



Mitigating Bias in Investigations



Information for designated officers under the
Public Interest Disclosure
(Whistleblower Protection) Act



**PUBLIC INTEREST
COMMISSIONER**

Actual bias

Apprehension of bias

Actual bias occurs when factors like relationships or personal financial interests improperly influence a decision.

A **reasonable apprehension of bias** happens when an informed person, viewing the circumstances realistically and practically, concludes that a decision maker may not be impartial or fair. A reasonable apprehension of bias does not require a finding of actual bias.

A reasonable apprehension of bias is the legal standard for disqualifying administrative decision makers for bias.



The importance of recognizing and mitigating bias in public interest disclosure investigations

1

Procedural Fairness

The principles of procedural fairness and natural justice require that investigations under the *Public Interest Disclosure (Whistleblower Protection) Act* are both fair and impartial—that is free of investigative or adjudicative bias.



The importance of recognizing and mitigating bias in public interest disclosure investigations

2

Public Interest

Investigations under the *Public Interest Disclosure (Whistleblower Protection) Act* are matters of public interest. They serve a higher purpose above the internal interests of the organization.

It is important these investigations are thorough, impartial and free from bias.



The importance of recognizing and mitigating bias in public interest disclosure investigations

3

Bias in investigations = organizational risk

- Judicial review of decision
- Subsequent investigation by the Commissioner or other external authority
- Reputational harm through public disclosure
- Loss of employee and public confidence
- Litigation



Bias in Investigations

Bias can generally arise in an investigation in two ways:

- 1) The **circumstances**, usually arising from a conflict of interest, that creates an apprehension of bias.
- 2) The **conduct** of the investigator that indicates they have pre-judged the matter under investigation. (Predetermination)



Circumstances that create an apprehension of bias

01

Conflicts of Interest

- **Personal financial interest**
An investigator or decision maker has a direct financial interest in the outcome of a matter.

An indirect, insignificant, or remote financial interest is generally not considered enough to qualify as a conflict.
- **Personal relationships**
The investigator or decision maker has past or current personal relationships with a person who has a significant role in the matter.

Professional or normal working relationships do not give rise to a reasonable apprehension of bias.



Circumstances that create an apprehension of bias

02

Prior Knowledge or Involvement

The final decision in an investigation must be made based only on the evidence that is collected during the investigation. An apprehension of bias may be created if:

- The investigator has knowledge of the matter that was not developed from evidence obtained during the investigation.
- The investigator was previously involved in the subject matter of the disclosure and is viewed to have already formed an opinion.



Circumstances that create an apprehension of bias

03

Conflict of Duty

- A ***conflict of duty*** arises not because of private interests or relationships, but because of competing official responsibilities.
- Designated officers often wear two hats in their organization. Occupying two roles simultaneously may result in opposing loyalties and interests.









Investigator conduct that can create an apprehension of bias

- Common law generally requires that an investigator keep an open mind—meaning that they not engage in conduct or say anything that indicates that the submissions and evidence of the parties are futile in changing the investigator’s mind. In other words, the investigator is biased when they pre-determine a case.
- Investigators are not, however, barred from forming opinions or empathizing with a complainant or alleged wrongdoer, and have latitude to use investigative tactics that may appear to indicate suspicion of a party (e.g., seizing records without notice).



Investigator conduct that can create an apprehension of bias

Do Not:

-  *Determine a case before seeing all of the evidence*
-  *Design an investigation plan to reach a predisposed outcome*
-  *Limit the extent of your investigation*
-  *Disregard a complainant or witness*
-  *Make comments or statements that presuppose the outcome*
-  *Make comments or statements that indicate impartiality or favouritism of one party*



Implicit Bias



Implicit bias, also known as “unconscious bias”, is the automatic and unintentional assumptions, beliefs, attitudes and stereotypes we associate towards a person or group of people.



Implicit Bias



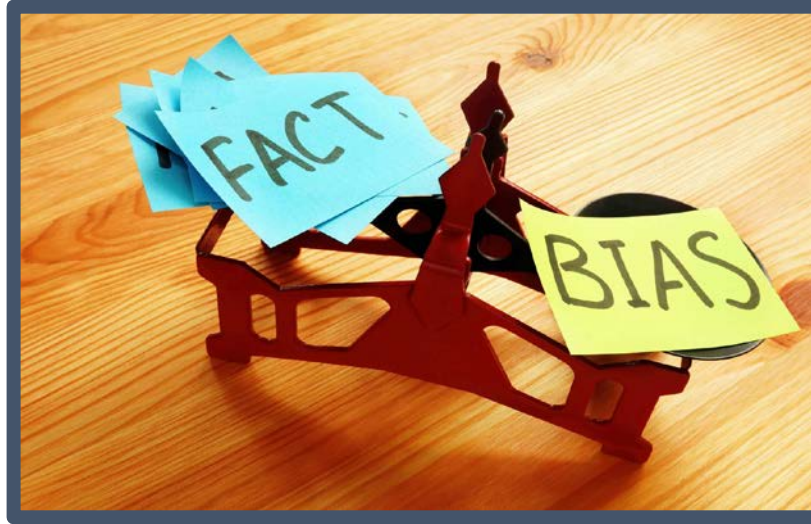
Familiar biases

- Race, age, gender, sexual orientation, ability

Less familiar biases

- *Affinity bias* - tendency to recognize with people similar to ourselves
- *Beauty bias* - tendency to treat attractive people favourably
- *Name bias* - tendency to judge someone based on name
- *Weight bias* - tendency to attribute weight with ability
- *Height bias* - tendency to attribute height with potential for success
- *Authority bias* - tendency to attribute greater accuracy to the opinion of an authority figure





- Strategy:**
1. Take time to **identify biases** at the onset of a matter
 2. During investigations, **mitigate the potential for apprehension of bias** through proper process and conduct



Identify biases

Implicit Bias

- *Try to identify your own implicit bias (*Be honest with yourself—we all have the potential for bias)*
- *Challenge your assumptions*
- *Counter-image (Imagine the person as the opposite of the stereotype)*
- *Keep open-minded*

*Harvard Implicit Association Test (Project Implicit)
<https://implicit.harvard.edu/implicit/>

Actual / Perceived Bias

Examine the circumstances of the matter and your role in the organization

- *Are you in an actual conflict of interest?*
- *Based on circumstances, is there a potential for a reasonable apprehension of bias?*

If yes to either, apply your procedures and request the chief officer appoint an alternate designated officer or refer the matter to the Public Interest Commissioner.



How do I determine if my circumstances may create a reasonable apprehension of bias?

The test for reasonable apprehension of bias was originally set out by the Supreme Court of Canada:

“...what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”

Committee for Justice and Liberty et al. v. National Energy Board, et al. [1978] 1 SCR 369 at page 386.

Unsure?

Seek advice from your internal legal counsel or from the Public Interest Commissioner.



Mitigate the potential for apprehension of bias



1 Give confidence to the parties in your process

- Disclose early any real or potential conflicts.
- Develop and rely on strong investigative procedures.
- Solidify the divide in your regular role, and your role as designated officer.
- Be clear in your neutrality.
- Explain processes to parties at the outset of the matter. Surprises lead to skepticism which fosters perceptions of bias.
- Base your decisions on established procedures and provisions of the Act.
- Explain reasons for challenges/delays (be transparent).
- Use the Commissioner's office for advice.



Mitigate the potential for apprehension of bias



2 Communicate impartially

- Be cautious and thoughtful in your communications.
- Consider your language—be mindful of how what you write and say may be interpreted.
- Do not generalize people or situations.
- Use neutral language in communications and reporting.
- Do not respond immediately to angry emails. Take 24 hours. Take a step back, empathize and respond when you are without emotion.



Mitigate the potential for apprehension of bias



3 Focus on facts and remove other influences

- Focus on facts. Ensure findings and decisions are based on the evidence obtained during the investigation and not on other factors.
- Disregard external influences (eg., opinion of others, media reports).
- Do not make presumptions.
- Try and corroborate hearsay information.



Mitigate the potential for apprehension of bias

4 Conduct thorough and impartial investigations

- Create and follow an investigation plan.
- Continue your investigation until all evidence (to a reasonable extent) has been collected.
- Avoid making conclusions until all the facts have been gathered.
- Create a full investigation report relying on evidence to support your findings.
- Inform the complainant of the outcome, including your decision and reasons. Rely on facts to support your reasoning.
- Document your work—interviews, evidence collected, investigative steps.
- Practice professional skepticism.



What if bias is alleged during an investigation?

Designated officers are not automatically required to recuse themselves unless the test for reasonable apprehension of bias is met—an accusation of bias in itself does not mean there is in fact a reasonable apprehension of bias.

Step 1

Remain objective.
Obtain specifics of why the person feels there is bias.

Step 2

Apply the test for reasonable apprehension of bias. If you are unsure, seek legal advice or advice from the Public Interest Commissioner.

No Bias

If you are satisfied a reasonable apprehension of bias does not exist, then document the decision with reasons and inform the individual. Continue with your investigation.

Potential Bias

If a reasonable apprehension of bias exists, the designated officer should recuse themselves. Request the chief officer appoint an alternate or forward the matter to the Public Interest Commissioner.



Accidents happen



If I do or say something inadvertently or it is taken out of context, do I have to recuse myself?

Key question: *Can you regain the confidence of the affected party?*

Be upfront and acknowledge the error. Confirm the intent of the statement and verify that you do not have a bias. If you regain the confidence of the impacted party, you may continue with your investigation. If the impacted party feels you are no longer able to fairly and impartially investigate the matter, and a reasonable apprehension of bias remains, you may need to recuse yourself.



Our best advice: Get advice

The Public Interest Commissioner's office is
here to support you

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