegations of housing discrimination occasionally involve situations where no similarly situated persons can be identified for purposes of comparison.

**For Example:** Complainant alleges that a small apartment complex located in a rural area refused to rent to him because he is Native American. The respondent's defense is that the complainant's prior landlord gave the complainant a bad reference. The respondent purchased the complex a year ago and there have been no vacancies in that period of time other than the vacancy for which the complainant applied. The respondent took the vacant unit off of the market and instead the respondent's son occupied the unit upon his graduation from high school.

In cases in which there is no identifiable individual who is sufficiently similar in circumstances to the complainant to serve as a basis for comparison, the following method of analysis should be planned and followed:

- Establish whether there are legitimate non-discriminatory reasons for the action.
- Contact complainant's former landlord to establish whether the landlord gave the complainant a bad reference.
- Establish whether normal business practices were followed (i.e., If the respondent normally contacts references of applicants by telephone was it done in this situation? In an eviction case, if it is the respondent's practice to send two notices prior to eviction, was this done?)

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- Establish whether there is any overt evidence of discriminatory animus, e.g., discriminatory statements.

## **7-11 EVIDENCE**

The totality of the collected evidence determines the outcome of the case. It is essential, therefore, that the investigator understands the kinds of evidence available, how to determine which evidence is relevant and how to evaluate the credibility of the evidence.

Evidence consists of facts that tend to prove or disprove an issue in the case. Evidence may consist of testimony, records, documents or objects. It is important in an investigation to identify as many sources of information as possible. The goal of the investigation is to uncover all of the evidence that is available in order to ensure a thorough investigation that supports a recommendation of reasonable cause or no reasonable cause.

There are several characteristics of evidence that affect its usefulness. In order for evidence to support a determination in a case, it must be both relevant and reliable.

### **A. Relevance**

Relevant evidence is evidence that has a relationship to the issues to be decided and tends to prove or disprove the issues in question. There are two components of relevant evidence: materiality and probative value. For example, if the complainant alleges that the respondent would not rent to her because she has a child, the issue of whether the respondent was aware of the presence of the child will affect the outcome of the case. Evidence that tends to prove or disprove the respondent's knowledge of the child, therefore, is relevant and has probative value. Evidence concerning the child's race would not be relevant since there is no claim of racial discrimination.

Material evidence is that which has a natural tendency to prove a fact or issue in controversy. For example, evidence that a respondent had expressed to his employees that he never wanted children living in his apartment buildings is material evidence on the issue of whether he discriminated against families with children.

The second aspect of relevant evidence is its probative value, or whether the evidence tends to make the existence of any fact of consequence (a material fact) more probable or less probable than it would be without the evidence. For example, in a claim that a respondent would not rent to a person of color, a note written by the respondent stating that he would never rent to a non-White person is direct evidence of discrimination that makes it more probable than not that the respondent was motivated by racial discrimination.

### **B. Reliability**

Evidence is deemed reliable, or credible, if it is believable when judged by common experience.

1. Statements/Testimony of Witnesses. Witnesses should have personal knowledge about the matters covered by their statements. If they do not have personal knowledge--for example, if they learned about a situation from a friend or others--



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their testimony under most circumstances should not be used in an enforcement proceeding.

Ideally, a witness should be unbiased. Bias is a witness's tendency or inclination to view a situation either favorably or unfavorably toward a party. Bias adversely affects a witness's objectivity. Bias may be measured by whether the witness has an interest in the outcome of the investigation, or by his or her relationship with the parties, or both. Bias will not preclude the use of a witness's statement; rather, it will bear upon how much weight will be given to the statement. The investigator should not ignore statements from witnesses who have the potential of being biased, such as a complainant's friend or sister. Such witnesses may provide perfectly reliable evidence.

The reliability of any witness's statement is enhanced if it is verified or corroborated by other witnesses, or sworn or affirmed (as in an affidavit), and confirmed by documentary or other physical evidence.

2. Records/Documents. In general, the most reliable evidence of the terms and provisions in a written record is the production of the written record itself. For example, written records of rents paid would be considered more reliable than the landlord's testimony about the rent payments.

In the absence of original documents, business records kept in the ordinary course of business, and records created in close proximity to the time of the event are also accepted as reliable evidence. Reliability is enhanced if the record is dated and signed by the author and if the custodian of the document gives testimony that authenticates, i.e., identifies the record. Documents created specifically in anticipation of an investigation may be biased since the respondent or the complainant could attempt to affect the outcome of the investigation through the records. Likewise, records created some time after the act in question may suffer from a lapse in the memory of the person creating the record.

The investigator must determine whether copies of each document reviewed on site should be collected. While copies may be useful in supporting the investigation's findings and/or needed to introduce information as evidence, sometimes the sheer volume of the records reviewed on site may make it very difficult to make copies, particularly if the respondent refuses to provide copies without reimbursement. The investigator should consult with his or her supervisor in these circumstances.

It is imperative that the investigation includes an accurate history of the source of each document obtained during the investigation. This history should show the person from whom, or organization from which, the document was received, the date and time it was received and the person who received the document. All documents should be preserved in the same condition as when they were received; with the exception of an official date stamp, no notations should be made on any document received during the course of an investigation.

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### C. Types of Evidence and Proof Categories

1. Direct Evidence. Direct evidence is evidence that on its face proves or disproves a fact in question, e.g., the respondent's discriminatory motive is direct evidence of intent. Intent is evidenced in the form of the spoken or written word. For example, the respondent may tell the complainant that he will not rent the apartment to the complainant because the complainant has children. In addition to stating that no children are allowed, the respondent may have a brochure that states that apartments will not be rented to families with children. Both the oral statement and the written brochure constitute direct evidence. However, as explained below, direct evidence is not required in order to show the respondent's discriminatory motive.
2. Circumstantial Evidence. Circumstantial evidence is evidence from which one may rationally infer the existence of a fact. For example, the respondent's motive may be inferred from circumstantial evidence. All relevant evidence that is not direct is circumstantial. Anything that tends to show that the respondent acted because of a reason prohibited by law is circumstantial evidence.

For example, circumstantial evidence may consist of facts that demonstrate that in an apartment complex, one remote section of the complex was rented almost solely to African-Americans. This evidence may further demonstrate that African-American tenants were shown apartments only in that section of the complex. Additionally, the evidence might reveal that the respondent repeatedly failed to show, offer or make vacant apartments available to African-Americans, in the buildings of the complex occupied by White tenants. From this evidence, an inference may be drawn that the respondent segregated African-American tenants because of their race from which the investigator can infer a discriminatory motive.

Another type of circumstantial evidence used in disparate treatment discrimination cases is comparative evidence. Suppose, for example, that the complainant alleges she was evicted because she had children. The respondent claims the complainant was evicted because other tenants complained that she and her family were noisy. Documents and testimony from tenants may show that residents complained to the respondent about loud noise by other tenants who did not have children, but that no action was taken against the tenants without children. This difference in treatment is circumstantial evidence of discrimination because of familial status.

3. Statistical Evidence. Statistical evidence can be used as evidence of intentional discrimination, even in cases involving disparate treatment. Most frequently, in such cases, statistics are useful in establishing that a pattern exists which is so persistent that it is extremely unlikely to have occurred by chance. Statistical evidence is nearly always at the heart of discriminatory impact cases. Impact cases rely upon statistics to show that a policy or practice has a significant adverse impact upon persons of a particular class covered by the Act. Statistical evidence is a form of circumstantial evidence. For example, a respondent bank may have a policy of approving residential loans only for more than a stated amount of

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money. A data analysis of successful and unsuccessful loan applicants may show that this policy excludes a statistically significant greater proportion of minority loan seekers than non-minority loan seekers.

4. Documentary and Physical Evidence. In addition to overt, circumstantial and statistical evidence, there are documents or other physical evidence that may prove the existence of a policy, a reason for an alleged discriminatory act, or establish a violation. See Chapter 10, Preparation of the Case File.

#### D. Probing for Indicators that a Transaction was Atypical

When, for example, an allegation is made that a housing opportunity was denied because the respondent discriminated on one or more of the protected bases, the complainant should be questioned in detail about what transpired at the time the incident occurred. For example, was the complainant given an application to complete? Did the application have any markings on it? Was the application accepted while the complainant was on the premises? Was the applicant shown a model apartment? Was the applicant told that he or she would be placed on a waiting list?

After the complainant, and the complainant's witnesses have been thoroughly questioned as to the details involved in the incident, the investigator should interview the respondent about the circumstances of the complainant's application. The respondent should be asked to provide details on the standard procedures used in the application process. Once every detail of that process is provided and the respondent identifies the criteria used to measure all applicants, the investigator can compare the experiences as told by the complainant to the process and criteria described by the respondent. In a failure to rent case units that could have been available during the relevant timeframe should always be identified.

The respondent should be asked to explain any differences between the standard procedures and the complainant's treatment. What legitimate excuses or reasons were uncovered for the action taken? What was the complainant told and was that accurate? Any criteria or procedures used with the complainant or reasons given for the action taken that differ from those described by the respondent as standard should be explored to determine if the respondent's normal business procedures were avoided and, if so, why.

In interpreting evidence that the respondent did not deal with the complainant in a manner typical of his or her usual practices, consider also whether attributes of the complainant other than the alleged prohibited basis may have been responsible for the break in procedure.

## **7-12 PARTIES AND WITNESSES WHO ARE REPRESENTED**

This section provides guidance to investigators on how to communicate with parties or witnesses who are represented. Investigators shall conduct investigations in a professional manner when communicating with represented parties and witnesses. This guidance applies to all representation, whether by an attorney or non-attorney.

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A. Parties Who Are Represented

Whenever an investigator contacts a complainant or respondent (party) and the party indicates that he/she/it is represented, the investigator shall ask the party to have their representative provide a letter of representation. The investigator should ask for the name, address and telephone number of the representative. If the representative does not provide a letter of representation, the investigator shall draft a letter to the representative asking the representative to confirm whether he/she represents the party. If the party was not initially represented but during the course of the investigation obtains representation, the investigator shall ask for a letter of representation. If a non-attorney represents the party, both the party and the representative shall sign the letter of representation.

Once the investigator knows that the party is represented, the investigator shall contact the representative and shall not contact the party directly unless the party's representative provides permission for the investigator to do so. If the permission to contact the party directly is limited to certain facts or issues, the investigator may not question the party regarding other facts or issues. In the absence of written permission to talk directly to the party, the investigator shall make a written notation to the file of the oral communication giving permission for the contact, and send a letter to the representative confirming permission to contact the party directly. Where a represented party contacts an investigator directly, the party must either provide a letter from the representative permitting such direct communication or have the representative on the telephone. An investigator may not talk directly to a represented party without the representative's consent.

The requirement that an investigator communicate with the representative, and not directly with the party applies during the course of the investigation and through all aspects of case processing, including the conciliation process and the post-charge phase of a case.

However, the requirement that an investigator communicate with the representative does not apply where the regulations require personal service on the parties, i.e., complaints, amended complaints, notification letters, 100-day letters or subpoenas. Such items shall be served upon the party in accordance with the statute and regulations. The representative should also receive a courtesy copy of the correspondence.

If the represented party contacts the investigator and indicates that he or she would like to speak to the investigator, the investigator shall inform the party that the investigator needs written permission from the party's representative before the investigator will speak directly to the party or a letter from the party stating that the relationship with the representative has been terminated.

If the party contacts the investigator and indicates that he or she has terminated the representation, the investigator shall ask for a letter in writing from the representative that states the relationship has been terminated. The investigator must have reasonable

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assurance that the representation has been terminated. A letter from the party that the relationship has been terminated is acceptable.

#### B. Witnesses Who Are Represented

If the investigator contacts a witness to request an interview and the witness asks to have a representative present during the interview, the investigator shall request the name, address and telephone number of the representative and then contact the representative to set up the interview. The investigator shall contact the representative and shall not contact the witness directly unless the witness's representative provides permission for the investigator to contact the witness directly. If the permission to contact the witness directly is limited to certain facts or issues, the investigator may not question the witness regarding other facts or issues. In the absence of written permission to talk directly to the witness, the investigator shall make a written notation to the file of the oral communication giving permission for the contact, and send a letter to the representative confirming the representative's verbal permission to contact the witness directly.

If the represented witness contacts the investigator and indicates that he or she would like to speak to the investigator, the investigator shall inform the witness that the investigator needs written permission from the witness's representative before the investigator will speak directly to the witness or a letter from the witness stating that the relationship with the representative has been terminated.

#### C. Conciliation

The requirement that an investigator communicate with the representative and not directly with the party applies during the course of the investigation and during the conciliation process. The investigator must contact the representative when relaying conciliation offers or counter-offers. If the investigator successfully conciliates a case, the investigator shall obtain the signature of the party's representative as well as the party's signature. See Chapter 11, Conciliation, for additional guidance.

#### D. Interviewing Employees of Parties or Witnesses

If the investigator is interviewing an employee or former employee of a party or a witness who requests to be interviewed without counsel; and the investigator knows or has reason to know that counsel represents party or witness of the employee or former employee, then the investigator shall contact the Office of Regional Counsel for guidance.

#### E. How to Deal with Non-Responsive Representatives

If the representative of the party or witness is not responsive to requests from the investigator for information, documents or an interview, the investigator should consult with his or her supervisor and seek guidance from Regional Counsel.

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If, during the conciliation process, the investigator believes that the representative is not communicating conciliation offers to the party or is not participating in good faith, he or she should contact the Office of Regional Counsel.

#### F. Whether a Party or Witness should Obtain Counsel

If a party or witness asks the investigator whether he or she should obtain counsel, the investigator shall respond that he or she cannot advise the party or witness as to whether they should obtain counsel but shall inform the party or witness that he or she is entitled to seek counsel.

### 7-13 MEMORIALIZING INTERVIEWS

#### A. Note-taking during Interviews

It is extremely important for the investigator to take thorough notes during an interview and to record the interview in TEAPOTS as soon as possible after the completion of the interview. In cases that are ultimately charged and litigated by HUD or DOJ, the investigator will have to rely on his or her interview records in order to prepare to testify. Moreover, in some cases, the interview records themselves may be entered into evidence at the trial.

In order to prepare interview records that will provide a firm legal basis for a determination and/or trial, the investigator must convey the context in which answers were provided as well as the content of the answers given. In addition, the investigator must be sensitive to statements that should be recorded verbatim and to set these apart from statements that are summarized.

In order to accurately convey the context of the answers provided by the party or witness, the investigator must strive to maintain the order of questions and answers throughout his or her note taking. In addition, the investigator needs to record, as accurately as possible, the question to which the witness is responding. For example, a party or witness may state:

"My landlord said on Tuesday that my daughter couldn't live with me because she had been in prison" and " ... on Wednesday I got an eviction notice."

The above answers might have been provided in reply to these questions:

- "What reasons did the landlord give for evicting you?" and
- "When did you receive your first eviction notice?"

Conversely, these answers might have been provided in response to these questions:

- "Did your landlord tell you that any other member of your household couldn't live with you?" and
- "What happened after you told the landlord you were going to contact HUD to file a complaint?"

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Clearly, the meaning of the answers of the party or witness in the above examples can be fully understood only when the questions that the complainant was answering are also supplied.

The investigator should not be so tied to the question format and sequence prepared prior to the interview that important information is lost or necessary follow up questions are not asked. Frequently parties and witnesses will supply a long narrative answer only parts of which are germane to the question being asked. However, that narrative may include information that is responsive to a question that appears later in the investigator's outline. The investigator should associate the volunteered information with the question that it concerns. Additionally, witnesses may convey unexpected, and sometimes extremely relevant, information during the narrative response that should be followed up with a new question immediately. The new question and the follow up information should be recorded wherever appropriate.

Occasionally parties and witnesses make statements that are particularly meaningful because of the precise words chosen. For example, a respondent might describe an African-American complainant in a racially derogatory manner. The precise meaning the words convey would be completely lost if the investigator simply wrote that the complainant says respondent referred to her in a racially derogatory manner or respondent used a racial slur when addressing complainant. The investigator must ask the complainant exactly what was said and write it down verbatim, using quotation marks to capture exactly what was said.

Throughout the interview, the investigator should ask the complainant to pause whenever necessary in order that a complete and legible record of the party or witness comments may be prepared.

The investigator should obtain a signed statement from any party or witness. During the introductory phase of the interview, the investigator should inform the party or witness that a signed statement may be requested at the conclusion of the interview. The signed interview record then becomes a document, which should be placed in the appropriate section of the case file, and recorded as such in TEAPOTS.

Sometimes, a witness will want to change, delete or amplify his or her responses when reviewing the written statement of the interview prepared by the investigator. This is the witness's right. The witness should be instructed to make any changes to the written statement on the document in ink and initial and date those changes. The written statement with the pen and ink changes should be filed in the appropriate section of the case file. An investigator should not transmit written statements electronically because the witness's changes will not be fully and completely documented.

If the witness changes anything on his or her statement, the original statement and the revised statement should be separately entered into the Interview section of TEAPOTS. If a witness refuses to sign the statement, then the investigator should note in the case file and in TEAPOTS that the witness was provided a copy of the statement and declined to sign it. This note should be dated.

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## B. Investigator Notes of Interviews

As emphasized above, during an interview of a party or witness, the investigator should take detailed notes of the questions and the responses to the questions provided by the person interviewed, as well as any additional comments made either by the investigator or the party or witness. Frequently an investigator will mark sections of the interview notes as the interview progresses. The notations or reminders signal the investigator to pursue the avenue of inquiry further, or obtain information from another person about the subject discussed. The investigative notes also may contain factual observations of the investigator regarding the demeanor of the party or witness, the location of the interview and any distractions that may have affected the effectiveness of the interview. Subjective observations may appear in the Notes section of the TEAPOTS in the interview tab, in the Deliberative Sections of TEAPOTS and the case file. Subjective observations should not appear in the FIR.

The investigator should enter the results of each interview as quickly as possible after the completion of the interview. The investigator will record the results of an interview in two places in TEAPOTS. The investigator's observations concerning the interview, information provided by the party or witness about methods of contacting other witnesses and similar information should be recorded in the "Notes" section of the interview screen. The substance of the interview should be recorded in the "Summary" section of the interview screen. The summary should be detailed and complete, as discussed in other sections of this chapter, using the investigative notes for accuracy. When recording the interview, the investigator may discover that he or she is not certain of what a party or witness stated at a given time; in those instances the investigator should contact that witness for clarification and include a reference to the supplemental contact in the Notes section.

**SPECIAL NOTE: After an interview has been recorded in TEAPOTS, the investigator's hand-written notes should be retained in the Evidentiary Section of the case file.**

## C. The Use of Recording Devices in Interviews

Tape recording an interview with a complainant, respondent or witness can be a very effective method of ensuring the accuracy of the written summary of the interview. A tape recording also may capture inflections, emphases, hesitations or other aural information that cannot be captured in a document. There are times when a tape recording may be evidence of the manner in which the investigator conducted the interview in response to allegations of impropriety.

However, the improper or careless use of tape recordings can also be very detrimental to an effective investigation. The laws regarding the use of recording devices, and consent required in order to allow such evidence to be admissible in court, vary from state to state. An investigator must consult with his or her supervisor and Regional Counsel before tape recording an interview. The investigator must not tape record an interview



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unless the party or witness being interviewed has expressly consented to the tape recording, and the party or witness **must** audibly and clearly record the affirmation of this consent on tape at the beginning of the taped interview. A clean tape should be used. Recordings should not be made on tapes that have previous recordings on them. Additionally, an investigator should tape record interviews only after having received training on the proper method to tape an interview and on the equipment being used. If a decision is made to tape record an interview, that decision should be memorialized in the “Notes” section of the interview record in TEAPOTS.

Additionally, when making a decision whether the use of a tape recorder during an interview is advisable, the investigator and supervisor should assess the probable effect of the tape recording on the outcome of the interview. Some parties or witnesses may become very uncomfortable or self-conscious if a tape recorder is being used and this may impede the free flow of information during the interview. On the other hand, some parties or witnesses may feel reassured that the tape recording will most accurately capture their statements. Occasionally a party or witness will insist on tape recording the interview; in those instances the investigator should be prepared also to tape the interview.

Before beginning a tape recording, the investigator should ensure that the equipment is working properly and that there are a sufficient number of blank tapes on which to record the entire interview. For complainant or respondent interviews, several tapes may be necessary. When the investigator has used one tape, the investigator should immediately mark that tape showing its sequence in the entire interview and place the tape in a secure place. A separate tape should be used for each party or witness interviewed. Whenever a respondent requests that an interview be taped, the investigator should demand that he or she receive a copy of the tape.

The investigator should never rely exclusively on a tape recording to capture the content of an interview. The investigator should take detailed notes of the answers to questions and any other information conveyed during the course of the interview. The investigator can use the tape recording when recording the interview summary in TEAPOTS to supplement those detailed notes to ensure accuracy of the interview summary.

While an interview is being conducted and tape-recorded, the party or witness may requests to “go off the record” or to end the tape recording. If this should occur, the investigator must agree to end or pause the tape recording. However, the investigator must explain that nothing said during an interview is “off the record;” the investigator will make a written summary of the information conveyed during the entire interview; and the investigator may request the witness to sign a written statement at the conclusion of the interview.

Whenever an interview is recorded, the tape(s) of that interview must be preserved. These tapes must never be destroyed, used to re-record another interview or otherwise erased or altered. The tape(s) of each interview should be placed in a separate manila envelope that should be marked with the date of the interview and the name of the

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witness and secured in the case file. The manila envelope containing a tape should also include the recorder of the tape and a Document Control Cover Sheet. See Chapter 10, Preparation of the Case File, for additional guidance on proper handling and filing of tape recordings.

In some cases, and in particular in cases that have been identified as potential reasonable cause cases, it may be important to obtain a complete transcript of one or more tapes obtained during the investigation. An expert in that business should do transcription. Transcripts can be expensive, and the supervisor should ensure that there are sufficient funds to cover this cost. Once a transcript is made, it is a document, and must be recorded in the Documents section of the Investigation folder in TEAPOTS. The transcript also should be secured in the evidentiary file in accordance with Chapter 10, Preparation of the Case File. Even if a transcript is made, the original tape(s) must be preserved in the case file as evidence.

## **7-14 INVESTIGATOR'S INTERVIEW WITH THE COMPLAINANT**

### **A. The Initial Interview**

After developing the Investigation Plan, the investigator should contact the complainant. The investigator needs to personally hear and document the complainant's story. Usually the initial contact is likely to be made by phone, if only to introduce the investigator and make arrangements for an in-person interview. Based on the circumstances of each case, the investigator should obtain as much information as possible during the initial phone contact and through the subsequent in-person interview, which can also be used to clarify information.

The investigator should contact the complainant without regard to whether the respondent has filed an answer. While a timely answer to the complaint by the respondent would expand the initial complainant interview to cover issues raised by the answer, it is not necessary to wait until the answer is received to begin getting important information from the complainant.

The investigator should outline the general flow of the interview and the questions to ask of the complainant. When the complainant has raised multiple allegations (alleging, for example, a pattern of harassment based on race or repeated incidents of unwanted sexual overtures), the investigator should plan to move from incident-to-incident throughout the interview and ask the complainant the same series of questions about each incident, i.e.,

- When did this occur?
- What, precisely, happened?
- Where did this happen?
- Who was responsible?
- Who might have witnessed the incident?
- What documents might have been created that would substantiate the complainant's account of the incident?

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The initial complainant interview should result in a detailed and specific understanding of the events giving rise to the complaint.

1. Preliminary Matters.

The investigator should begin the interview by introducing him or herself to the complainant and explaining the purpose of the interview. If the first interview occurs face-to-face, the investigator should present HUD identification. The investigator should make sure to cover the following:

- Explain the complaint process. Many complainants do not understand that FHEO is a law enforcement agency that conducts a full, fair, and impartial investigation of all sides of an issue. Ensure that the complainant understands that an investigation can conclude in a conciliated settlement, a dismissal or litigation. Explain to the complainant that the focus of the investigation will be exclusively upon alleged and potential violations of the law. Explain that the complainant can and should take whatever steps are necessary to improve his or her living situation while the complaint is being processed. (There is no need for the complainant to maintain the status quo until the conclusion of complaint processing). Describe the length of time that may be required for processing the complaint and the current status of the investigation.
- Emphasize HUD's objectivity to the complainant and explain that the complainant has a right to legal representation if he or she desires it.
- Ask if the complainant has any questions about the process.
- Explore the Complainant's Allegation. Ask the complainant to explain, in his or her own words, what happened.

As the complainant explains what happened, the investigator should listen for and record the "what," "when," and "where" of the alleged violation, such as:

- A physical description of where the alleged act of discrimination took place;
- A precise description of what the complainant did, such as where, for example, she applied for an apartment, how she applied, to whom she applied, who was present, how she learned of the unit, the type of unit she was seeking, etc.;
- A physical description of the respondent and a description of the respondent's actions and requirements, such as questions the respondent asked, whether an application was required, what qualifications were stated, whether a deposit was required, the amount of the rent, materials provided, the existence of a waiting list, etc.; and
- How and when complainant became aware of the alleged discrimination. Was anyone else treated in the same manner? What does the complainant think will be the respondent's explanation for his or her actions?

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The investigator should continue asking questions until he or she understands all events relevant to the alleged violation, giving the complainant feedback to ensure that his or her understanding of the information is accurate. The investigator must ask the complainant explicitly why he or she believes the events occurred because of discrimination.

2. Explore the Respondent's Defenses. The complainant may be inclined to tell the investigator only those facts that support the discrimination claim. For example, the complainant may say, "I received an eviction notice as soon as I got home from the hospital with my new baby." The complainant may know, but neglect to say, that, prior to going to the hospital, she had received three warning notices about noise and parking violations. The investigator should ask the complainant what she believes the respondent will say in response to the complaint. For example, she may tell the investigator about the warning notices. The investigator can then ask the complainant if she believes the warning notices are the real reason for her eviction. If the complainant believes the warning notices are not the reason for the eviction, she should be asked to explain why she believes otherwise. This type of exploration helps to ensure a thorough investigation.

As soon as the respondent's answer to the complaint is available, the investigator should review it -- point by point -- with the complainant. Obtain the complainant's response to each prong of the respondent's defense. The complainant can be asked to suggest witnesses and provide any witnesses who might refute the statements in the respondent's answers.

3. Review the Signed Complaint Form for Accuracy. The investigator should review the complaint form in light of the complainant's statements and determine if it accurately reflects the complainant's allegations. If the complaint is not properly framed, the investigator must discuss the required changes with the complainant and ask the complainant to execute an amended complaint. If it is apparent during the interview that other parties should be added to the complaint, the investigator should consult with and assist the complainant in executing an amended complaint. If the complainant relates additional acts of alleged discrimination that have occurred since the filing of the complaint, the investigator determines whether those allegations are a part of a continuing course of the alleged discriminatory conduct alleged in the complaint or new acts. The investigator also must determine whether the existing complaint should be amended or a new complaint taken. A new or amended complaint must be served on all parties.
4. Identify Witnesses. The investigator needs to ask the complainant to identify any witnesses who can corroborate the complainant's statements or who can provide further information relevant to the complaint, e.g., persons who were present when the act took place, persons familiar with any policies at issue or anyone who can verify any facts in dispute. The investigator should ask how to contact the witnesses and record that information in the Investigation Plan and in the witness's section of TEAPOTS. The investigator also should ask the complainant whether he or she knows of any other persons who share the complainant's

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protected class status who also may have been injured by the respondent's alleged discriminatory practices and how these individuals could be located.

5. Identify Records and Documents. The investigator asks questions that may lead to the identification of relevant records. This line of questioning is particularly important because the complainant may have relevant documents in his or her possession. For example, did the complainant sign a register? Did the agent take notes? Did the complainant pick up a business card? Were the police called? Did the agent say that a credit check on the complainant had been run? Questions of this nature will identify relevant documents, and the complainant may be able to provide copies or arrange to copy the documents.
6. Discuss Injury and Damages. The investigator should ask the complainant to describe how the alleged discriminatory acts injured the complainant and any other identified aggrieved persons named in the complaint. The investigator may use the Damages Worksheet in TEAPOTS as a basis for questions concerning the complainant's economic and non-economic harm. With respect to non-economic damages, the investigator should ask the complainant to describe how he or she and members of the household reacted to the alleged discrimination, with whom have they discussed their feelings and how those feelings affected their outlook or daily activities. This avenue of inquiry also will provide information that the investigator or conciliator will need to conduct conciliation efforts. The investigator should be careful to distinguish between questions concerning the type of harm and damage that the complainant experienced from the complainant's requests for compensation or conciliation proposals; the latter should never be included in the interview notes but instead should be recorded as part of the conciliation record.
7. Closing. The investigator should always conclude an interview by asking the complainant if there is anything else he or she would like to add and thanking the complainant for his or her cooperation. The investigator should inform the complainant that he or she will conduct further interviews following contact with the respondent in order to get the complainant's comments on the respondent's position. The investigator should explain that he or she will keep the complainant apprised of the progress of the investigation and should let the complainant know his or her name, address and telephone number.

The investigator needs to advise the complainant of the necessity to notify the investigator or the HUD office of any change in address or telephone numbers at work or home. The complainant should be informed that the complaint could be closed if HUD cannot locate the complainant or if the complainant should fail to cooperate with HUD during an investigation.

#### B. Follow up Interviews with Complainants

In almost every investigation it will be necessary to conduct additional interviews of the complainant. The investigator should be careful, however, to ask the complainant additional questions only to clarify or supplement answers to previous questions or to provide new information in response to evidence produced during the investigation. Unless new or additional information makes the complainant's credibility a key issue in

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the investigation, it is not productive to ask the complainant the same questions during subsequent interviews. For that reason, it is important that follow up interviews with complainants are conducted with the same thorough preparation and planning as the initial interview.

## **7-15 INITIAL DATA REQUESTS**

The investigator should include in the Investigation Plan a list of the information and documents needed from the respondent. The investigator should promptly prepare and mail or fax an initial Data Request to the respondent and then verify whether the respondent has received the initial Data Request. The initial Data Request should be designed to obtain information that helps determine whether: (1) all of the appropriate respondents have been named in the complaint, (2) the respondent(s) will be represented by anyone during the investigation; and (3) any information exists that tends to prove or disprove any element of the complainant's prima facie case of discrimination or the respondent's defenses.

Only in limited situations would an Initial Data Request be sent to complainant. Such limited situations would include:

- Complainants whose circumstances do not permit personal or telephone interviews;
- Complainants who have representation; and
- Complainants who have failed to provide information within a reasonable time after receipt of the investigator's verbal request.

If an early on-site visit is planned, the initial Data Request may state that the respondent should make the data available for review during the visit and need not mail it to the Regional Office. If an on-site visit is not anticipated in the immediate future, the initial Data Request may need to be framed so as to produce a method for sampling and independently verifying the data response.

Suppose, for example, that a complaint alleges discrimination in rentals on the basis of familial status. The investigator must determine, among other things, whether the landlord has a history of renting to persons of the complainant's familial status. The investigator should ask the respondent to document this fact. If the respondent says that he or she had no records that would reveal the familial status of the tenants, the respondent should be asked for a list of tenant names, addresses and telephone numbers. A representative sample of these persons can then be contacted in person or by telephone during the on-site visit and asked about the presence of children under age 18 in their households and whether their landlord asked questions about their familial status when they first applied to rent at the subject property or has inquired into their familial status or treated them differently.

In most cases, the investigator should request a list of similarly situated individuals (applicants, tenants or clients of the respondent) with current addresses and telephone numbers. As the investigation progresses, the investigator may need to contact persons to learn how they were treated or to obtain comparative information.

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Always include a reasonable deadline by which the Department will expect answers to the Initial Data Request and follow up with the respondent if the information is not received by the date indicated.

Initial Data Requests should not, on their face, be described as pre-subpoena letters. If necessary, follow-up data requests, interrogatories or subpoenas may be used in cases where responses are not forthcoming. See Section 7-20.

Data request letters should be recorded in the Documents section of TEAPOTS.

## **7-16 INVESTIGATOR'S FIRST CONTACT WITH THE RESPONDENT**

When preparing to make contact with the respondent, the investigator must take into consideration that there may be multiple respondents, including agents or other individuals, who must be interviewed. On the other hand, the respondent may be a sole proprietor or small family business. These considerations would obviously affect the planning and conduct of the investigation.

When possible, it is preferable for the investigator to conduct separate interviews of each respondent. In scheduling the separate interviews, the investigator should consider what would be the most effective sequence of interviews. For example, the investigator may conclude that it is more efficient to first interview a top manager who can provide an overall picture of the respondent's operations. On the other hand, the investigator may find that it is more productive to first get an account of the events in question from the respondent who actually dealt with the complainant.

The following description is developed as though there is one respondent involved in the allegations.

### **A. Planning and Arranging Respondent Interviews**

The investigator should review in detail the information submitted by the respondent in response to any data requests. The investigator should make copies of any documents about which the investigator intends to ask questions during the respondent's interview, so that the investigator can show those documents to the respondent during the interview. The investigator should review the notes of the interviews with the complainant and the complainant's witnesses, as well as all other information in the case file and the Investigation Plan. The investigator should learn as much as possible about the business of the respondent before the initial contact by asking other investigators who might be familiar with the respondent to explain the nature of the respondent's business, checking to see if any of the commercial publications list the respondent and learning the terminology used in the respondent's business. An understanding of the respondent's operations is very helpful in conducting a comprehensive investigation. It is difficult to evaluate the legitimacy of the respondent's defenses without some understanding of the business.

The investigator should outline interview questions before contacting the respondent. Based on those questions, the investigator should be prepared to give the respondent a good estimate of the amount of time the interview will take when the investigator contacts the respondent to arrange the interview. The investigator should ascertain from

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the respondent when the interview is scheduled whether copying facilities are present at the site of the interview, and whether the copying equipment will be available to the investigator and under what conditions. The investigator may find that it is necessary to arrange for an independent copying capability, either at another location or with a portable copying machine.

If the purpose of an on-site visit is to both interview the respondent and review documents, it is a good practice to plan first to review the documents provided and then to conduct the interview. The document review may produce avenues of inquiry that the investigator had not initially included in the interview outline. If documents are reviewed after the interview, a follow-up interview usually will be required to ask questions about certain documents.

## B. Conducting Respondent's Interview

When conducting the respondent's interview, the investigator should make sure to cover all of the following items:

### 1. Define the Role of the Department and the Investigator

Begin the conversation by introducing yourself and explaining the purpose of the contact. It is possible that this will be the respondent's first contact with HUD. Ask the respondent whether he or she has been served with a copy of the complaint. If the initial contact is by telephone and the respondent has not been served, verify the respondent's address and immediately serve the complaint. If the investigator is conducting a personal interview with the respondent, the investigator should take an extra copy of the complaint to the interview and, if necessary, serve the respondent at the interview and obtain a signed receipt as proof of service.

The investigator should take time to familiarize the respondent with the sections of the Act that provide the Department with authority to investigate a complaint. In addition, the investigator should explain that the Department remains impartial while investigating a complaint. Explain the complaint process and the rights and duties of the respondent and the complainant. Explain the possible outcomes of the process.

### 2. The investigator should review the complaint with the respondent to make sure that he or she understands the stated allegations.

### 3. Discuss the Respondent's Business Operation with the Respondent. The investigator should ask the respondent to explain the particulars of his or her business with regard to both its overall operations and in particular the areas involving the complaint. In most instances, the questions should initially focus on the general or standard operating procedures of the respondent, and then move to the specific application of those procedures to the complainant, and individuals who have been identified as similarly situated to the complainant. The investigator should ask any specific questions, including questions about potential jurisdictional problems that may have arisen while carrying out the initial research on the respondent's business. The investigator should obtain a detailed description of any procedures involved in the complaint (such as rental



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application procedures, waiting lists, etc.) and any qualifications or selection criteria utilized. The investigator should determine how housing decisions are made.

4. Defenses. The investigator should ask for the respondent's version of what happened. This is the central purpose of the interview. The investigator should get specific facts, not generalities or conclusions that are of little use. For example, if the respondent claims that the complainant wasn't qualified, the investigator should ask how the respondent determined the complainant wasn't qualified and why. The investigator should ask the respondent to identify any corroborating witnesses. The investigator should note any discrepancies between the respondent's and the complainant's stories for further investigation.

If comparative evidence is required, the investigator should first review the files to identify similarly situated persons. The investigator should then compare the complainant's experience with the respondent to the experience of these similarly situated persons. Once the investigator gains an understanding of the respondent's business in theory and in practice, the investigator should ask the respondent how similarly situated persons were treated, such as, "Have you evicted other people who are a month late with their rent?" Ask to see relevant records. At the end of the interview, the investigator should restate the reasons given by the respondent for the complainant's alleged unfavorable treatment and ask whether there were any other reasons for the respondent's actions.

5. Respondent's Witnesses, Records, and Documents. The investigator should ask the respondent to identify witnesses who could support his or her version of events. If the respondent has named employees as witnesses, the investigator should arrange to interview them separately. (Please refer to the guidance applicable to employees of parties, Section 7-12). The investigator should also arrange to review records that are within the respondent's possession and ask the respondent to provide you with any necessary documents. The investigator should be aware that any discriminatory statements by the respondent during the interview are evidence of discriminatory intent and should be recorded as accurately as possible. When recording those statements, the investigator should be sure to include the context in which the statement was made.
6. Closing. At the end of the interview the investigator should ask the respondent if he or she would like to add anything else to his or her statement. The investigator should thank the respondent for cooperating with the investigation, state that future contact may be necessary to further clarify matters, and arrange for necessary follow up to review records, inspect a site or interview respondent's employees. The investigator should provide his or her name, address and phone number to the respondent. The investigator should draft a written statement of the interview and request that the respondent review and sign the statement.

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## **7-17 ON- SITE AND OFF-SITE INVESTIGATION**

### **A. The Difference between On-site and Off-site Investigations**

An investigation may be conducted off-site or on-site. In "off-site" investigations, interviews are conducted primarily by telephone or regular or expedited mail, and other electronic media. In "on-site" investigations, the investigator travels to the site(s) where the investigator finds the complainant, respondent, witnesses, documents and records, the dwelling that is the subject of the dispute and the respondent's place of business, and interviews parties and witnesses, reviews records and makes relevant observations of facts and circumstances. In most situations involving investigations of housing discrimination complaints, an on-site visit is the most efficient way to conduct an investigation.

It is also possible for a combination of methods to be used. For example, the initial interviews with the complainant and respondent may be by telephone followed by an on-site visit during which further interviews of the parties and interviews of the witnesses are conducted in person. Whether on-site or off-site, the goal is to conduct the investigation in the most efficient and practical manner depending upon the circumstances of the individual case.

Whether an investigation involves a visit to the site of the alleged discrimination or not, the investigation should involve significant off-site analysis both before and after the on-site visit. Documents such as leases, purchase contracts, eviction notices and employee handbooks should be requested in advance of the on-site visit. At least one fact-finding interview by telephone should be conducted with each party to the complaint before the on-site visit. The investigator should be clear about the ownership of the subject property, the reporting relationships of employees, and each and every allegation that should be investigated prior to an on-site investigation to make effective and efficient use of the travel budget

Occasionally the specific fact-pattern of a complaint renders it possible to conduct a thorough and effective investigation without an on-site investigation. Factors to be weighed in determining the necessity of an on-site visit are described below.

### **B. Should the Investigation be On-site or Off-site?**

In planning the investigation the investigator, on a case-by-case basis, must determine whether the investigation should be conducted on-site or off-site. In some cases a review of the case file will provide enough information to allow the investigator to make a decision to travel to the site.

#### Cases That Lend Themselves to Off-Site Analysis

The following factors, after consultation with Counsel, may indicate cases that do not require an on-site visit:

- Cases involving only questions of law (rather than factual disputes).
- The evidence submitted by the parties shows a clear cause case (Respondent admission and documents that corroborate the respondent's admission).

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- The evidence submitted by the parties shows a clear no cause case (comparative data showing similar treatment).

### Re-evaluation of Site Decision

The need for an on-site visit should be constantly re-evaluated. While it may appear that an on-site visit is not necessary at the beginning of an investigation, issues may develop as a case progresses that support the necessity of an on-site investigation.

### C. On-site Investigations

The investigator should also plan to interview the parties and all available witnesses during the on-site investigation. The investigator will have identified some witnesses from a review of documents supplied and interviews conducted prior to the on-site investigation. Additional witnesses may be identified during the on-site document reviews and interviews.

On-site investigations require the investigator to plan and schedule in advance the times and places for interviews and for the review of the available records. Once the interviews are scheduled, the investigator should send written confirmation of the date and time of interview to each person who has agreed to the interview or meeting. The written confirmations should list any records, documents, files or other information that the party or witness agreed to produce during the on-site investigation. The written confirmation should also include any other records, documents, files or information that the investigator needs as a part of the investigation, although there may be no agreement, or a dispute about the investigator's right and authority to examine this information. (This shows the Department's efforts to obtain the party or witness's voluntary cooperation.)

While on-site the investigator should review all pertinent data provided by the respondent and interview the person responsible for creating the records, as well as the person responsible for keeping the records. All interviews should be documented and any failure of a party or a party's witness to follow through on a scheduled interview should be noted. If the existence of a document is disputed, the custodian of similar types of documents should be interviewed about the procedures used for handling the kinds of documents in question.

During the on-site investigation, the investigator will have the opportunity to make necessary personal observations relevant to the issues in the case. For example, the investigator may inspect the condition of a dwelling, note its relation to other dwellings, and measure its living and bedroom space or test an assertion that certain locations can be viewed from the dwelling. The investigator may inspect facilities and services offered in connection with the dwelling, look at posted rules and regulations governing the use of recreation or parking areas or note whether a fair housing poster is in evidence. All of these observations should be recorded, along with a notation of the date and time of the observation. The investigator also may make relevant observations concerning the demeanor or presentation of parties or witnesses during the on-site investigation. For example, the investigator may note that a witness whose testimony rests on his ability to have seen or heard something has vision or hearing problems.

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#### D. Off-site Investigations

The investigator should conduct telephone interviews with parties and witnesses. The investigator should review all documents, records and data submitted with the respondent's answer, or that have been received in response to the investigator's request.

Persons other than the parties to the complaint may have created many of the documents relevant to a given case. Where this is the case, it is preferable to request submission of the document by the uninvolved third party, rather than allowing the parties to collect and submit these key documents. Police reports can be obtained through the police department, property tax records through the appropriate county office or the local municipality, and building plans through the municipal office that inspects and licenses proposed construction. For example, a complainant claiming a disability, which the respondent disputes, might provide his or her healthcare provider with written permission to release information to the investigator. If possible, the release should authorize the healthcare provider to disclose information to the investigator verbally or in writing. The investigator can then interview the healthcare provider by telephone or write to the physician describing the information necessary to the investigation.

When the investigator receives a critical piece of information from one of the parties, such as a complaint filed by a neighbor against the complainant, the author of the original document should be contacted in person or by telephone to verify the genuineness of the document and obtain information about the facts and circumstances that caused the author to file the complaint. Where the decision has been made to forego an on-site investigation, the investigator should consider whether photographs or a videotape of the involved properties would be helpful. Where an on-site investigation appears to be necessary in order to obtain a single piece of factual information, such as the dimensions of a dwelling, the investigator should explore whether there is a HUD office in the vicinity of the involved property.

### **7-18 WITNESS INTERVIEWS AND DOCUMENTS**

Whether the investigation is conducted on-site or off-site, interviews of witnesses, whether provided by the complainant, the respondent, or identified in the course of the investigation, are invaluable sources of relevant information. These witnesses may include other similarly situated applicants or tenants who can relate how they were treated by the respondent, former employees of the respondent or former landlords of the complainant, medical professionals of whom the complainant is a patient or client, expert witnesses on accessible design, state or local government and police officials and other persons identified by a party or by the investigator.

The investigator should begin every witness interview by stating his or her name and title. In any interview of a witness who is not a party the investigator should describe the nature of the investigation, the role of the investigator, and the fact that information provided by the witness will become a part of the official record of the investigation and may be disclosed to the parties in response to a request for the investigative report or during litigation. The investigator should consult with Regional Counsel if a respondent's representative requests to be present during the interview of any nonparty

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witness. Regional Counsel will assist the investigator and determine whether a respondent's representative should be permitted to attend the interview.

Employees and former employees of the respondent may have information that is crucial to the investigation. (See Section 7-12 in this chapter for a discussion on whether a respondent's representative must be given the opportunity to be present during an interview of any person who is or has been employed by the respondent.) In cases where an attorney does not represent the respondent, the investigator should consult with his or her supervisor and Regional Counsel about whether the respondent should be notified of, and is entitled to be present during the interview of present or former employees.

In disability discrimination cases, an investigator may need to interview the complainant's healthcare provider. The investigator should be aware that under new laws and regulations concerning medical information, medical professionals are limited in many situations in the type of information that they can disclose without the explicit consent of the patient or client. It is important that the investigator get written consent from the complainant not only for the receipt of medical records but to interview the medical professional. The investigator may consult Regional Counsel on how to word the complainant's release, including the scope and timeframe of the release.

Many investigations may involve the use of an expert witness. These include accessibility complaints, lending complaints and complaints involving statistical analyses. Before interviewing an expert witness provided by the respondent, the investigator should become sufficiently familiar with the subject matter about which the expert will provide information to ask informed relevant questions. The investigator and supervisor may decide that it is necessary for the Department to retain an expert to assist in the investigation, including interviews of other expert witnesses.

State and local government and police officials may provide useful documents as well as testimony. For example, in a case where the respondents defend their decision to evict the complainant because the complainant was arrested for some offense, the investigator needs to interview the arresting officer and obtain a copy of the police report. Many public officials will provide information and documents willingly, but some may require the issuance of a subpoena. If a subpoena is required, one should be prepared and served on the person named in the subpoena (See Section 7-21). Also, the investigator should make arrangements to cover the costs of any documents that are provided by a third party.

During the course of an investigation a party to the complaint may identify many potential witnesses. The investigator should ask the complainant or respondent to describe what information the witness could provide. The investigator may have to explain to the complainant or respondent that the investigation will focus only on information that is relevant to the housing discrimination allegation that has been made, and that in most cases only witnesses with first hand knowledge of facts related to potential discrimination will be included in the investigation.

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## 7-19 ASSESSING CREDIBILITY

“Credibility”, as used in this chapter, refers to the trustworthiness of the statements made by parties and witnesses. Credibility becomes an issue when people give conflicting versions of the same event, offer evidence that conflicts with their own previous statements, or when a person's statements appear to conflict with the facts of the situation. Objective observations of the behavior or mannerisms of a party or witness may be helpful in situations where those observations provide insight or circumstantial evidence about the truth of the person's statements. Caution must be exercised in making judgments about a person's credibility. It is important to remember that individuals vary and it is not possible to read a person's mind. For example, nervousness and/or failure to make eye contact do not necessarily mean that a person is lying. The person merely may be shy.

The following factors may help in assessing the credibility of witnesses.

### A. Reliability of Witness Testimony

#### 1. Ability and Opportunity to Perceive

- How well could the witness see or hear?
- Were there physical factors or conditions that would distort the witness' perception of the events in question? For example, did the witness indicate that he or she was tired, under the influence of alcohol or drugs at the time of the event?
- Does the witness have the maturity to understand what was seen?

#### 2. Ability to Recall

- How long ago did the event(s) complained of occur?
- Is the event in question something the witness is likely or unlikely to remember well because of its relative impact, unexpectedness, frequency of occurrence or its linkage to another important event in the witness's life?
- How accurate/reliable does the witness's memory appear to be generally?
- Does the witness utilize memory aids such as notes, diaries or tape recordings made at or near the time of the events in question?

### B. Witness Interest, Bias, or Motive

#### 1. Interest

- Could the witness derive some benefit from or be hurt by the outcome of the case, the outcome of his/her testimony or the fact that he or she testified?

#### 2. Bias or Prejudice

- Does the witness have a relationship to someone or hold a philosophical view that affects partiality?

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- Is the witness a friend, relative, enemy, employee, etc., of a person involved in the case? If so, might this affect the witness's impartiality?

### 3. Motive

- Does the witness exhibit hostility or favoritism toward the gender, race, national origin, etc., of any person involved in the case?
- Is there some underlying emotion or motive that might prompt a witness to think, act or testify in a certain way? (e.g., revenge? greed? jealousy?)

## C. Nature of Testimony

### 1. Undisputed Testimony

- Could it have been contradicted or further corroborated?
- Although the investigation did not produce any contradictory witness statements or documents, do the facts and circumstances suggest the reliability on the undisputed witness or document?

### 2. Form of Testimony

- Is it written or oral?
- Is it signed, affirmed or adopted in some manner?

### 3. Presence or Absence of Inconsistencies or Conflicts with Other Evidence

### 4. Records and Other Documents

- Do documents exist that would support or rebut testimony?
- Is testimony consistent with reliable records?
- Are the records complete? Unaltered? Accurate? Reliable?

Observations on credibility should be written up as factual observations and incorporated into the Evidentiary Section of the Final Investigative Report. The only observations that are relevant are those that are non-judgmental and objective. For example, do not write that the witness appeared "fidgety" (which is a judgment about the witness's overall behavior.) Rather, record objective observations, such as: "During the interview the witness kept tapping her foot on the floor. She changed her position in her chair numerous times."

## **7-20 INTERROGATORIES AND DATA REQUEST LETTERS**

### A. Distinguish between Interrogatories and Data Request Letters.

After a Data Request is served upon the respondent, an investigator may determine that additional information is necessary to complete the investigation. When this happens, the investigator may serve the respondent with a second Data Request Letter or interrogatories.

Data Request Letters represent the investigator's efforts to obtain the respondent's voluntary cooperation in the collection of existing documents and records pertaining to

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the events forming the basis of the complaint. Data Request Letters do not generally require the respondent to answer under oath and there is no limit to the number of requests that can be made. The investigator has discretion about setting the time for response.

Interrogatories are formal written questions that the recipient answers under oath. The use of written interrogatories during the investigation is governed by Section 811(a) of the Act and 24 CFR Section 103.215(b) and is therefore subject to the same restrictions placed on discovery in administrative proceedings under the Act. As a result, only a total of 30 interrogatories may be served on any single party. The respondent must reply within 15 days of service of the interrogatories.

Interrogatories should be recorded in the Interrogatory Section of TEAPOTS. Whenever an investigator sends interrogatories, the answers received should be placed in the Evidentiary Section and a copy should be attached to the Final Investigative Report. The failure to answer any Data Request Letter or interrogatories may justify the use of a subpoena to obtain information that could not be obtained through voluntary efforts. There is no requirement that both a Data Request Letter and interrogatories be served on a respondent prior to issuance of a subpoena.

#### B. Situations in which the Use of Interrogatories may be Appropriate.

Where a respondent appears to doubt the legitimacy of the Department's inquiry, or to be vague or casual in responding to the investigator's questions, interrogatories may be helpful in getting the respondent to be more detailed, serious and factual about his or her answers. In cases involving a municipality or corporation as a respondent, interrogatories can be very effective. Municipal and corporate respondents will generally respond to fair housing complaints through their legal counsel who are generally more accustomed to the use of interrogatories. In addition, where complex issues of reporting arrangements, corporate policies, ownership and liabilities must be untangled, it is wise to allow the respondents to explain their organization through the answers to a series of interrogatories.

#### C. Drafting Interrogatories and Data Requests.

Open-ended questions serve a purpose in person-to-person interviews, but they are generally not helpful in interrogatories and data requests. The drafter should remember that the recipient would invariably provide only the information absolutely necessary to appear responsive to the question. Therefore, questions must be thorough and exacting. For example, questions such as: "What happened when the complainant inquired about the availability of an apartment?" are better used in person-to-person interviews. However, a question such as, "Identify all African-American tenants currently living in the complex and provide their full address and telephone number" may need to be researched by a respondent and could be difficult for a person to answer during an interview. It would be more appropriate and helpful to use an interrogatory (or a data request) to ask this question and obtain the answer.

Interrogatories should be drafted with the assistance of Regional Counsel and are concurred upon by the Regional Counsel prior to service.



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## **7-21 USE OF THE DEPARTMENT'S SUBPOENA POWER**

### **A. What is a Subpoena?**

A subpoena is a legally enforceable request for the production of either documents or testimony or both. When a respondent refuses to allow the investigator access to records or to the employees who need to be interviewed, the investigator should make and document reasonable and sufficient efforts to obtain the respondent's voluntary cooperation and consult with Regional Counsel. During this consultation, some effort should be made to assess the value of the information on the ultimate outcome of the case, e.g., the probability that this information will lead to a determination. Any time that a respondent withholds records, or refuses to schedule an interview or answer questions during the interview, the investigator should remind the respondent in writing of the Department's authority to seek each party's voluntary cooperation as well as its authority to issue a subpoena.

### **B. Authority for the Use of a Subpoena**

Section 811(a) of the Act authorizes the issuance of subpoenas in the aid of administrative investigations to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place. The means of discovery available to the Department are listed in the regulations at 24 CFR Part 104, Subpart E, and include the power to issue subpoenas. 24 CFR Parts 103 and 180 govern subpoenas in the aid of investigations and in administrative proceedings.

The authority to issue subpoenas and to rule on motions to quash or modify subpoenas has been re-delegated to the FHEO Regional Directors. The Regional Counsel, however, must approve subpoenas issued by the FHEO Regional Directors as to their legality before service on the named party or witness.

### **C. Drafting the Subpoena**

Investigators should consult with Regional Counsel prior to drafting a subpoena and should have counsel review a proposed subpoena in the course of an investigation. Subpoenas are normally served upon uncooperative respondents or hostile witnesses. Occasionally subpoenas are used to secure information from witnesses who request or require a subpoena to insulate them from potential liability resulting from the disclosure of confidential information or retaliation from an employer. For example, an employee who fears retaliation from his or her employer may want to speak only if he or she is compelled by a subpoena, or an apartment owner may ask for tenant records to be subpoenaed to avoid any conflict with state landlord/tenant laws.

The subpoena power can be used to require a party or witness to testify or to produce only those documents and computerized records within his or her possession, custody or control. Consequently the subpoena must request documents and records with sufficient clarity and specificity for a respondent to identify and produce files, documents and records at a reasonable time and place. If the subpoena does not conform to these standards, a respondent may ask the Regional Director to "quash" (or nullify) a subpoena by contending that it is overly broad, vague, ambiguous or burdensome or by arguing that

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the documents requested are not directly relevant to the case. To draft a subpoena which is thorough and yet not overly broad, describe the documents to be provided as specifically as possible. For example, in a mortgage lending case involving an applicant who was rejected based upon a high debt to income ratio, a badly expressed subpoena item might be:

“Any and all documents related to the mortgage lending process.”

The same evidence might be better described as:

"Produce documents that establish, explain or implement ABC Mortgage Company's policy with regard to acceptable debt-to-income ratios for first mortgage applicants, prepared or disseminated from January 1, 2002 to the present. Such documents are:

- Training materials prepared for employees;
- Memoranda directed at employees and managers that express this policy;
- Underwriting standards;
- Brochures prepared for applicants which explain ABC's standards; and
- Performance evaluation standards established for underwriters that express expectations as to the application of debt-to-income ratio standards.”

#### D. Additional Points to Remember in Drafting Subpoenas

The investigator should take care to subpoena records and documents from the individual or corporate entity that has possession, custody or control of the documents. If the subpoena is served upon the registered agent of the person who is the custodian of the desired document, all the time and care spent drafting the subpoena will be in vain, for the individual will have the right to quash the subpoena because he or she does not have possession, custody or control over the information. If, for example, a complaint is filed against the developer of a new subdivision, the loan company financing the project and the partnership responsible for marketing the homes -- attempt to determine which entity is responsible for maintaining records of mortgage applications, and which is responsible for maintaining information on the flow of potential customers through model properties.

In addition, certain documents and records (membership lists of private organizations, for example) may be protected from disclosure by privacy laws and the First Amendment. Regional Counsel will advise the investigator if any of the documents to be requested are so protected.

#### E. Use of the Subpoena to Obtain Testimony

A subpoena can be used to gain access to individuals whom the investigator needs to interview. The subpoena can be used as a means to compel a person to appear and answer questions under oath, depending upon the circumstances.

A subpoena can be used to require the appearance of a witness at a deposition. A deposition is an interview recorded by a court reporter that takes place with attorneys for all parties, including the Department, in attendance. During the deposition HUD Counsel will interview the witness, but the witness's attorney also has an opportunity to ask questions in order to ensure that facts that he or she believes to be pertinent are entered

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into the record. After the deposition, the court reporter will prepare a transcript that may be used during the trial, and entered as evidence, in whole or part, under certain circumstances, if the complaint goes to trial.

All parties normally receive notice of a deposition. Consult with Regional Counsel in order to ensure that notice of a deposition is prepared and properly served.

Depositions can be extremely helpful in certain circumstances. A deposition may be necessary, for example, in the case of a witness or party who is terminally ill or a respondent who has demonstrated a willingness to leave the area to avoid the investigative process. On the other hand, depositions are formal, time-consuming, and more costly than investigation interviews. Therefore, the deposition is an investigation tool that should be used only when necessary.

#### F. Service of Subpoena

Subpoenas should be personally served and not mailed. Generally, any person, who is not a party and is at least 18 years of age, may serve a subpoena. However, it is HUD's policy that its employees will not effectuate personal service and will hire a service processor to accomplish this task. The process server should provide written documentation of the date, time and location of the delivery and the name of the person served. The subpoena and the process server's verification of service are placed in the case file.

These rules should be followed unless they conflict with the procedures for the issuance of subpoenas in the United States District Court for the District in which the investigation of the discriminatory housing practice took place. In the event of a conflict, the rules of the United States District Court apply. 24 CFR §180.545.

In some cases an attorney representing a respondent or witness may agree to "accept service" of a subpoena and waive personal delivery on the individual. Such an agreement with an attorney may be sought. The agreement should be documented in a letter to the attorney, which should precede service of the subpoena. In those cases, the subpoena may be mailed to the attorney.

#### G. Motions to Quash or Limit a Subpoena

A respondent may file a motion to quash or limit a subpoena. A motion to quash or modify an administrative subpoena must be made within five days after service of the subpoena and should be directed to the FHEO Regional Director. The Regional Director may quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown. The Regional Director will issue a written order responding to the motion to quash or modify after consultation with Regional Counsel. If the respondent does not comply with the Regional Director's order, the Regional Counsel will send the subpoena to the Department of Justice, Housing and Civil Enforcement Section, for enforcement. If the respondent does not file a timely motion to quash or modify and simply refuses to answer the subpoena, then the subpoena may be sent directly by the Regional Counsel to the Department of Justice Civil Rights Division, Housing and Civil Enforcement Section, for enforcement.

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## **7-22 SEIZURE ORDERS**

In some limited circumstances the Department can ask a U.S. District Court to order the U.S. Marshall to seize a respondent's documents. The Department would be required to show that a credible complainant has filed the complaint involved and that there is reason to believe that the respondent would destroy or alter evidence if the order is not granted. If an investigator is working on a complaint that fits such a situation, the possible use of a seizure order should be discussed with Regional Counsel.

## **7-23 REQUESTS FOR PHYSICAL INSPECTIONS**

Attempts to secure information during an investigation should be made by seeking the voluntary cooperation of the respondent. However, circumstances may arise where a respondent refuses to allow an investigator on-site to review documents or otherwise conduct an inspection of the premises (i.e., measurements in a design and construction or occupancy case). When this occurs, an investigator should immediately notify his or her supervisor and consult with Regional Counsel. The Regional Director may serve on any party a request to permit entry on land for purposes of inspection and measuring, photographing, testing or other purposes. See 24 CFR §180.500; 24 CFR §180.525(a)(2). If the respondent opposes the request, the Regional Director may issue an order compelling the entry on land. If the respondent continues to deny entry on land, the Regional Counsel may send a request to the Department of Justice for enforcement of the order.

## **7-24 INVESTIGATIVE RECORDS**

### **A. Essential Records**

As a general rule, each time a party or witness makes a statement indicating that a record of a relevant fact exists the investigator should obtain the record. In most cases, the need for particular records must be identified through analysis of the specific fact situations and issues. There are, however, certain types of records that should always be obtained for certain types of cases. (While some examples of the records to be obtained are listed below, these examples do not represent all of the records that should be collected.) For example:

- In cases alleging discrimination on the part of a landlord against a tenant, the investigator should obtain a copy of the tenant's lease and a copy of the landlord's standard lease.
- If the case involves an eviction, the investigator should obtain a copy of all notices to vacate and records of court proceedings, including complaints received.
- In cases alleging discrimination in the sale of housing, the investigator should obtain the purchase offer; if a sales contract was created, obtain a copy of this as well; if there was a refusal to sell, always get all other offers received, including the one accepted.

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- In cases involving discrimination in mortgage lending, the investigator should get a copy of the mortgage application and a copy of any written guidelines on loan approval.
  - In cases involving zoning codes or occupancy codes, the investigator should obtain a copy of the code.
  - In cases alleging discriminatory newspaper advertisements contradicting false denial of availability of a dwelling, the investigator should obtain a copy of the advertisement with the name of the subject newspaper and the date published visible.
  - In cases where there are threats of force and violence used and a complaint has generated police reports against a party, the investigator should get a copy of the police report.

#### B. Evaluating the Reliability of Records

"Reliability" of records depends upon the extent to which the document accurately presents a fact or event.

Records are more reliable when they have been created contemporaneously (that is, at the time of the relevant events) and for purposes other than a response to the investigation. Among the other factors to be considered in determining the reliability of records are:

- The condition of the records,
  - Whether the records can be corroborated through witness interviews,
  - "Patterns" in the presence or absence of records, and
  - Whether the records are kept in the ordinary course of business.
1. Evaluating the Condition of Records. During a records review, the investigator should be alert to indications that a respondent has altered the records. Discrepancies should be recorded in the FIR and in the Evidentiary Section of the case file.
  2. Considering the Situation Surrounding the Provision of Records. In evaluating the reliability of documents and records forwarded by either party during an investigation, the investigator should compare any documents and records received through the mail with the same documents when reviewed on-site.
  3. The "chain of custody." The persons who have been in possession, custody, or control of evidence establish the chain of custody for that evidence. The chain of custody for a document is important because investigators, attorneys, ALJs and judges want to know the persons through whom the documents have passed. A chain of custody identifies each person who handles a given document, photograph or piece of evidence from the time of its creation or receipt to the time of trial. It is therefore critical that Document Control Cover Sheets are used and accurately completed during the course of the investigation. When recording the chain of custody for a given record the investigator should add any additional

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information that might be helpful in establishing the reliability of the document. See also Chapter 10, Preparation of the Case File.

4. **Authenticating Critical Records if Possible.** Records are considered to be more reliable if they can be authenticated through witness testimony. The authentication of records is more meaningful if the authenticating source is unbiased.

For example, a mobile home park, purporting to qualify for exemption under the law as housing for older persons, might present an investigator with a stack of documents and photocopied drivers licenses, in an effort to prove that they were enforcing age verification procedures on the date of the alleged violations. The investigator should verify whether the age verification procedures were instituted by the respondents during the relevant timeframe and prior to the receipt of the complaint notification by asking randomly selected tenants whether they can recall being asked to prove their ages at the time they assumed occupancy. Alternately, the investigator might interview current and former employees of the mobile home park regarding the application procedures.

5. **Evaluating Patterns and Their Significance.** A pattern of missing documents may indicate that a respondent has destroyed damaging evidence.

**Example:** Respondent is accused of sexually harassing female tenants. The investigator wants to interview other women who formerly rented from the respondent, and hopes to locate them through the employment and personal references supplied on their lease applications. Respondent's normal recordkeeping procedure is to keep applications and tenant leases on file for three years after the tenancy has ended. However, in response to the investigator's request for tenant and applicant records, the respondent can supply leases and applications for all of the male-headed households residing in the development during the period under review, but claims he can only locate the leases and applications of a few of the female-headed households who no longer rent from him. The investigator should interview the respondent and his employees about the missing applications and what happened to them.

The main point in the above example is whether there are missing documents from a set of documents kept in the ordinary course of business, and whether there is a discernible pattern to the kind of documents that are missing. If there is a discrepancy the respondent should be questioned about the discrepancy, and both the pattern and the respondent's explanation for the missing paperwork should be recorded in the Final Investigative Report and the Evidentiary Section of the case file.

### C. Summarizing Records

Part of the investigator's job is to review voluminous documents and organize facts relevant to the case under investigation. A summary of information extracted from a group of documents need not always be lengthy or complicated. Often, a single paragraph stating briefly what the documents divulged will suffice. Alternatively, the investigator can produce a chart that extracts and compares relevant information from a

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group of documents. This chart should be prepared as a “Word table” or an “Excel chart”, copied into TEAPOTS and placed in the paper case file consistent with Chapter 10, Preparation of the Case File.

Very often, the most critical information obtained during an investigation will be gleaned from careful review of records presented by the parties. Avoid over-reliance on interview statements as a form of evidence at the expense of careful, detailed record review. As a general rule, for every record you have required the parties to provide during the investigation there should be a corresponding entry in the Final Investigative Report summarizing what the record told.

For example, a complainant might allege that the management of an apartment complex required higher security deposits from new minority tenants than from new non-minority tenants. The management should be asked to provide the investigator with access to the tenant files that would include photocopies of deposit checks. The investigator should list each document reviewed and record all relevant information from that list, and summarize the findings of the review in the Documents section of the Investigations folder in TEAPOTS. An example of such a summary is as follows:

Reviewed 150 tenant files, which included copies of security deposit checks. During 1990, 78 new tenants, of whom 33 were the same race as the complainant (African-American) moved into the complex and all were charged a security deposit of \$400. In 1991, 52 new tenants, of whom 40 were African-American, moved into the complex and all were charged a security deposit of \$425. In 1992, 30 new tenants, 27 of whom were African-American, two were Hispanic, and one was non-minority, moved into the complex and all were charged \$450.

## **7-25 ANALYSIS OF THE INVESTIGATIVE EVIDENCE**

### **A. Data Analysis**

Statistical data are often used as a means of establishing discriminatory impact discrimination, but analysis of data trends can be used to add depth to an investigation of disparate treatment that includes comparative data. Data analysis can be useful and helpful circumstantial evidence of disparate treatment even if the data pool is too small to run a reliable statistical test. For example, the respondent has owned ten rental units in a predominantly African-American neighborhood for a decade. There has been very little turnover. The respondent has never rented to an African-American. While the number of units and turnover may not create a large enough pool for a statistical comparison, the lack of African-American tenants in a predominantly African-American neighborhood will be part of the circumstantial evidence in a disparate treatment case.

Statistical data analysis is important because, if the proper statistical techniques are applied, the resulting inference may have a certain and predictable validity. Data analysis and statistical evidence can be helpful in proving individual cases of disparate treatment because they can be used as circumstantial evidence to establish the presence of discriminatory motive. Statistical evidence can also be used under a theory of discriminatory impact to demonstrate the adverse effect of a procedure, policy, rule,

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selection criteria or method of administration on a protected class. See also Chapter 2, Theories of Proof.

The successful use of statistical tests as the primary proof of a pattern of discriminatory effect normally will require analyzing comprehensive data by using one or more statistical tests. If an investigation involves the collection and analysis of statistical data, the investigator should consult with his or her supervisor, Headquarters, O/E, Regional Counsel and the Office of Policy Development and Research to discuss the use and application of the various types of tests and proper analysis.

#### B. Analysis of Statements and Documents

A complete and thorough investigation precedes a complete and thorough analysis of the statements of witnesses and the documents collected in the course of the investigation. Although the elements of a prima facie case of unequal treatment tend to be very similar from case to case, the elements of a prima facie case that involves disparate impact, reasonable modifications, reasonable accommodations or design and construction issues differ significantly from cases of unequal treatment. The same holds true with respect to the elements of a prima facie case of discrimination that involves intimidation, harassment or retaliation. The elements of a prima facie case of racial harassment differ from the elements of a prima facie case of sexual harassment.

Several times during the investigation the investigator should stop, return to his or her Investigative Plan and review the evidence collected to date in light of the logical structure of accepted discrimination theory. This mental discipline is necessary to ensure that each prong of the prima facie case and each aspect of the respondent's defenses have been investigated, and to ensure that the investigator does not lose time pursuing irrelevant issues.

### **7-26 FINAL INTERVIEWS WITH COMPLAINANT AND RESPONDENT**

#### A. The Final Interview

When the investigator believes that he or she has collected all the evidence needed to issue a determination, has analyzed the evidence, considered the parties' relative credibility, and is fairly certain what finding he or she will recommend, a final interview with each party should take place.

The final interview should include a last attempt to determine if the parties are willing to conciliate. If there is a possibility of conciliation, the conciliation attempt will be the last action taken before drafting a determination. If there is no indication that conciliation is possible, the final interviews will close the fact-finding portion of the investigation.

The final interview is important in order to give each party (and particularly the party against whom the Department will probably find), the opportunity to comment upon the totality of the evidence in the case.

Conducting a thorough final interview should decrease the likelihood of case files being returned for additional investigation or reopened as a result of a request for reconsideration.



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The investigator should be honest and open in presenting the evidence collected during the investigation to the parties, but must not express an opinion as to the probable finding in the complaint. The parties may attempt to elicit the investigator's opinion, but the investigator must strive to return the parties' attention to the records, testimony and other evidence collected in the investigation. Optimally, each party will reach his or her own understanding of the strength or weakness of his or her case by reviewing the evidence with the investigator.

#### B. Contents of a Final Interview

**NOTE:** The complainant and the respondent should be interviewed separately but the information covered in each interview should be the same. The investigator should make sure to include the following in the final interview:

1. Review the contents of the complaint, including any amendments. Ensure that the complainant agrees that the allegation that was investigated was the basis of his or her complaint. Ensure that the respondent understands the allegation and the sections of the Act that speak to the alleged activity.
2. Review the prima facie case. If the prima facie case has not been established, give the complainant a last opportunity to provide evidence that would correct the deficiency. If the prima facie case is established, ensure that the respondent understands each prong.
3. Summarize the respondent's defense to the allegation. Ask the complainant again for his or her response to the defense, and again request any evidence that the complainant can provide to rebut the defense. Ask the respondent if there is any additional evidence he or she would like to submit in support of this defense.
4. Summarize the statements of witnesses. If either party disagrees with any statements by the witnesses, ask the party to provide any evidence that would support his or her position.
5. Summarize documents or records relevant to the case and ask for comments. If the final interview is done in person, the documents may be presented to the complainant and the respondent in order that they can verify their signatures, state whether the documents appear to have been altered and so on.
6. Identify contradictory statements or conflicting evidence and ask again for an explanation for the discrepancies.

### **7-27 TIMEFRAME FOR COMPLETING THE INVESTIGATION**

The Act, as amended, and the regulations implementing the Act, require HUD to complete an investigation within 100 days from the filing date of the complaint, unless it is impracticable to do so (see Sections 103.225 and 103.400(c)). An investigation is completed when a Determination or Charge is issued, a Conciliation Agreement is executed or the complaint is otherwise closed.

The preamble to the implementing regulations makes it clear that the regulations' authors did not intend the phrase "unless impracticable to do so ..." to provide HUD with a

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liberal license to exceed the 100-day timeframe. Rather, this clause aims to ensure that the need to meet an arbitrary deadline never compromises the investigation of a valid complaint. Fair housing complaints may involve complex issues and the investigation may be delayed by circumstances beyond the control of the Department.

If the investigation cannot be completed within 100 days, the Regional FHEO Director must notify the complainant and the respondent in writing of the reasons for the delay. See Paragraph 7-28 for information on how to prepare and issue 100-day letters. Because recommended closures must be reviewed and approved by supervisory staff, the investigator should plan to complete the investigation within 75 days of the filing of the complaint.

## **7-28 PREPARATION AND ISSUANCE OF 100-DAY LETTERS**

The following represents guidance on Field and Headquarters preparatory responsibilities prior to issuance of the 100-day letter to all identified parties to a complaint.

Four criteria apply in all situations: (1) The Office, (whether Field or Headquarters), which has the case file on the 85th day after the complaint is filed is responsible for initiating all actions relevant to issuance of the letters; (2) TEAPOTS is responsible for generating all 100-day letters, including letters for Secretary-initiated cases and other cases investigated by Headquarters; (3) hard copies of the letters to both complainant and respondent must remain with the case file at all times; and (4) the 100-day letters should be signed by the appropriate FHEO Director and sent by certified mail.

### **A. Case Transfers from Field Offices**

1. Before day 85. If a Field Office transfers a case file, including cases with Regional Counsel, to Headquarters before the 85th day after the complaint is filed, Headquarters must: complete the case status report; input the data; and fax the case status report form to the appropriate Field Office for generation of the 100-day letters. Headquarters will place the original case status report form in the file. This applies to all cases (individual complaint, zoning, pattern and practice, etc.).
2. After day 85. If a Field Office transfers a case file to Headquarters on or after the 85th day the complaint was filed, the Field Office must: complete the status report form; input the data; fax a copy of the case status report to Headquarters; place the original in the file; generate the 100-day letters and place the hard copies of the letters in the file.

### **B. The Case Status Report Form and the 100-Day Letter: Filling in the Blanks**

By the 85th day the investigator should complete and sign off on the case status report form. This facilitates the generation of the 100-day letter. All the reasons for the extension of the investigation beyond 100 days must be checked. Most of the reasons are self-explanatory. For Item 13 the reason(s) must be unusual and specific to the issues of the case, and not explained by any combination of the preceding items. This item must refer only to matters directly related to the case, and not to matters internal to the

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Department such as travel budgets. Supervisors should review the case status report form, as appropriate, especially when Item 13 is completed.

Once the 100-Day Letters have been completed and issued, copies of the letters should be maintained in the "Jurisdiction" Section of the case file, and made available to Headquarters and the Department of Justice as necessary.

#### C. Monitoring Expected Dates of Completion of Case

The office responsible for the investigation and resolution of the complaint must monitor progress toward the expected date of completion of each investigation that appears in the 100-day letter.

#### D. Requests for Copies of 100-Day Letter

Frequently, parties to the complaint or a court will request copies of the 100-day letter. The processing office should be able to respond to such requests by duplicating the hard copies from the case file. If, for some extraordinary reason, that is not possible, the responsible office may generate a "second notice" letter, using the data in the system from which the original letter was generated. The "second notice" must be identified as such, with the current date. The data in the system (and the date of its input) should affirm the authenticity of the letters.