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Description of document: **Three (3) United States Air Force (USAF) Inspector General (IG) Guides and Memorandum of Understanding between the US Air National Guard (ANGUS) and the USAF IG, various dates**

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Memorandum of Agreement
The Secretary of the Air Force Office of the Inspector General Complaints Resolution Directorate JAG Guide to IG Investigations, March 2008
The Secretary of the Air Force Office of the Inspector General Complaints Resolution Directorate Inspector General Guide for Investigating Officers, April 2007
The Secretary of the Air Force Office of the Inspector General Complaints Resolution Directorate Commander-Directed Investigation (CDI) Guide, July 2006

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DEPARTMENT OF THE AIR FORCE

WASHINGTON DC

Office of the Secretary

17 Dec 08

SAF/IGQ
1140 Air Force Pentagon
Washington DC 20330-1140

This is in response to your Freedom of Information Act (FOIA) request, dated 22 Sept 08. We received your request via e-mail on 2 Oct 08 from HAF/IMII. You requested a copy of the following records:

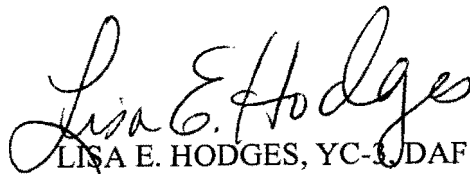
- 1) A digital copy of the JAG guide to IG Investigations
- 2) A digital copy of the SAF/IGQ Investigation Officer Guide
- 3) A digital copy of the Commander-Directed Investigation Guide
- 4) A digital copy of ANG/USAF/IG Memorandum of Agreement between NGB-IG & SAF/IGQ

Under the FOIA, we are releasing to you the above mentioned guides and the memorandum of agreement between NGB-IG & SAF/IG except as redacted. The basis for this decision is FOIA exemption (b) (6). Exemption (b) (6) requires withholding of information in personnel, medical, and similar files where disclosure would constitute a clearly unwarranted invasion of personal privacy (e.g. names). The purpose of exemption (b) (6) is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.

Should you decide to appeal this decision, your appeal must be made in writing within 60 calendar days from the date of this letter. Your appeal must include case number (09-0019), the reasons for reconsideration, and a copy of this letter. Please address your letter as follows:

Secretary of the Air Force
THRU: HAF/IMII (FOIA)
1000 Air Force Pentagon
Washington DC 20330-1000

Please direct any questions to Ms. Patricia Wilson at (703) 588-0768 or patricia.wilson@pentagon.af.mil.

A handwritten signature in black ink, reading "Lisa E. Hodges". The signature is fluid and cursive, with the first name "Lisa" and last name "Hodges" clearly legible. The middle initial "E." is smaller and less distinct.

LISA E. HODGES, YC-3 DAF
Deputy Director, Complaints Resolution Directorate

Attachment:
Requested documents

cc:
HAF/IMII (FOIA # 09-0019)

MEMORANDUM OF AGREEMENT

Part I. General Provisions.

1. This memorandum outlines the Office of the Inspector General, Complaints Resolution Directorate (SAF/IGQ) responsibility for cases involving members of the Air National Guard of the United States (ANGUS) regardless of whether they are in a Title 10 status voluntarily, for example, participating in the NGB statutory Tour Program or performing ADSW (Active Duty Special Work) tours, or have been involuntarily mobilized for ANGUS service by appropriate authority. Members of the Air National Guard (ANG) when entered into a federal status become members of the ANGUS and are therefore relieved from duty in the ANG and the authority of the Adjutants General (TAGs) of the states and territories or Commanding General for the District of Columbia. (See Title 32 United States Code, Section 325) Complaints involving members of the ANGUS should be worked at the lowest level possible (i.e.; Wing or State Inspector Generals (IGs), as appropriate) with SAF/IGQ acting in the role of MAJCOM. Cases involving ANG members or policies, practices and procedures of the ANG remain the responsibility of the TAGs. Notwithstanding, IAW AFI 90-301, SAF/IGQ is the release authority for IG investigations on complaints of ANG members involving reprisal complaints and for complaints substantiated against a Colonel (O-6). SAF/IGQ will also be release authority on any FOIA requests related to the above-mentioned complaints.

Part II. Title 10 Status Investigations

. When a determination has been made (i.e.; complaint clarification and analysis by a Wing or State IG) that a complaint by an ANGUS member will require an investigation for resolution, the appropriate level IG should coordinate a plan of investigation with SAF/IGQ. If the case originates at SAF/IGQ, SAF/IGQ will conduct a complaint clarification and analysis, then coordinate the plan of investigation with the appropriate level IG. The selection and appointment of an Investigating Officer (IO), if one is desired, for ANGUS cases is the responsibility of the appropriate level IG and SAF/IGQ. This will also be coordinated with the National Guard Bureau Inspector General (NGB-IG), or their designee.

2. NGB-IG will serve as a liaison to SAF/IGQ for complaints of ANGUS members participating in the NGB statutory tour program, wherever located, including those ANGUS members volunteering for service at the ANG Readiness Center (201st MSS), Andrews AFB, Maryland, and NGB Headquarters, Jefferson Plaza 1, Crystal City, Virginia. In addition, NGB-IG will assist with those cases that can be resolved by means other than by an investigation. For example, NGB-IG is authorized to act on any complaint when a resolution can be accomplished by way of assistance, referral, transfer or dismissal. In all cases, SAF/IGQ will serve as MAJCOM IG for ANGUS complaints and will provide assistance to NGB-IG as necessary.

3. Funding and man-day requirements for ANGUS investigations will be the responsibility of NGB/CF. Requests for such funds as well as authorizations for an IO will be coordinated through NGB-IG and are addressed in Attachment 1 - Requesting, Supporting, and Funding Inspector General Investigations.

Part III. Title 32 Status Investigations

1. Complaints of members of the ANG that are in a Title 32 (state/territory/district) status that require an investigation for resolution, regardless of whether the complaint clarification and analysis is done at Wing, State, or SAF/IGQ level, will be investigated in accordance with AFI 90-301, Chapter 2. The ANG Wing IG will service these investigations with the assistance of the State IG and/or SAF/IGQ, as required. For investigations that are beyond the scope of the ANG Wing IG, due to its complexity or the existence of prohibitive conflicts, the TAG, through the State IG, should solicit and document the support of SAF/IGQ, to include recommendation of an IO. SAF/IGQ in partnership with the respective State IG will prepare a plan of investigation and assist in management of the IO. Upon receipt of a complaint at SAF/IGQ level, if no State IG is appointed at the time, the complaint will be referred to the TAG or the Office of the State IG. State IGs will provide advice and assistance as necessary (i.e., setting up interviews and locating office space, telephone access, and copying service). For those IOs recommended by SAF/IGQ, the IO shall prepare the report of investigation (ROI) and submit the report to the State IG and SAF/IGQ, in turn, for a quality review IAW AFI 90-301. Following their review, SAF/IGQ will send the completed ROI back to the State IG and appointing authority for action. A copy of SAF/IGQ's transmittal letter will be provided to NGB-IG.

2. The TAG is the appointing authority for ANG investigations on complaints of ANG members, unless this authority has been delegated to the State IG in writing. Funding for ANG investigations shall be the responsibility of the respective state, territory or the District of Columbia, as applicable. In those cases where a conflict of interest exists or there is a risk of self-investigation, the appointing authority may defer appointment of an IO to SAF/IGQ. Hence, under limited circumstances, SAF/IGQ will serve as the appointing authority for appointing an IO in ANG cases if the situation warrants such an appointment. In all other respects, SAF/IGQ will serve as the MAJCOM for the ANG Wing IG program.

3. The procedures for the funding of Title 32 status investigations by the respective state, territory or the District of Columbia, as applicable, is also set forth in Attachment 1.

Attachment 1

Requesting, Supporting, and Funding Inspector General Investigations

CONCUR:

(b)(6)

H. CRONIN BYRD, GS -15

CONCUR:

(b)(6)

DANN MCDONALD, Col, USAF

Date, 3 Feb 2004

ATTACHMENT 1

Requesting, Supporting, and Funding Inspector General Investigation

APPLICABLE REGULATIONS:

10 U.S.C. 8014 & 8020

AFPD 90-3, *Inspector General -- Complaints Program*

AFI 90-301, *Inspector General Complaints*

PROCEDURES AGREED UPON BY NGB-IG AND SAF/IGQ:

A. If complaint concerns members in Title 10 status

- (1) Wing IG, State IG, or SAF/IGQ receives a complaint and conducts a complaint clarification and analysis, as required by AFI 90-301.
- (2) If an investigation is warranted, appropriate level IG and/or SAF/IGQ will further select an Investigating Officer IO to conduct the investigation and issue him or her an appropriate Letter of Appointment from the Appointing Authority.
- (3) In certain instances, SAF/IGQ can serve as the Appointing Authority appointing the IO and will also provide IG, Judge Advocate, (JA) and subject matter expert (SME) support, as required.
- (4) Before performing any duty, the selected IO will submit an ADSW request form, a current weight certification letter signed by the Commander or Weight Control Monitor, and an FM Certification letter signed by the Unit Comptroller to SAF/IGQ. These documents will be submitted to NGB-IG at least TEN (10) days prior to the proposed start date of ADSW service.
- (5) NGB-IG will coordinate with ANG/OM to determine the status of the IO, whether or not the ADSW period will carry the IO into sanctuary, and whether or not the requested ADSW will carry the IO beyond 179 days of active duty.
- (6) When determined and verified by ANG/OM that the IO met all requirements indicated above, a spreadsheet is forwarded to NGB/CFS for approval and tasking ANG/FM to flow the days to the IO's unit of assignment.
- (7) ANG/FM provides the Unit FM an authorization letter (copy to SAF/IGQ) for the IO within TEN (10) days of receipt.
- (8) Should the IO need additional days, a request will be made to NGB-IG through SAF/IGQ supported by full justification.

- (9) If approved by NGB-IG, the request for additional days will be forwarded to ANG/FM to authorize the additional days.
- (10) Authorization of additional days by ANG/FM will be accomplished within 3 days of receipt.

B. If complaint is a State action or arises under Title 32

- (1) Wing IG, State IG, or SAF/IGQ receives a complaint and conducts a complaint clarification and analysis, as required by AFI 90-301.
- (2) State IG in coordination with the Wing IG determines whether an investigation is necessary to resolve the complaint and, if so, the number of days required for conducting the investigation.
- (3) In cases where an outside IO is determined necessary to resolve a complaint, SAF/IGQ, in coordination with the State IG, may recommend an IO to TAG, who is the Appointing Authority.
- (4) State IG will validate availability of funds and days for the investigating officer through the State FM. That information is then provided to the State FM of the IO to prepare orders.
- (5) If the State FM validates that there are no funds available at the State level for an IO, the State FM will coordinate with ANG/FM and request an appropriate fund cite at least 10 days before the start date of service.
- (6) The fund cite will be made available to both the unit being served and the unit of the IO within 10 days of receipt.
- (7) Should additional days be needed, requests for additional investigation days with full justification will be submitted to State IG for approval with copy being provided to SAF/IGQ and NGB-IG.
- (8) With approval of State IG and concurrence of SAF/IGQ (for an outside IO), ANG/FM will provide an appropriate fund cite within 3 days.



**The Secretary of the Air Force
Office of the Inspector General
Complaints Resolution Directorate**



JAG Guide to IG Investigations

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Current: as of 24 March 2008

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FOREWORD

The Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) administers the Air Force Inspector General (IG) Complaints Resolution Program for the Air Force community. The IG Complaints Resolution Program is a leadership tool to promptly and objectively resolve problems affecting the Air Force mission. When necessary, the IG accomplishes this through objective fact-finding in the form of IG complaint analyses and investigations that address both the concerns of complainants and the best interests of the Air Force. AFI 90-301, *Inspector General Complaints Resolution* (8 February 2005), establishes the procedural requirements for the Complaints Resolution Program and IG investigations. The Judge Advocate General (JAG) Corps provides critical support to the IG throughout all phases of the Complaints Resolution Process. This guide focuses on JAG roles and responsibilities before, during and after IG investigations.

I would like to formally acknowledge the following personnel for their assistance with and dedication to this project: Mr. (b)(6) (AF/JAA), Mr. (b)(6) (AF/JAA), Col (b)(6) (Director, SAF/IGQ), Col (b)(6) (SAF/IGR), Lt Col (b)(6) (SAF/IGS), Lt Col (b)(6) (SAF/IGQ), Lt Col (b)(6) (SAF/IGS), Lt Col (b)(6) (AF/JAA), Lt Col (b)(6) (SAF/IGQ), Lt Col (b)(6) (ACC/JAM), Lt Col (b)(6) (USAF/DFL), Major (b)(6) (USAF/DFL), Major (b)(6) (AETC/JAJ), Major (b)(6) (AMC/JAC), Capt (b)(6) (SAF/IGO), Mr. (b)(6) (JACL CLLO), Ms. (b)(6) (SAF/IGQ-FOIA), Mr. (b)(6) (b)(6) (AMC/IGQ) and Mr. (b)(6) (AFRC/IGD).

//signed//
(b)(6) Major, USAF
Legal Advisor, SAF/IGQ

CHAPTER 1. INTRODUCTION

1.1. Purpose. The intent of this guide is to provide JAGs, at all levels, the tools they need to effectively assist IGs throughout the Complaints Resolution Process, with particular emphasis on IG investigations.

1.2. IG Complaints Resolution Overview. The IG is the “eyes and ears” of the commander.¹ Any individual can submit an IG complaint if they reasonably believe inappropriate conduct has occurred, or a wrong or violation of law, policy, procedure or regulation has been committed, even if the complainant is not the wronged party or was not affected by the alleged violation.² However, not all allegations fall under the IG’s purview. Even when a complainant raises allegations that may be appropriate IG matters, the IG might not conduct an IG investigation. The IG uses a three-phase process to resolve complaints:

1.2.1. Phase 1: Complaint Analysis (CA). During CA, the IG preliminarily reviews the complainant’s assertions and evidence to determine the potential validity, relevance of the issues to the Air Force and what action, if any, is required within IG, supervisory, or other channels.³ A CA is always required.⁴ The IG will attempt to properly frame allegations from the complainant’s assertions.⁵ The JAG should assist the IG in properly framing allegations. Because complainants may be unable to properly articulate the standard violated, IGs and JAGs should always read the complaint carefully and assess whether there has been a wrongdoing. Depending on what, if any, allegations can be properly framed, the CA will recommend: referral, transfer, dismissal, assistance or investigation.⁶

1.2.1.1. Reprisal Complaint Analysis (RCA). When a complainant’s assertions raise the possibility of reprisal in violation of 10 U.S.C. § 1034, IGs use a special complaint analysis format called an RCA. AFI 90-301, Attachment 20 contains a sample RCA. An RCA always includes an analysis of a four-part “acid test” for reprisal.⁷ Reprisal is a subset of *abuse of authority*. As such, even if the facts do not meet the standard for reprisal, they may constitute abuse of authority, which should be considered in the alternative and possibly investigated.⁸ IGs who recommend *dismissal* of a reprisal allegation in the RCA, even if the recommendation is to proceed with abuse of authority or another allegation, must forward the RCA to the Department of Defense, Office of the Inspector General (DoD IG) through their Major Command (MAJCOM) or State Joint Forces Headquarters (JFHQ- (State)) and SAF/IGQ. DoD IG is the

¹ AFI 90-301, para.1.24.1.1.

² AFI 90-301, para. 1.45.6.

³ AFI 90-301, para. 2.12.

⁴ AFI 90-301, para. 2.11.

⁵ AFI 90-301, para. 2.12.1.

⁶ AFI 90-301, para. 2.14 and Tables 2.11 and 2.16 (referral); para. 2.19 and Tables 2.12 and 2.17 (transfer); para. 2.20 and Tables 2.13 and 2.18 (dismissal); para. 2.22 and Tables 2.15 and 2.19 (assistance).

⁷ AFI 90-301, Attachment 21; *see* paragraph 2.2.1 of this guide for the reprisal “acid test.”

⁸ AFI 90-301, para 3.17.1.3; *see* paragraph 2.2.4. of this guide for abuse of authority discussion.

final authority in all reprisal cases; they must concur with the dismissal of any reprisal allegations.⁹ In cases where reprisal is not dismissed, the IG proceeds with an investigation.¹⁰

1.2.1.2. Non-Reprisal CAs. AFI 90-301, Attachment 2 contains a sample non-reprisal CA.

1.2.2. Phase 2: Investigation. An investigation should be conducted when either the preliminary evidence indicates there was wrongdoing or where the IG cannot sufficiently rule out such wrongdoing without further investigation. In this regard, the CA is the decision tool. Another consideration relevant to whether an investigation should ensue is the timeliness of the allegation (normally complaint filed within 60 days of the alleged violation or misconduct).¹¹ Once the CA (or RCA) recommending investigation is completed, the IG forwards the analysis package to the Appointing Authority, who is normally the wing commander, for review.¹² The Appointing Authority directs an investigation by appointing an investigating officer (IO) in writing.¹³ The Appointing Authority provides written notice to the subject's commander about the scope of the investigation.¹⁴ The subject's commander notifies the subject of the investigation. The IG notifies the complainant.¹⁵ Upon request of the IO, the commander makes witnesses available to the IO. The investigation phase includes: pre-fact finding, fact-finding and report writing. The JAG assists the IO throughout all investigative phases.

1.2.3. Phase 3: Quality Review. The IG staff conducts a quality review on every investigation to ensure completeness, compliance with AFI 90-301 and other appropriate directives, objectivity and obtains a legal sufficiency review before forwarding to the Appointing Authority for approval or to a higher-level IG for review.¹⁶ A legal sufficiency review is required for all IG investigations.¹⁷

1.3. JAG Roles in IG Investigations. JAGs at all levels play a critical role in the Complaints Resolution Process. During the CA (Phase 1), prior to an IG investigation, JAGs will assist the IG in properly framing allegations.¹⁸ During the investigative phase (Phase 2), as part of pre-fact finding, JAGs help IOs craft an Investigation Plan (IP), formulate a Proof Analysis Matrix (PAM) and review draft interview questions. When consulted, JAGs provide advice to both IGs and IOs on issues that arise during the actual investigation or "fact-finding." After the completion of all investigations, a JAG, other than the initial legal advisor to the IO, will conduct

⁹ AFI 90-301, para. 3.19.3.2.

¹⁰ AFI 90-301, para. 3.19.3.1.

¹¹ AFI 90-301, para. 2.21; Table 2.14; and Table 2.6, Rule 6 for "60 day rule." DoD, in a recently drafted DoD Instruction (DoDI) 7050.6, *Military Whistleblower Protection*, extends the "60 day rule" to 120 days. IGs and IOs should not rigidly apply this rule to justify dismissal of allegations that otherwise merit investigation.

¹² AFI 90-301, para. 1.5.

¹³ AFI 90-301, para. 2.35.

¹⁴ AFI 90-301, Attachment 5.

¹⁵ AFI 90-301, Table 2.21., Rule 1C.

¹⁶ AFI 90-301, para. 2.58.

¹⁷ AFI 90-301, para. 2.61.1

¹⁸ AFI para. 2.36.2.

2.2.4. Abuse of Authority. Reprisal is a subset of abuse of authority. As such, even if the facts do not constitute reprisal, they may rise to the level of abuse of authority.³³

AFI 90-301 defines “abuse of authority” as an *arbitrary or capricious* exercise of power by a military member or a federal official or employee that *adversely affects* the rights of any person or that *results in personal gain or advantage* to the abuser.³⁴ Courts have interpreted the arbitrary and capricious standard in the context of government agency action under 5 U.S.C. § 706, the Administrative Procedure Act (APA).³⁵ This precedent can be summarized into a test for abuse of authority:

1. Did the responsible management official’s (RMO’s) actions either:

a. Adversely affect the rights of any person? (e.g., demotion, referral OPR, etc.)

or

b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

and

2. At the time of the action:

a. Did the RMO act within the authority granted under applicable regulations, law or policy?

and

b. Was the RMO’s action based on relevant data and factors?

and

c. Was the RMO’s action rationally related to the relevant data and factors?

If both Questions 1(a) and (b) are answered “no,” then it is not necessary to consider Question 2. If either part of Question 1 ((a) or (b)) is answered “yes”, proceed to Question 2. *In answering Question 2, IGs and JAGs should examine the RMO’s action very narrowly, giving the RMO’s decision substantial deference (great weight) without substituting one’s judgment for that of the RMO.* In so doing, if the answer to Question 2, parts (a), (b) and (c) is “yes,” the action should not be considered “arbitrary and capricious.” If the answer to any part of Question 2 is “no,” then the action was “arbitrary and capricious” (a clear error of judgment) and the action amounts to abuse of authority.

Abuse of authority is not a “catch-all” standard for actions that don’t seem “fair.” While actions may not be fair, they don’t always rise to the level of abuse of authority. Abuse of

³³ AFI 90-301, para 3.17.1.3.

³⁴ AFI 90-301, Attachment 1, Terms.

³⁵ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)(quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)) See also *Dep’t of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002)(discussing arbitrary and capricious standard)).

authority requires wrongdoing that had an impact either on the complainant (adverse loss) or subject (positive gain). IGs and JAGs should guard against using abuse of authority as the basis for an allegation if another standard more accurately characterizes the alleged inappropriate conduct or failure to act.

An example of abuse of authority might be: Colonel A offers Captain B an assignment working on his staff. Citing personal reasons, Capt B declines. Following this interchange, the relationship between the two cools markedly. A few months later, Capt B's supervisor nominates him for a quarterly award for which Col A is the decision authority. After the submission deadline passes, Capt B is the only nominee, more than meets all the award criteria and seems highly deserving. However, without receiving a formal submission, Col A selects Capt C, his golfing buddy who received a conviction for driving under the influence during the award period, as his winner.

With regard to Question 1 of the test, Capt B was denied an award for which he was otherwise highly qualified and the only nominee. Commanders and supervisors are afforded great latitude with regard to actions such as quarterly and annual awards. Nevertheless, if Col A disregarded local policies or instructions in choosing Capt C, his friend and, more importantly, a person who engaged in significant misconduct that quarter, and he based that action on the fact that Capt B decided not to work for him, then the answer is: Yes, this is likely an abuse of authority.

2.2.5. Fraud, Waste and Abuse (FWA).³⁶ Fraud is any intentional deception designed to unlawfully deprive the Air Force of something of value or to secure from the Air Force an individual a benefit, privilege, allowance, or consideration to which he or she is not entitled.³⁷ Actions that constitute fraud may be more appropriately framed against other regulations and statutes, such as DoDD 5500.7-R, *Joint Ethics Regulation (JER)*, 30 August 2003, or the Uniform Code of Military Justice (UCMJ).³⁸ The only definitions for "waste" and "abuse" are found in AFI 90-301.³⁹ The AFI defines "abuse" as the intentional wrongful or improper use of Air Force resources. Examples include misuse of rank, position or authority that causes the loss or misuse of resources such as tools, vehicles, computers or copy machines. Abuse allegations may involve unnecessary purchases, such as disposing of newly acquired government furniture and acquiring new furniture merely because the supervisor's tastes have changed. The AFI defines "waste" as the extravagant, careless or needless expenditure of AF funds or the consumption of AF property that results from deficient practices, systems controls or decisions, as well as practices not involving prosecutable fraud.

³⁶ FWA is not solely an IG matter. Depending on the circumstances, Air Force Office of Special Investigations (AFOSI) might investigate FWA as a criminal matter. (AFI 90-301, Table 2.10, Rule 8)

³⁷ AFI 90-301, Attachment 1.

³⁸ Bolded portions of the JER are punitive under the UCMJ.

³⁹ AFI 90-301, Attachment 1

2.3. Matters Not Appropriate for the IG. More often than not, a complaint's assertions will fall more appropriately under the purview of command or other agencies. AFI 90-301, Table 2.9, *Matters Not Appropriate for the IG Complaints Resolution System*, contains a helpful but non-exhaustive list. While the Appointing Authority has great latitude to direct an IO to investigate any matter that he or she deems appropriate, normally the following should not be included as part of an IG investigation. [Foot stomper: The IG should not investigate Privacy Act violations or violations of any other law under which the Air Force might face civil liability.]

2.3.1. Command Matters. The IG is not a substitute for chain of command channels. Complainants should attempt to resolve their issues at the lowest possible level *using supervisory channels before* addressing them to the IG.⁴⁰ *Commanders* have the inherent authority to investigate matters under their jurisdiction, unless preempted by higher authority. Commanders typically initiate a Commander-Directed Investigation (CDI) to investigate issues that affect their command.⁴¹ [Foot stomper: A CDI is never appropriate for "Big Three" allegations. *The IG must conduct reprisal investigations.*]

2.3.2. Within Purview of Other Established Grievance or Appeal Channels. The Air Force IG Complaints Resolution Program may not be used for matters normally addressed through other established grievance or appeal channels, unless there is evidence that those channels mishandled the matter or process.⁴² As an exception to this general rule, the Appointing Authority may direct an IG investigation for a MEO complaint.⁴³

2.3.3. UCMJ Offenses. UCMJ offenses more appropriately fall under the purview of law enforcement and command. As such, the IG does not routinely investigate them.

2.4. Allegation Requirements. For due process purposes, IG allegations serve as *notice* to the subject. An allegation should clearly inform the subject what he or she allegedly did wrong. By far, improperly framed allegations are the most prevalent, and significant, error in IG investigations. Many allegations are either vague, poorly worded, or allege conduct that does not amount to unlawful or unauthorized conduct. IGs must properly frame allegations by precisely identifying the who, what, when, and how of an alleged violation of law, regulation or policy.⁴⁴

2.4.1. The Who. The allegation must indicate the subject's full name and rank (e.g., Major Jack Hammer). It is helpful, but not required, to include the subject's duty title, if relevant to the alleged violation (e.g., Commander, 1st Fighter Squadron). Each allegation must address only one subject.⁴⁵ Use separate allegations when multiple subjects are alleged to have committed the same or similar misconduct.

⁴⁰ AFI 90-301, para. 1.43.2.

⁴¹ The CDI is distinct from an IG investigation and beyond the scope of this guide. For information about properly conducting CDIs, see SAF/IGQ *CDI Guide*, 1 April 2001. (Note: The CDI Guide is currently under revision.)

⁴² AFI 90-301, para. 1.44.

⁴³ AFI 90-301, para. 3.45.3.1.

⁴⁴ AFI 90-301, para. 2.12.1.

⁴⁵ AFI 90-301, para. 2.12.2.

2.4.2. The What. Allegations must identify a violation of law, policy or regulation (e.g., 10 U.S.C. § 1034).⁴⁶ They must address a violation of only one standard (e.g., not 10 U.S.C. § 1034 and AFI 90-301). The standard used must be the correct standard (e.g., not “fraud, waste and abuse” but DoDD 5500.7-R, Joint Ethics Regulation, paragraph X).

2.4.3. The When. The allegation, to the extent practicable, should precisely indicate the date of the alleged violation.⁴⁷ If the exact date is not known, the IG may qualify the date with the term, “on or about.” If the misconduct occurred during or between certain dates, use, “between on or about X May 200X and X July 200X.”

2.4.4. The How. The allegation must provide sufficient notice of how the standard was violated.⁴⁸ If applicable, the allegation should indicate the full name and rank of the affected party, who may or may not be the actual complainant. [Foot stomper: The allegation should not identify the complainant, e.g., “Col Y did whatever to Captain X, *the complainant*... .”]

2.4.5. Example. Major Jack Hammer, Commander, 1st Fighter Squadron, **(WHO)** on or about XX November 20XX, **(WHEN)** downgraded the Enlisted Performance Report of Senior Airman Ima Havintrouble, in reprisal for making a protected communication **(HOW)**, in violation of 10 U.S.C. § 1034 **(WHAT)**.

CHAPTER 3. PRE FACT-FINDING

3.1. Overview. “Pre-Fact Finding” is the equivalent of case preparation. As in litigation, the end result of an IG investigation will typically reflect the amount of preparation put into the case. AFI 90-301 specifically charters the appointed IO to meet with their legal advisor before initiating the investigation.⁴⁹ The JAG legal advisor must help the IG train the IO.⁵⁰ In addition to training, the JAG should assist the IO to formulate his or her Investigative Plan (IP), Proof Analysis Matrix (PAM) and interview questions.

3.2. JAG Legal Advisor Qualifications. The JAG legal advisor to the IO must be someone other than the JAG who will ultimately conduct the post-investigation legal sufficiency review or the supervisor of the JAG reviewer.⁵¹ At a minimum, the assigned JAG legal advisor must be familiar with AFI 90-301, the *SAF/IGQ IO Guide*, this guide and, for reprisal or improper MHE cases, IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health*, 6 February 1996. It is preferred, but not required, that the JAG advising the IO should have attended IIGTC (the Installation IG Training Course) or have investigative or litigation experience and background.

⁴⁶ AFI 90-301, para. 2.12.1.3.

⁴⁷ AFI 90-301, para. 2.12.1.4.

⁴⁸ AFI 90-301, para. 2.12.1.2.

⁴⁹ AFI 90-301, para. 2.36.2.

⁵⁰ The *SAF/IGQ Investigating Officer Guide (IO Guide)* is a mandatory training tool per AFI 90-301, para. 2.36.1.

⁵¹ AFI 90-301, para. 2.61.2.

an independent legal sufficiency review of the IG case file as part of the Quality Review Process (Phase 3). Depending on the allegations, the MAJCOM or higher-level law office may provide an additional legal review. In addition to these roles, JAGs support IGs by training commanders and IOs, facilitating IG information release and providing advice on a myriad of IG-related matters.¹⁹

CHAPTER 2. FRAMING ALLEGATIONS

2.1. General Considerations. Assisted by the JAG, the IG frames allegations during the CA phase (Phase 1). Framing allegations is the **single most important factor** in analyzing a complaint.²⁰ Allegations framed during the CA focus the entire investigation. JAGs and IGs must carefully examine the complainant's assertions, usually documented on an AF IMT 102, to identify what standards were possibly violated. This may require research. The end goal is that all allegations clearly and concisely identify the complainant's assertions as a specific violation of law, rule or policy.²¹

2.2 IG Matters. IGs must determine whether the matters at hand are properly within the IG purview. Congress has specifically designated the IG as the appropriate agency to investigate allegations involving "**The Big Three**": reprisal, restriction and improper mental health evaluation (MHE) referrals.²²

2.2.1. Reprisal. Reprisal is a violation of 10 U.S.C. § 1034. Reprisal occurs when a *responsible management official (RMO)*²³ takes (or threatens to take) an unfavorable personnel action²⁴; or withholds (or threatens to withhold) a favorable personnel action, to retaliate against a member of the armed forces who made or prepared to make a *protected communication*.²⁵ Any communication, regardless of the subject, to an IG or Congress, is considered protected. Additionally, it is a protected communication when a member who reasonably believes he/she has evidence of a *violation of law or regulation* (regardless of whether he/she is the victim), discloses this to an *authorized recipient*²⁶ in the form of a *lawful communication*.²⁷

¹⁹ See AFI 90-301, para. 1.50.

²⁰ AFI 90-301, para. 2.12.1.

²¹ AFI 90-301, para. 2.12.1.

²² See 10 U.S.C. § 1034, as implemented by DoD Directive (DoDD) 7050.6, *Military Whistleblower Protection*, 23 June 2000 and Public Law 102-484, Section 546, *National Defense Authorization Act for Fiscal Year 1993*, 23 October 1992, as implemented by DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997.

²³ RMOs include three categories: (1) deciding officials; (2) those who influenced/recommended the action; and (3) reviewers/indorsers (e.g., additional rater on EPR) (AFI 90-301, Attachment 1)

²⁴ Personnel actions include actions that affect or have the potential to affect a military member's current position or career (e.g., a LOR, referral EPR) (AFI 90-301, Attachment. 1)

²⁵ AFI 90-301, para. 3.16.2.

²⁶ Besides the IG, MEO and family advocacy, *authorized recipients* of protected communications include, but are not limited to, First Sergeants, Command Chief Master Sergeants, Flight Commanders, Squadron Commanders and higher as well as others appointed IAW AFI 51-604 and AFI 38-101. (AFI 90-301 paras. 3.16.1.2.1.1; 3.16.1.2.1.2.; 3.16.1.2.1.8.; AFI 90-301, Attachment 1)

²⁷ *Unlawful* communications include: (1) those that convey an admission of misconduct, violation of the UCMJ, or violation of other applicable criminal statutes and (2) communications that, in themselves, constitute misconduct, a

AFI 90-301 sets forth an “acid test” for evaluating reprisal allegations. The “acid test” consists of four questions:

- 1. Did the member make or prepare a communication protected by statute?**
- 2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?**
- 3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?**
- 4. Does the evidence establish that the personnel action would have been taken withheld, or threatened if the protected communication had not been made?**

When analyzing question 4, the IO is required to consider the following five factors: (a) reasons stated by the RMO for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant’s performance and conduct; (c) consistency of the action(s) of RMO(s) with past practice; (d) motive of the RMO for the action; and (e) procedural correctness of the action. If questions 1 through 3 of the “acid test” are answered in the affirmative and question 4 is answered in the negative, a *prima facie* case of reprisal exists. If the answer to any of the first three questions is “no,” reprisal cannot be substantiated. However, where appropriate, the underlying personnel action should then be analyzed to determine whether an abuse of authority occurred.

An example of a *prima facie* case of reprisal is: A female Staff Sergeant (SSgt) files a Military Equal Opportunity (MEO) complaint against her male supervisor for sexual harassment. The supervisor rates her enlisted performance report (EPR) as a “3.” The SSgt’s previous EPRs were all “5’s.” The supervisor has no documentation to justify downgrade to a “3.” The analysis follows: 1. Was there a protected communication? Yes, the MEO complaint against her supervisor. 2. Was there an unfavorable personnel action? Yes, the downgraded EPR. 3. Did the person who took the action know about the protected communication? In all likelihood, yes, as the allegations were against the supervisor. This constitutes a *prima facie* case and must be reported. Further complaint analysis will determine the need for investigation.

2.2.2. Restricted Access (Restriction). 10 U.S.C. § 1034 also states that a military member may not be *restricted* or prohibited from making a protected communication to authorized recipients.²⁸ Restriction can result from either private or public statements that may reasonably discourage Air Force members from using appropriate grievance channels, such as MEO, IG, etc. Proper analysis of these complaints requires an in-depth review of both of the following issues: **1. What was the intent of the RMO who allegedly restricted the**

violation of the UCMJ or violation of other applicable criminal statutes (e.g., threats, false statements etc.) (AFI 90-301, Attachment 1)

²⁸ The definitions for *RMO*, *protected communication*, *unlawful communication*, *authorized recipients* also apply to restricted access. (AFI 90-301, para. 3.33)

member?, and 2. Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a protected communication based on the RMO's actions? (i.e., would the communication have a "chilling effect" on others?) An example of restriction would be if, during a commander's call, a squadron commander were to tell his unit that all problems will always go through him first. However, if during a commander's call, the commander were to tell his unit that he prefers to solve problems within the chain of command and also informs the unit that they are free to file complaints by any other means, without fear of retribution, this would not constitute restriction.

2.2.3. Improper MHE Referrals. These cases typically involve coercion, improper procedures or reprisal. For framing suggestions, see Attachment 2 to this guide, *SAF/IGQ Guidelines for Improper MHE Referral Allegations*.

2.2.3.1. Coercion. Commanders and other supervisory personnel may *encourage* an individual to seek a MHE on his or her own, but they may not *coerce* the member to do so.²⁹ These complaints often involve tough calls. There is a fine line between caring and coercion—and an individual's indication on a MHE intake form that he was there "voluntarily," while compelling, is not necessarily outcome determinative.³⁰ An example of a coercion case would be: Amn Snuffie has been acting strangely. He recently told his commander that he was "losing it," and going to "go postal on someone." The commander meets with Amn Snuffie at 1600 on a Friday before a three-day weekend. He tells Amn Snuffie that he's not getting released for the weekend until mental health clears him. Amn Snuffie, feeling he has no choice in the matter, "volunteers" to go to mental health, escorted by his two supervisors.

2.2.3.2. Improper Procedures. Only a commander can "direct" a member to undergo a mental health evaluation (MHE).³¹ Special procedures apply to involuntary referral of military members for a MHE. In all MHE referral cases, the commander is required to notify the member in writing, of his or her rights.³² A procedurally improper MHE referral case will ordinarily not involve an in-depth review of the commander's intent or motives. Good intentions do not negate technical violations of procedural requirements; however, good intentions may mitigate any command action that may eventually be taken as a result of the violation.

2.2.3.3. MHE as Reprisal. Sometimes a complainant will allege his or her commander referred him or her for a MHE in reprisal for making a protected communication. Treat such cases as potential violations of 10 U.S.C. § 1034 and frame the allegation as reprisal.

²⁹ AFI 44-109, para. 4.1.

³⁰ See Attachment 3 to this guide, *Sample Legal Review*, for a summary of the applicable legal standards for MHE coercion cases.

³¹ AFI 44-109, para. 4.2.

³² AFI 90-301, para. 3.26.2 and DODI 6490.4, para. 6.1.1.4.1.

3.3. The Investigation Plan (IP). The IO should complete an IP, which the IG approves.⁵² Attachment 7 to AFI 90-301 provides a sample IP. The IP outlines the: issues for resolution, preliminary facts including a chronology, applicable regulations, evidence required and administrative considerations related to the investigation (such as travel required). The IP is the IO's roadmap. It is the precursor to the PAM and ultimately, the Report of Investigation (ROI). As such, it behooves the JAG legal advisor to review the IP and provide inputs to the IO and IG to ensure the investigation is properly focused on the issues presented. Additionally, the IP should plan the order of witness interviews. AFI 90-301 requires that the IO interview the complainant first and the subject, last.⁵³

3.4. The Proof Analysis Matrix (PAM). The PAM is the IG version of a proof analysis. It provides a construct for identifying the evidence needed to prove or disprove an allegation. Additionally, the PAM provides a reference outline for the analysis section of the IO's ROI. While not addressed in AFI 90-301, the SAF/IGQ *IO Guide* encourages IOs to create a PAM for each allegation.⁵⁴ The PAM is a living, breathing document, which, if done thoroughly and revised continuously throughout the investigation, will serve as a solid template for the ROI.

3.4.1. The IO Guide Sample PAM. Currently, the sample PAM in the IO Guide breaks down the analysis as: WHO / DID WHAT / IN VIOLATION OF WHAT STANDARD / WHEN. The majority of the current PAM focuses on issues that the IO can easily prove (who, the standard and when). From a proof perspective, the crux of any issue, however, is the analysis of "did what."

3.4.2. The Preferred Practice. The preferred practice is to build the PAM around the "elements" of the standard, including its definitions, while still incorporating the who, the standard and when. Definitions are critical to a determination of whether a standard was violated. For example, in a reprisal case, the first question of the "acid" test is whether the individual made a "protected communication" (PC). If the IO does not understand what qualifies as a PC, and the subtle nuances involved in making that determination, then the IO's conclusion might be incorrect. The same logic applies to any standard violation. Understanding the standard is a prerequisite to determine whether the subject violated it.

3.4.3. Sample Reprisal PAM. In a reprisal case, for example, the issue is whether the individual "reprised" in violation of 10 U.S.C. § 1034. To determine this, one must apply the reprisal "acid test." For a detailed sample PAM, see Attachment 3 to this guide.

3.5. Question Formulation. While not required by AFI, JAG legal advisors can and should assist the IO by reviewing his or her interview questions and techniques in advance. JAGs should review IO interview questions for relevance, organization, thoroughness and form.

⁵² AFI 90-301, para. 2.36.4.

⁵³ AFI 90-301, para. 2.42.1.1. and 2.42.1.2.

⁵⁴ SAF/IGQ *IO Guide*, p. 11.

3.5.1. Relevance. Military Rule of Evidence 401 defines relevance as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. The key to relevance is whether the information sought might have a material affect on the outcome of the case. The interview questions should focus on the facts and circumstances surrounding, and leading up to, each allegation. Information that relates to the issues and concepts outlined in the PAM for each allegation will always be relevant: who, did what, to whom, when. DoD Inspector General Guide 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, 6 February 1996, is an excellent starting point for interview questions in reprisal and MHE cases.

3.5.2. Logical Progression. The best interviews are organized in such a way that they start with background and build up to the pivotal question or issue. While there is no cookie cutter method to ensure effective interviews, the recommended approach is to review events chronologically, instead of serially (allegation 1, allegation 2). Jumping from allegation to allegation often results in going back and forth between timeframes and leads to confusion. Use the chronology in the IP to frame questions that facilitate an orderly sequence of events.

3.5.3. Peeling Back the Onion. Thoroughness is required in all IG investigations. IG investigations are about people and for people. As such, they are inherently about relationships. Each person has a unique history that contributed to who they are today, and more importantly, why they act the way they do and/or perceive things as they do. IOs need to look beyond who, what, when, where and how. They need to address the “why,” whether or not motive is an element outlined in the PAM. Motive is always relevant. Sometimes the “why” cuts to the heart of the matter and reveals the most relevant facts in the case.

3.5.4. Leading Questions. Questions that either assume the answer or leave the witness no choice but to state a particular response (yes or no) are often unhelpful in ferreting out facts in an IG investigation. JAGs should train IOs to use the proper form. This means avoiding leading questions, except in limited circumstances, such as when confirming facts the IO already knows or when rephrasing an answer the witness previously provided. The end goal is for the witness to testify, not the IO.

CHAPTER 4. FACT-FINDING (INVESTIGATIVE) ISSUES

4.1. Rights Advisement for Witnesses/Subjects. IGs and IOs may contact the JAG about the propriety of rights advisement for subjects, suspects or witnesses prior to or during a break in the interview or reinterview.

4.1.1. Military. The mere fact that someone is the subject of an IG investigation does not automatically trigger the need for a rights advisement. Rather, the test is whether the IO, at the time the active duty military subject is interviewed either (1) believes (subjective test) or (2) reasonably should believe (objective reasonable person test) the individual committed an offense under the UCMJ, or other criminal code.⁵⁵ If the answer is “yes,” then the subject, or witness,

⁵⁵ *United States v. Meeks*, 41 M.J. 150, 161 (CMA 1994).

should be considered a *suspect*. The IO should advise suspects of their Article 31, UCMJ rights. Cases involving Guard and Reserve personnel are further complicated by their status at the time of the improper conduct and the time of interview. As a matter of practice, in “close calls,” we recommend the IO err on the side of advising individuals of their rights. The required rights advisement must be given without regard to the anticipated nature of any resulting disciplinary action. The individual’s status as a suspect controls this issue, not the severity of the offense or harshness of any possible subsequent punishment.⁵⁶

4.1.2. Civilian. Even if suspected of an offense, a civilian witness or subject need not be advised of their Fifth Amendment rights when interviewed as part of an investigation. Such rights are only required in conjunction with custodial interrogations (i.e., interrogations in which the interviewee is not free to leave at will). Interviews by an IO do not meet the threshold requirement for a custodial interrogation.⁵⁷ The lack of a requirement to advise civilian witnesses of their Fifth Amendment rights does not preclude them from invoking such rights if circumstances warrant.

4.2. Third-Party Presence During Interviews. Sometimes a witness or a subject will request that a third-party be present during their IG interview.

4.2.1. Labor Union Representatives. Civilian subjects or witnesses who are members of collective bargaining units, and their labor unions, have specific rights with regard to labor organization presence during IG interviews. The Civilian Personnel Office can help you with the situation present at each installation.

4.2.1.1. Formal Discussions Over Grievances. An IO must extend to a labor organization the opportunity to attend a collective bargaining unit employee’s interview *if* the investigation concerns a *grievance* and the interview amounts to a *formal discussion*. First, there must be a grievance as broadly defined in the Federal Service Labor Management Relations Statute, which generally refers to any complaint by an employee about any term or condition of employment.⁵⁸ Second, the discussion must be *formal*. If the meeting requires the attendance of the employee, is held in a structured setting with an agenda, is conducted by someone higher in the chain of authority than the first or second level supervisor of the employee, and the person conducting the meeting is a representative of the agency, one can infer formality.⁵⁹ The presence is an institutional right to protect the bargaining agreement, insure that direct dealing with bargaining unit members is not undertaken in relation to matters that are the subject of collective bargaining, and to provide limited protection to the bargaining unit member by insuring that management does not subvert the bargaining agreement in relation to the employee. The role of the labor organization is that of an interested observer. The labor organization cannot interfere

⁵⁶ See AFI 90-301, para. 2.45.

⁵⁷ AFI 90-301, para. 2.45.3.

⁵⁸ Most IG complaints do not concern grievances, that is, no complaint by a bargaining unit employee has been made prior to the investigation. Often management initiates the process.

⁵⁹ IG investigators are representatives of the agency when they conduct their interviews of employees. *NASA v. FLRA*, 527 U.S. 229 (1999).

with the discussion, is not there to advise the employee, but may interject appropriate remarks regarding the collective bargaining agreement or other labor practices observed by the parties in relation to the discussion and its content.

4.2.1.2. Weingarten Rights. Employees have the right, during an *investigatory interview* conducted by a representative of the agency, where the employee reasonably believes that discipline may occur as a result, to request the presence of a representative from the labor organization that represents the bargaining unit to which the employee belongs. To exercise this right, the employee must request representation before there is an entitlement to it. There is no duty for the IO to advise the employee of this right. Thus, this right is one that is personal to the employee. It is distinct from the right of a labor organization in connection with formal discussions. The IO has options when this right is invoked: (1) wait until a representative from the labor organization arrives or (2) inform the employee that if a representative is desired, no interview will take place and management will determine its course of action without any input from the employee. The role of the representative is much greater here than in relation to a formal discussion over a grievance. In this instance, the representative is a *personal representative* of the employee and may provide advice, consult with the employee, and suggest areas of inquiry. The representative may not, however, obstruct the interview or instruct the employee not to answer legitimate questions.⁶⁰

4.2.1.3. When Rights Converge. The situation can occur where both the rights of a labor organization and the rights of an employee arise in the same setting. If the interview is about a grievance submitted by a bargaining unit employee, and the employee being interviewed reasonably believes that discipline may follow as a result of the interview, then both rights may be invoked, if the employee requests representation. This might result in two representatives from the labor organization.

4.2.2. Attorneys. Only a *suspect* has the right to have an attorney present during an interview. The attorney may not answer questions for the suspect.⁶¹ Witnesses and *subjects* may consult with their attorney, but are not permitted to have the attorney present during the interview.⁶²

4.2.3. Other Personal Representatives. Third parties are not permitted to be present during IG investigations.⁶³

4.3. Tape-Recordings. The IO records all testimony electronically. These recordings are transcribed verbatim, with the exception of nonessential witnesses whose testimony may be summarized, at the discretion of the Appointing Authority.⁶⁴ Witnesses, on the other hand, are not permitted to record their interview.⁶⁵ IOs should consider informing witnesses of this

⁶⁰ See AFI 90-301, para. 2.44.

⁶¹ AFI 90-301, para. 2.43.1.

⁶² AFI 90-301, para. 2.43.2.

⁶³ AFI 90-301, para. 2.43.

⁶⁴ AFI 90-301, para. 2.42.2.3. and 2.42.2.4.

⁶⁵ AFI 90-301, para. 2.42.2.3.

prohibition in advance of their interview. If a witness tape-records their IG interview, without permission, the IO should request the individual to voluntarily relinquish the tape to him or her for inclusion as part of the official IG record. An IO is the agent of the Appointing Authority and the IG. AFI 90-301, paragraph 2.3 states that communications made to the IG will not be disclosed unless required by law or regulation, when necessary to take adverse action against a subject or when approved by The IG (TIG). Additionally, paragraph 4.3 establishes that release authority for IG records rests with the Appointing Authority. If the individual declines to provide the tape voluntarily, the IO should give the person a lawful order (or, in the case of a civilian, the IO should direct the person) to surrender it, subject to disciplinary action if they further refuse.

4.4. New or Additional Allegations. Sometimes the investigation may raise additional allegations. This typically occurs during the investigation, when a witness' testimony reveals additional misconduct, or during the review process when a later reviewer notes issues raised, but not addressed, in the investigation.

4.4.1 During the Investigation. If a witness' testimony, or other evidence, raises the possibility of additional misconduct of the subject or another person, the IO should approach the IG, who, in turn, will forward the issue to the Appointing Authority to decide whether the additional issues will be investigated separately or as part of the on-going investigation.⁶⁶ If the Appointing Authority expands the scope of the investigation, the appointment letter must be amended. *Although not discussed in AFI 90-301, if the scope of the investigation has been expanded, the subject's commander should be notified and should provide the subject notice of the additional allegations.* If the subject has not yet been interviewed, the IO must read the subject in for all the alleged misconduct. If the subject has already been interviewed, but not been given adequate opportunity to respond to the substance of all misconduct under investigation, the subject should be re-interviewed and read in for all allegations.

4.4.2. Post-Investigation. The more challenging scenario occurs when later reviewers, including JAGs conducting legal reviews, discover misconduct that was not addressed in the ROI. When this occurs, the reviewer should discuss with the responsible IG whether the alleged misconduct was addressed, but simply not documented in the case file. If such is the case, the IG can include a brief memorandum for record in the case file or write an addendum. If the alleged misconduct was not considered, the IG should conduct a complaint analysis to determine a proper disposition of the issue(s). If investigation is warranted, the Appointing Authority will decide whether to reopen the investigation or consider the issues in a separate, but related, investigation.⁶⁷ JAGs must ensure the subject receives adequate due process, which includes notice and an opportunity to respond.

4.5. Computer Evidence. Occasionally, an IO may want to access a subject's or witness' e-mail or computer files for evidence of wrongdoing. Generally, real-time monitoring, such as intercepting e-mails *en route* to their destination, is out of the question. Because members believe they have greater privacy in what they put on their own official hard drives, accessing

⁶⁶ AFI 90-301, para. 2.42.4.1.

⁶⁷ AFI 90-301, para. 2.42.4.1.

such files or e-mails is also probably not within the range of options for an IO. This information is accessible through a search authorization issued by the proper authority after law enforcement officials demonstrate probable cause. However, because IG investigations are not normally criminal investigations, the search authorization route is not a viable option for the IO. The IO may be able to access computer files if the computer is shared by more than one user or is in a non-private area, for example, files or e-mails stored on a network (shared) drive. To access such files, two prerequisites apply: (1) the search must be reasonable (the IO must reasonably expect to find what he is looking for when the IO started looking and the execution of the search has to be rational, e.g., the IO can't read every file in the person's network folder if looking for a specific e-mail), and (2) the investigation must be work related (which, essentially, every IG investigation is).⁶⁸ JAGs should conduct independent research prior to advising IOs on the search and seizure of computer evidence.

4.6. CSAF “Hand-Off” Policy. The CSAF 26 November 2002 *Policy for Investigative Interviews* applies to IG investigations. This policy requires a person-to-person hand-off of all subjects, suspects and any distraught witnesses following their investigative interview. The hand-off must take place between the IO and the individual's commander or commander's designated representative. The policy applies to everyone, regardless of rank or position. The IO needs to document the hand-off in the ROI.

4.7. How Much Investigation is Enough? As JAGs and as former or current trial and defense counsel, we know that due process requires more rigorous investigative efforts when the stakes are higher. Although this concept is not controlling, JAGs should consider the seriousness of the allegation, including the implications for both the subject and the complainant, in assessing whether the IG investigation was conducted sufficiently. For example, the resources expended on an investigation into an improper purchase of a pager might be significantly different than a case involving alleged improper purchases of multiple plasma screen TVs.

CHAPTER 5. LEGAL SUFFICIENCY REVIEWS

5.1. “Informal” Legal Review. After the IO has completed his ROI, the attorney-advisor JAG to the IO should then conduct an “informal” review. This informal review will allow the IO to correct any flaws in the investigation or the ROI, such as: the need for additional investigation, failure to analyze witness credibility, correction of embarrassing typographical, spelling or grammatical errors and confirmation as to whether the case file otherwise meets all legal requirements.

5.2. Formal Legal Reviews. AFI 90-301 requires JA to conduct a written “legal sufficiency” review for all IG ROI.⁶⁹ The AFI also requires JA to conduct an additional legal review at the MAJCOM, JFHQ-(State), FOA or DRU levels in cases involving allegations against a colonel (or equivalent), reprisal *or* where a higher authority includes an *addendum* (such as when higher

⁶⁸ See, e.g., *O'Connor v Ortega*, 480 U.S. 709 (1987).

⁶⁹ AFI 90-301, para. 2.61.1.

headquarters disagree with lower-level findings).⁷⁰ The AFI conflicts on whether an additional independent legal review is required in restriction cases.⁷¹ The AFI does not currently require an additional review in cases involving improper MHE referral. *However, SAF/IGQ strongly encourages MAJCOMs, FOAs and DRUs to conduct an additional legal review for all cases with “Big Three” allegations, O-6 allegations and addendum.*⁷²

5.3. JAG Reviewer Qualifications. The JAG who conducts the legal review must be someone other than the JAG who acted as legal advisor or the legal advisor’s subordinate.⁷³ At a minimum, the JAG legal reviewer must be familiar with AFI 90-301 and this guide. It is preferred, but not required, that the reviewer JAG have attended IIGTC.

5.4. Legal Sufficiency Test. AFI 90-301 outlines the requirements for legal sufficiency as follows:

- (1) Has each allegation been addressed?;
- (2) Does each allegation allege a violation of law, regulation, procedure or policy?;
- (3) Did the IO reasonably apply the *preponderance of the evidence* standard in arriving at the findings?;
- (4) Are the conclusions supported by and consistent with the findings?;
- (5) Does the investigation comply with all legal requirements?;
- (6) Does the investigation comply with all administrative requirements?; and
- (7) Are there any errors or irregularities and, if so, what is their legal effect?⁷⁴

5.5. Review Guidance. An independent review of all the testimony and evidence is critical. For an in-depth practical explanation of how to conduct the case file review see Attachment 4 to this guide, *Judge Advocate (JA) Primer: “Legal Sufficiency Review” for Inspector General (IG) Investigative Case Files*. Also attached to this guide, at Attachment 5 is a *Sample Legal Review*.

5.5.1. Preponderance of the Evidence Standard. The standard of review for IG investigations is a preponderance of the evidence.⁷⁵ JAG reviewers should keep in mind that this legal standard is much less than that for beyond a reasonable doubt. AFI 90-301, Terms, defines “preponderance of the evidence” as when the IO “is satisfied that the greater weight of the credible evidence supports the findings and conclusions—it is more likely than not that the alleged events have occurred.” An IO’s analysis must include a *credibility assessment*—this is critical.

⁷⁰ AFI 90-301, para. 2.61.4., 2.71.3. and 2.72.1.

⁷¹ AFI 90-301, para. 2.61.4 and 3.39.2

⁷² See Attachment 6, Matrix – Levels of Legal Review Required.

⁷³ AFI 90-301, para. 2.61.2.

⁷⁴ AFI 90-301, para. 2.61.1.1.1. - 2.61.1.1.6;

<https://www.ig.hq.af.mil/igq/IO%20Toolkit/TheReport/ToolkitTheReportMenu.htm>.

⁷⁵ AFI 90-301, para. 2.48.

5.5.2. Deference to IO Findings. While conducting the legal review, JAGs must not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge. Reasonable minds may differ in these cases. If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient.

5.5.3. Disagreement vs. Legal Insufficiency. If the JAG simply disagrees with the IO's findings and conclusions, then document the rationale for this in the legal review.⁷⁶ A disagreement is not necessarily the same as legal insufficiency. In such cases, the Appointing Authority acts as the "tie-breaker" by writing an addendum.

5.5.4. Adopting Lower Level Review. The AFI allows MAJCOMs, FOAs and DRUs to adopt a lower level legal review, except in reprisal and O-6 cases.⁷⁷ The best practice is for MAJCOMs to conduct complete legal reviews of the entire case file containing O-6 and "Big Three" allegations - restriction, reprisal, and improper MHE referrals. See Attachment 6 to this Guide, *Matrix – Levels of Legal Reviews Required*.

5.5.5. Time Standards. The legal review should take five days or less to complete.⁷⁸

5.6. Legal Review Format. See Attachment 5 to this guide for a sample legal review.

CHAPTER 6. OTHER INTEREST AREAS

6.1. Special Notification Requirements. JAGs advising commanders and IGs must be aware that allegations related to reprisal, restricted access, improper MHE referral, O-6s and senior officials have unique reporting requirements.⁷⁹

6.1.1. Allegations Against O-6s (Or Equivalents). All complaints, regardless of the nature of the allegation, alleging O-6 misconduct (even if handled by a CDI, MEO, EEO etc.) must be reported to SAF/IGQ immediately through the MAJCOM, FOA or DRU IGs.⁸⁰ Additionally, a copy of any material collected addressing allegations of misconduct by a Colonel, Colonel-select, or GS/GM-15 must be provided to SAF/IGQ in accordance with AFI 90-301, Table 3.3, Rule 1.

6.1.2. Allegations Against Senior Officials. Only SAF/IGS handles and investigates complaints against O-7 selects (and above) and civilian equivalents.⁸¹ If there is an allegation against an O-7 select or above, the IG will not investigate, but rather will immediately report that

⁷⁶ AFI 90-301, para. 2.61.3.1.

⁷⁷ AFI 90-301, para. 2.61.4.

⁷⁸ AFI 90-301, Section 2J, Step 9.

⁷⁹ See AFI 90-301, paras. 3.18; 3.29; 3.35; 3.10; 3.3.

⁸⁰ AFI 90-301, para. 3.8.1

⁸¹ AFI 90-301, para. 3.2.1.

allegation to SAF/IGS through MAJCOM, FOA or DRU IGs IAW AFI 90-301, Chapter 3, Section 3A and Table 2.10, Rule 1.

6.1.3. The Big Three (Reprisal, Restriction and Improper MHE) Referrals. IGs must notify SAF/IGQ through MAJCOM, FOA or DRU IGs within seven workdays.⁸² This allows SAF/IGQ to notify OIG, DoD within ten workdays.

6.2. Investigating Retirees. Although not specifically referenced in AFI 90-301, the IG has the authority to investigate retiree misconduct that has a link to the Air Force, by virtue of the federal compensation they receive and UCMJ applicability.⁸³ As a practical matter, if a retiree refuses to cooperate with an IG during an investigation, unless recalled back to active duty, the IG has no basis to compel participation.

6.3. IG “Confidentiality.” Communications made to the IG are not privileged or confidential. However, disclosure of these communications (and the identity of the communicant) will be strictly limited to an official need-to-know.⁸⁴ The ROI will be marked “*For Official Use Only*” (FOUO) and treated as closely held information.

6.4. Sexual Assault Allegations. On 3 June 2005, the Air Force implemented new policies and procedures for the prevention of and response to sexual assault. IGs and the JAGs advising them need to be aware of the implications of this policy as we perform our missions. Under the policy, “sexual assault” is not a separately enumerated UCMJ punitive offense, but rather is an umbrella term that encompasses the offenses of rape, nonconsensual sodomy, indecent assault or attempts to commit these offenses. The policy provides for “restricted reporting,” an option that enables *military members* to report allegations of sexual assault to specified personnel (health care providers and the Sexual Assault Response Coordinator or SARC), without triggering an investigation⁸⁵ “Unrestricted” reporting means any report of a sexual assault made through “normal” reporting channels, such as the victim’s chain of command or law enforcement agency. Because the policy does not include the IG as an agency that can receive a communication considered protected for purposes of restricted reporting, any disclosures of a sexual assault to the IG will be considered unrestricted. The implication of this is that once a victim discloses the details of the sexual assault to the IG, the restricted reporting is no longer available to him or her. Upon receipt of a report of sexual assault, the IG should immediately contact the AFOSI, the lead agency for investigating sexual assault allegations. AFOSI has a duty to contact the SARC. To the extent that AFI 90-301 (8 February 2005), para. 2.14.4 conflicts with this policy, SAF/IGQ

⁸² AFI 90-301, para. 3.18., 3.29. and 3.35.

⁸³ See Rule for Court-Martial 202.

⁸⁴ AFI 90-301, para. 2.3.

⁸⁵ Restricted reporting is only available to military members of the Armed Forces and the Coast Guard when attached to the Department of Defense (active duty, Reserve and National Guard performing federal duties).

considers it rescinded.⁸⁶ IGs should consult with their JAG whenever there is any question about any issues that arise under the new AF sexual assault policy.

6.5. Domestic Abuse Allegations. On 22 January 2006, the DoD initiated a “restricted reporting option” for adult victims of domestic violence or abuse, similar to that implemented in the sexual assault arena. The policy provides for a “restricted reporting” option that enables victims to report allegations of domestic violence or abuse to specified personnel (health care providers and victim advocates), without triggering an investigation. “Unrestricted” reporting means any report of a domestic incident made through “normal” reporting channels, such as the victim’s chain of command or law enforcement agency. Because the policy does not include the IG as an agency that can receive a communication considered protected for purposes of restricted reporting, any disclosures of domestic violence or abuse to the IG will be considered unrestricted. Upon receipt of a report of domestic abuse or violence, the IG should immediately contact law enforcement in accordance with local procedures. IGs should consult with their JAG whenever there is any question about any issues that arise under the new DoD domestic violence policy.

6.6. IG Information Release. AFI 90-301, Chapter 4 relates to IG records release. IG records contain protected information. As such, they may not be released, reproduced, or disseminated in whole or in part, or incorporated into another system of records without the express permission of the Secretary of the Air Force, Inspector General, as indicated in AFI 90-301. JAG involvement in this process ranges from requests for IG information to legal reviews of information requested, withheld or released pursuant either to the Freedom of Information Act (FOIA) or Privacy Act (PA).

6.6.1. JAG Requests to IG. JAGs typically request IG information in three contexts: (1) government counsel, on behalf of the commander, to facilitate command action that results from an IG investigation (e.g., non-judicial punishment (NJP)); (2) defense counsel, to prepare for or defend a court-martial (e.g., discovery); or (3) defense counsel, to defend a client against command action other than court-martial (e.g., administrative or NJP).

6.6.1.1. Facilitating Command Action. The Appointing Authority is the release authority for IG information used for purposes of command action.⁸⁷ The Appointing Authority will automatically provide the subject’s commander a copy of the relevant portions of an approved and substantiated ROI, without attachments, to determine command action. The commander who seeks additional information, either individually or through his or her JAG, must file a written Official Use Request (OUR) directly to the Appointing Authority..⁸⁸ AFI 90-301, para. 4.6 outlines the requirements for an OUR.

6.6.1.2. Defending Against Command Action. This paragraph relates to requests from defense counsel who seek information to defend clients, who were subjects of IG investigations,

⁸⁶ AFI 90-301, para. 2.14.4. currently states, “If a complainant asserts... criminal offenses (to include, but not limited to... sexual assault...), IGs will immediately consult with the JA, Security Forces and AFOSI office to determine whether the complaint should be referred for appropriate action, or stay within the IG complaint system.”

⁸⁷ AFI 90-301, para. 4.5.3.

⁸⁸ AFI 90-301, para. 4.7

in either administrative or NJP forums. JAGs advising commanders may, on behalf of the Appointing Authority, release to the subject relevant information provided to command pursuant to an OUR, for purposes of preparing a defense of an administrative or NJP command action.⁸⁹ If information requested by the defense is beyond the scope of the original OUR, then the request must be forwarded to the Appointing Authority for a release determination. Denial of a defense OUR does not preclude the defense from making an appropriate FOIA or PA request. Information provided to the defense as part of an OUR may not be further released.⁹⁰ Although not required in the AFI, a recommended practice for JAGs advising commanders is to have defense counsel (or the defense paralegal) sign an endorsement that acknowledges their duty to protect the documents and prohibits further release.

6.6.1.3. Court-Martial Discovery. When defense counsel makes a discovery request for IG records, trial counsel should forward this, as an OUR, to SAF/IGQ for consideration. Should SAF/IGQ provide trial counsel with IG records, trial counsel must carefully review the request and release only *relevant* portions of the IG records to the defense. Due to the protected nature of the documents, trial counsel must comply with the provisions of the Privacy Act (PA) when using the records. Improper release of information (a willful, improper disclosure) may constitute a violation of the PA and subject the releaser to civil and criminal penalties. Trial counsel must make appropriate redactions and/or seek appropriate protective orders from the court or other legal authority with regard to further release of information. If applicable, portions of the record that trial counsel determines not to be relevant can be provided to the judge for an *in-camera* review. These documents will be further released to the defense only if ordered by the judge after the *in-camera* review. Trial counsel should destroy all copies of the records when no longer needed.

6.6.2. JAG Role in Information Release. JAGs will be consulted in any FOIA or PA requests for IG records.⁹¹ SAF/IGQ is the initial denial authority for records related to all ANG cases, non-reprisal investigations containing substantiated allegations against O-6s and cases closed out at the SAF/IGQ level.⁹² Otherwise, the MAJCOM, FOA or DRU IGs are the release authority for IG records finalized at their level.⁹³

6.6.3. Releases Pursuant to 10 U.S.C. § 1034. 10 U.S.C. § 1034 (e)(1) and (e)(2) require that all complainants must be provided a copy of the ROI without supporting documents. However, the ROI may be withheld/redacted IAW the FOIA, 5 U.S.C. § 552.

6.7. “Appeals” of IG Investigations. AFI 90-301 does not contain a formal appeal process. However, complainants may request the next higher-level IG review if they are not satisfied with the original investigation and desire such a review.⁹⁴ The complainant must provide additional

⁸⁹ AFI 90-301, para. 4.7.1.3.2.

⁹⁰ AFI 90-301, para. 4.7.1.3.3.

⁹¹ AFI 90-301, para. 4.13.1. and 4.12.3.

⁹² AFI 90-301, para. 4.12.1.2.; 4.12.2.1. and 4.12.2.2.

⁹³ AFI 90-301, para. 4.12.2.

⁹⁴ AFI 90-301, para. 2.67.5.1.

information to justify a review. Simply disagreeing with the results does not constitute sufficient justification for further review or additional investigation.⁹⁵ Complainants and subjects may appeal their cases to the Air Force Board for Correction of Military Records pursuant to AFI 36-2603, *Air Force Board for Correction of Military Records*.

⁹⁵ AFI 90-301, para. 2.67.5.3 and 2.67.5.4.

ATTACHMENT 1 -IG Reference Materials for JAGs

General:

AFPD 90-3, *Inspector General Complaints Program*, 1 November 1999

AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005

Reprisal:

10 U.S.C. § 1034, (Military Members) *Whistleblower Protection Against Reprisal*

5 U.S.C. § 2302, (DAF Civilian Employees)

10 U.S.C. § 1587, (NAF Civilian Employees)

10 U.S.C. § 2409, (Defense Contract Employees)

DoDD 7050.6, *Military Whistleblower Protection*, 23 June 2000 (*currently under revision)

IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, 6 February 1996

Mental Health Evaluations:

DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997

DoDI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces*, 28 August 1997

AFI 44-109, *Mental Health and Confidentiality in Military Law*, 1 March 2000

IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, 6 February 1996

Computer Searches:

18 U.S.C. § 2510, *Electronic Communications Privacy Act*, 21 October 1986

18 U.S.C. § 2511, *Federal Wiretap Statute*

18 U.S.C. §§ 2701-2711, *Federal Wiretap Statute*

AFI 33-119, *Air Force Messaging*, 24 January 2005

AFI 33-129, *Web Management and Internet Use*, 3 February 2005

Records Release:

DoD Regulation 5400.7/AF Supplement, *DoD Freedom of Information Act Program*, 24 June 2002

DoJ *Freedom of Information Act Guide* (May 2004)(*currently under revision)

AFI 33-332, *Privacy Act Program* (29 January 2004)

<https://afrims.amc.af.mil>

https://wwwmil.acc.af.mil/ja/civil_files/FOIA/foia.htm

<http://www.foia.af.mil>

<http://www.defenselink.mil/pubs/foi/index.html>

Other:

SAF/IGQ Website: [https:// www.ig.hq.af.mil/igq/](https://www.ig.hq.af.mil/igq/)

SAF/IGQ *Investigating Officer's Guide*, June 05

SAF/IGQ Commander-Directed Investigation Guide, 1 April 2001

ATTACHMENT 2 – Guidelines for Improper MHE Referral Allegations

ALLEGED WRONG DOING	PERSON MAKING MHE REFERRAL	STANDARD	NOTES	SAMPLE ALLEGATION
Procedural Error	Commander	DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i> , 1 Oct 97 or DoDI 6490.4, <i>Requirements for Mental Health Evaluations of Members of the Armed Forces</i> , 28 Aug 97	The standard will depend on the specifics of the allegation. For example, DoDD 6490.1 does not address the requirement to allow the member two business days before referral for a routine (non-emergency) MHE, but DoDI 6490.4, para. 6.1.1.4 does. So, if the wrongdoing rests in this procedural issue, DoDI 6490.4 may be the appropriate standard.	“(Subject) improperly referred (complainant) for a routine Mental Health Evaluation by failing to consult a mental healthcare provider prior to the evaluation, in violation of DoDI 6490.1 on (date).” “(Subject) improperly referred (complainant) for a routine Mental Health Evaluation by failing to provide (complainant) the prescribed notification memorandum, in violation of DoDI 6490.4 on (date).”
	Personnel in supervisory chain (other than commander) OR Personnel not in supervisory chain	DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i> , 1 Oct 97	Other than the commander, personnel who make MHE referrals are overstepping their authority (i.e., only the member’s commander may direct a MHE).	“(Subject) referred (complainant) for a Mental Health Evaluation when not authorized to do so, in violation of DoDD 6490.1 on (date).”
	Non-Mental Health healthcare provider (e.g., dermatologist)	Refer to SG channels (ref. DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i> , 1 Oct 97, para. 4.3.5)	DoDD 6490.1, para. 4.3.5, states that MHEs requested by non-Mental Health healthcare providers <u>not</u> part of the member’s chain of command are <u>not</u> covered by DoDD 6490.1 guidance. Complaints involving these providers should be referred to SG for disposition IAW AFI 90-301, Table 2.9.	Not applicable.

ALLEGED WRONG DOING	PERSON MAKING MHE REFERRAL	STANDARD	NOTES	SAMPLE ALLEGATION
Coercion	Commander	AFI 44-109, <i>Mental Health, Confidentiality, and Military Law</i> , 1 Mar 00	Commanders are prohibited from coercing members into a MHE in AFI 44-109, para. 4.1, so this AFI would be the appropriate standard for a coercion case	“(Subject) coerced (complainant) to seek a Mental Health Evaluation, in violation of AFI 44-109 on (date).”
	Personnel in supervisory chain (other than commander)	AFI 44-109, <i>Mental Health, Confidentiality, and Military Law</i> , 1 Mar 00	DoDD 6490.1 and DoDI 6490.4 refer only to commanders. AFI 44-109 addresses personnel in the supervisory chain. It states supervisors may encourage, but not coerce members to seek a MHE.	“(Subject) coerced (complainant) to seek a Mental Health Evaluation, in violation of AFI 44-109 on (date).”
	Personnel not in supervisory chain	DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i> , 1 Oct 97	Personnel not in the supervisory chain who coerce members to seek a MHE are overstepping their authority (i.e., only the member's designated commander may direct a MHE; personnel in the supervisory chain may encourage a MHE).	“(Subject) referred (complainant) for a Mental Health Evaluation when not authorized to do so, in violation of DoDD 6490.1 on (date).”
	Non-Mental Health healthcare provider (e.g., dermatologist)	Refer to SG channels (ref. DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i> , 1 Oct 97, para. 4.3.5)	DoDD 6490.1, para. 4.3.5, states that MHEs requested by non-Mental Health healthcare providers <u>not</u> part of the member's chain of command are <u>not</u> covered by DoDD 6490.1 guidance. Complaints involving these providers should be referred to SG for disposition IAW AFI 90-301, Table 2.9.	Not applicable.

ATTACHMENT 3 - Sample Reprisal PAM

Elements	Definitions	Testimony	Documents
<p>1. Did (the military member)(<i>complaint name here-SrA X</i>) make or prepare to make a communication protected by statute?</p> <p>ANSWER: YES</p>	<p>Protected Communication-(1) any <u>lawful</u> (if <i>lawfulness is at issue, use combined definitions at AFI 90-301, Atch 1, Protected Communication and Unlawful Communication</i>) communication to any member of Congress or IG/IG investigative staff or (2) cooperated or otherwise assisted (list out para. 3.13.1.2.1.1. through 3.16.1.2.1.8—if chain of command is at issue, list definition in Atch 1 to AFI) by providing information that the military member reasonably believed he has evidence of wrongdoing. (<i>AFI 90-301, Atch 1, definition of Protected Communication</i>)</p> <p>Make or Prepare-includes circumstances where (1) the military members was preparing a lawful communication or complaint that was not actually delivered or (2) where the member did not actually communicate or complaint but was believed to have done so by management officials (<i>AFI 90-301, Atch 1, definition of Protected Communication</i>)</p>	<p>SrA X (Section III, Tab D-1, p. 1)-complained to IG about Col A's FWA on X May 200X</p>	<p>Section II, Tab B (AF IMT 102-complaint to IG, dated X May 200X)</p>

Elements	Definitions	Testimony	Documents
<p>2. Was an unfavorable personnel action taken or threatened or was a favorable action withheld or threatened to be withheld <u>following</u> the protected communication?</p> <p>ANSWER: YES</p>	<p>Personnel Action-Any action taken on a member of the armed forces that affects or has the potential to affect (for example a threat) that military member's current position or career. <i>(AFI 90-301, Atch 1, definition of Personnel Action contains a non-exhaustive list)</i></p> <p>Unfavorable-negative <i>(Merriam-Webster on-line Dictionary)</i></p>	<p>SrA X (Section III, Tab D-1, p. 3) said rec'd referral EPR in late June 200X</p> <p>Col A (Section III, Tab D-2, p. 5) acknowledged he gave SrA X the referral EPR dated X June 200X</p>	<p>Referral EPR, dtd X June 200X (Section III, Tab E-1)</p>
<p>3. Did <i>(Col A, Commander 1st FS-- subject name here)</i> the official responsible for taking, withholding or threatening the personnel action know about the protected communication?</p> <p>ANSWER: YES</p>	<p>Responsible Management Official (RMO)-RMOs are: (1) officials who influenced or recommended to the deciding official that he/she take, withhold or threaten a management (personnel) action; (2) officials who decided to take, withhold or threaten the management/personnel action or (3) any other officials who approved, reviewed or indorsed the management/personnel action. <i>(AFI 90-301, Atch 1, definition of RMO)</i></p>	<p>SrA X (Section III, Tab D-1, p. 6) stated she told Col A about the PC the day she made it.</p> <p>Col A (Section III, Tab D-2, p. 10) admitted SrA X told him about the PC the day she made it.</p> <p>SSgt Y (Sec III, Tab D-5, p. 4), IO for FWA CDI interviewed Col A as a subject in early Jun 200X</p>	<p>FWA CDI (Section III, Tab E-5) shows Col A interviewed in early June 200X; FWA SUBSTANTIATED against Col A in August 200X</p>

Elements	Definitions	Testimony	Documents
<p>4. Does the evidence establish that the personnel action would</p>	N/A	<p>SrA X was facing a court-martial for theft of government property and</p>	<p>See below.</p>

have been taken, withheld or threatened if the protected communication had not been made? ANSWER: YES		has a PIF a mile long. See below for further info	
4a. Reasons stated by the RMO for taking, withholding or threatening the action?	<i>Note: Focus on RMO's testimony only here!</i>	Col A (Section III, Tab D-2, pp. 7-11) Explained in detail all of SrA X's transgressions during the reporting period MSgt Z, First Sergeant (Section III, Tab D-4, pp. 6-8) corroborated Col A's testimony	SrA X's PIF (Section III, Tabs E- 3 through E-11) includes charge sheet, Art. 15 for AWOL and 6 LORs this reporting period AFOSI ROI # (shows investigated for theft)
4b. Reasonableness of the action taken withheld or threatened considering the complainant's performance and conduct.	Consider using "arbitrary and capricious" standard here.	Col A (Section III, Tab D-2, p. 11) spoke with JAG Capt P (Sec. III, Tab D-6, pp. 5-6) JAG, Chief of Military Justice, who advised Col A	PIF (above)

Elements	Definitions	Testimony	Documents
4c. Consistency of the actions of the RMO with	<i>Note--Look to RMO's actions here. Can also look to practice across the unit, wing,</i>	Col A (Section III, Tab D-2, pp. 12-13)	Referral EPRs of Amn S and R (Section III, Tabs E-12-

past practice.	<i>command or AF if no RMO past practice.</i>	explained 3 rd referral OPR given; similar cases	13); co-conspirators with SrA X, also rec'd referral EPRs this period
4d. Motive of the RMO for deciding, taking or withholding the personnel action.	Motive -something that causes a person to do something (<i>Merriam-Webster Online Dictionary</i>) WHY they did it.	Col A (Section III, Tab D-2, p. 14) says he wanted to send a message to the court-members that this Amn is a "bad apple" Was not happy about FWA complaint, but the EPR was earned MSgt Z, CCF (Section III, Tab D-4, p. 9) says he agrees 110% with EPR and that CC did it for right reasons	
4e. Procedural correctness of the action.	<i>Look to applicable AFI for processing the particular personnel action</i>		AFI 36-3602, Referral EPRs shows followed procedures properly

ATTACHMENT 4 - Judge Advocate (JA) Primer:
“Legal Sufficiency Review” for Inspector General (IG) Investigative Case Files

The purpose of this paper is to provide practical guidance to JAGs who conduct legal reviews of IG investigative case files pursuant to Air Force Instruction (AFI) 90-301, *Inspector General Complaints Resolution*, 8 February 2005. The AFI requires JA to conduct a written “legal sufficiency” review for all IG Reports of Investigation (ROI). One restricting factor is that the JA who conducts the legal review should not be the same JA who advised the Investigating Officer (IO) or was otherwise a subject, complainant or witness in the case. The AFI also requires JAGs to conduct an additional legal review at the Major Command (MAJCOM) Joint Force Headquarters (JFHQ-(State)), Forward Operating Agency (FOA) or Direct Reporting Unit (DRU) levels in cases involving allegations against a colonel (or equivalent), reprisal *or* where a higher authority includes an addendum. Although the AFI does not technically require an additional legal review in cases involving improper mental health evaluation referral or restriction cases, SAF/IGQ strongly encourages this practice.

1. Has each allegation been addressed? (AFI 90-301, para. 2.61.1.1.1)

a. Review:

- **Case File Section III, Tab B** (AF IMT 102, any other complainant submission): What issues did the complainant raise in complaint?
- **Case File Section I, Tab K** (Complaint Analysis): What allegations did the IG craft from the complaint and the complaint clarification?
- **Case File Section III, Tab A** (Appointment letter): What allegations was the IO appointed to investigate?
- **Case File Section II, Tab B** (ROI Background and Allegations): Did the IO actually investigate the allegations the Appointing Authority directed?
- **Case File Section II, Tab C** (Findings, Analysis and Conclusions): Did the IO analyze each allegation in the ROI?

b. Guidance:

- All of the information in 1(a) above should be consistent.
- A common problem is an **“incomplete” investigation**. Return incomplete case files to the IG action officer (AO) for rework when:
 - The IO failed to address the issues that the complainant raised.
 - Ensure that the case file contains documentation as to the disposition of ALL issues raised by the complainant (even if they were invalidated during the complaint analysis stage). Find this in the case file Section I, Tab K, in the Complaint Analysis.
 - The IG may decide to open a separate case on the issues not addressed, in order to press on with the current case. Again, this needs to be explained.
- The IO failed to investigate the allegations the Appointing Authority directed.
- The IO failed to analyze each allegation in the ROI.
- Another recurring issue occurs when either the IO or a later reviewer **“reframes”** or crafts entirely **new allegations**.
 - Did he/she have that authority? (e.g., was the appointing letter amended?) If not, send the case file back to the IG action officer for administrative correction.

- It is possible that the subject will need to be readvised of a new allegation or substantially new information and given an opportunity to respond (para. 2.42.1.2)

2. Does each allegation allege a violation of law, regulation, procedure or policy?
(AFI 90-301, para. 2.61.1.1.2)

a. Review Case File:

- **Case File Section III, Tab B** (AF IMT 102, any other complainant submission): What issues did the complainant raise in the complaint?
- **Case File Section II, Tab B** (ROI Background and Allegations): What are the allegations that the IO actually investigated?
- **Case File Section III, Tab E** (Evidence): Does the evidence include copies of relevant portions of all applicable standards?

b. Guidance:

- Carefully examine the complaint to identify what standards-violations the complainant raised. (This may require research!)
- Do the allegations, as crafted, clearly and concisely identify the complainant's assertions? (AFI 90-301, para. 2.12.1)
- Are the allegations matters properly within the IG purview? (AFI 90-301, Table 2.9)
 - If not, is there further explanation in the ROI as to why this is an IG investigation? Possible reasons why matters not normally in the IGs purview were investigated include:
 - The Appointing Authority designated the IG to conduct the investigation.
 - There are multiple allegations (both IG and non-IG issues) that are so interwoven that it is more appropriate to conduct a single investigation.
- Does each allegation:
 - *Address violation of ONLY ONE standard? (AFI 90-301, para. 2.12.2)
 - *Allege the correct standard? (AFI 90-301, para. 2.12.1.3)
 - Address ONLY ONE subject? (AFI 90-301, para. 2.12.2)
 - List subject's full name and rank?
 - List the date of the alleged violation? (AFI 90-301, para. 2.12.1.4)
 - Provide sufficient notice of how the standard was violated? (AFI 90-301, para. 2.12.1.2)
 - Indicate the full name, rank of the complainant, if applicable?
- If the answer to one of the * items above is "no," the IG will need to reframe the allegation to correct this error. This may require the IG to go back to the Appointing Authority the IO appointment letter amended.

c. Example: Major Jack Hammer, Commander, on or about XX November 20XX, wrongfully downgraded the Enlisted Performance Report of Senior Airman Ima Havintrouble, in reprisal for making a protected communication, in violation of 10 USC 1034.

3. Did the IO reasonably apply the preponderance of the evidence standard in arriving at the findings? (AFI 90-301, para. 2.61.1.1.3)

a. Review:

- AFI 90-301, Attachment 1, definition of Preponderance of the Evidence
- Case File Section II, Tab C (Findings, Analysis, Conclusion)
- Case File Section III, Tab D (Witness Testimony)
- Case File Section III, Tab E (Evidence)
- Case File Section III, Tab C (Chronology, if applicable)

b. Guidance:

- An independent review of all the testimony and evidence is critical.
- Do not rely on *assertions* in the ROI—confirm that the evidence is in the record.
- All factual assertions should have a cite to the record for reviewer reference.
- Ensure that the IO has not “made a case” for his/her position, but rather presented both sides of the story and has made a reasonable judgment call.
- Ensure that there is sufficient evidence available to make a reasonable conclusion. If critical questions have not been asked or information not gathered, then the case is “incomplete”—send it back to the IG action officer for rework.

4. Are the conclusions supported by and consistent with the findings? (AFI 90-301, para. 2.61.1.1.4)

a. Review:

- Case File Section II, Tab C (Findings, Analysis, Conclusion)

b. Guidance:

- Judge advocates should carefully review ROIs against prevailing legal standards. They must ensure the investigative process is properly followed, the analysis of the facts and circumstances is reasonable, and the appropriate legal standards are applied to the facts. If the ROI is legally sufficient, but could have been more thorough in some respect, the JAG should provide this feedback to the IO, through the IG.
- If the JA simply disagrees with the IO’s findings (and conclusions), then document the rationale in the legal review. (AFI 90-301, para. 2.61.3.1) A disagreement is not necessarily the same as “legal insufficiency.”
- While conducting the legal review, JAGs should not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge. Reasonable minds may differ in these cases. If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient.
- If one individual is the subject of multiple allegations, ensure that the findings and conclusions are internally consistent.

5. Does the investigation comply with all legal requirements? (AFI 90-301, para. 2.61.1.1.5)

a. Review:

- AFI 90-301, para. 2.61.
- AFI 90-301, para. 2.71. (for higher headquarters reviews)

b. Guidance:

- The legal requirements are outlined in paragraphs 1-4 above: Has each allegation been addressed? Does each allegation allege a violation of law, regulation, procedure or policy? **Did the IO reasonably apply the preponderance of the evidence standard in arriving at findings?** Are the conclusions supported by and consistent with the findings?
- “Legal” requirements overlap with administrative requirements (discussed below) insofar as AFI 90-301 contains requirements for format, content and objectivity/fairness. It is critical that the JA examine the Quality Review Checklist (QRC) to ensure the case file complies with AFI 90-301.
- Other legal requirements that might be relevant, besides those mentioned, include:
 - Were “suspects” (vice subjects) properly advised of their constitutional or statutory rights?
 - Was the subject given adequate **notice** of the allegations and sufficient **opportunity to respond**? (This includes any “reframed” allegations or allegations added after the subject’s initial interview, either at the base or from a higher review level)
 - If computer evidence was obtained, was it legally obtained? See AFI 33-119

6. Does the investigation comply with all administrative requirements? (AFI 90-301, para. 2.61.1.1.5)

a. Review:

- AFI 90-301, Attachment. 10 (Case File required format)
- SAF/IGQ, MAJCOM, or locally required Quality Review Checklist (QRC)

b. Guidance:

- JAGs should ensure that the IG correctly completed the applicable QRC.
- Generally, administrative errors not render the case file legally insufficient.
- If the case is not administratively sufficient, the JA should return the file to the IO through the IG for rework.

c. Examples (Checklists):

- SAF/IGQ: <https://www.ig.hq.af.mil/igq/IO%20Toolkit/TheReport/ToolkitTheReportMenu.htm>
- ACC/IGQ: <https://ig.acc.af.mil/divisions/igq/Checklist.asp>

7. Are there any errors or irregularities and, if so, what is the legal effect? (AFI 90-301, para. 2.61.1.1.6)

a. Review:

- AFI 90-301, Table 2.22

b. Guidance:

- Most procedural errors or irregularities in an investigation **do not invalidate** it
 - **Harmless errors** are defects in the procedures that do not have a materially adverse effect on an individual’s substantial rights.
 - **Appointment errors** resulting in the appointment of an IO by an unauthorized official can render the investigation void. A properly authorized appointing official may subsequently ratify the appointment.

- **Substantial errors** are those that adversely affect an individual's rights. If the error can be corrected without substantial prejudice to the individual concerned, the Appointing Authority may return the case file to the same IO for corrective action.
- Common IG case file errors include:
 - **Improperly framed allegations.** Allegations may be reframed with the concurrence of the Appointing Authority. Note that reframing an allegation *may* trigger a requirement for notice to the subject and (another) opportunity to respond. The test here is whether the subject was provided with reasonable notice in the original allegation.
 - **Reliance on evidence outside the record.** This is not permissible. If the information is important enough to comment on, then it must be included in the case file. This might require a witness statement.
 - **Unsworn statements.** If any statement is unsworn, the IO should have the witness *adopt* their testimony under oath, in writing.
 - **Summarized testimony.** The testimony of complainant, subject, and key witnesses must be recorded and transcribed verbatim. (AFI 90-301, para. 2.42.2) Other testimony may be summarized, with Appointing Authority approval.
 - **Not all allegations are investigated.** As noted above, send back to the IG action officer as "incomplete."
 - **Witnesses requested by complainant or subject or key witnesses not interviewed.** If the IO failed to provide rationale for failing to interview these people, the case should be returned as incomplete.
 - **Copies of relevant documents/evidence not included in the file.** Anything material to the inquiry must be included, especially copies or extracts of relevant standards (law, policy, regulation alleged to have been violated).

If the case file is not legally sufficient, then the legal review must explain, in sufficient detail, what the IO must do to remedy any issues. Similarly, if the JA finds the case file is administratively insufficient, the legal review must also detail the remedy. If the legal review merely disagrees with the IO's findings and conclusions, then JA will provide the rationale for the disagreement to the Appointing Authority for final determination.

ATTACHMENT 5: -Sample Legal Review of IG Investigative Case File

XX Month 200X

MEMORANDUM FOR APPOINTING AUTHORITY

FROM: (Unit)/JA

SUBJECT: Legal Review of IG Investigation Concerning Allegations of Improper Mental Health Evaluation Referral, Restriction, Abuse of Authority, Reprisal and/or Other Wrongdoing *(Note--use these terms and choose one(s) that summarize(s) the allegation(s))*, ACTS # 200X-XXXXXX

1. We have reviewed the above referenced Inspector General (IG) Report of Investigation (ROI) case file and find it to be legally sufficient. *(If not legally sufficient, briefly state why)* The case may be further processed in accordance with (IAW) Air Force Instruction 90-301, *Inspector General Complaints Resolution*.

2. **BACKGROUND:** *Explain here the parties, allegations and IO's conclusions as well as all the relevant facts of the case.*

a. Complainant, *(Rank/Name)*, was a *(duty position)* assigned to *(unit and base of assignment)*. There were *(#)* subjects. The first subject, *(explain the rank/name(s) of subject(s), their unit(s), and base(s) of assignment and relationship to the complainant)*. Subject number two.... The complaint alleged *(summarize the allegations)*.

b. The investigating officer (IO) determined the allegations were, as follows: *(summarize findings--either substantiated or not substantiated--may have to list these out in bullet format if several)*.

c. *This series of paragraphs should provide whatever background information a reader will need to understand the findings, analysis, and conclusions of the IO or the JA view, if it differs from the IO. **IMPORTANT!!!** Cite the Section, Tab and page number in the Report of Investigation (ROI) to support each fact. (Section III, Tab D-2, p. 2)*

d. *Look to the applicable law to determine what facts are relevant. For example, in restriction, the intent of the responsible management official (RMO) is a factor to consider. Quote what the RMO said he or she meant by their statement.*

3. **(MAJCOMS ONLY) PREVIOUS LEGAL REVIEWS:** *Briefly summarize the lower level legal review and whether the MAJCOM/JA has adopted that same position.*

a. *(Unit)/JA conducted a legal review of the ROI on XX Month 200X. The legal review indicated (Unit)/JA found the IO's conclusions and findings to be legally sufficient. (Section I, Tab B)*

b. (Unit)/JA, however, disagreed with the IO and found Allegation X to be NOT SUBSTANTIATED. As discussed further below, we concur with (the JA, IG or IO's) analysis. (Discuss here whether the lower level JA disagreed with the IO's findings and conclusions on any allegations and whether the Appointing Authority agreed.)

4. STANDARDS: Briefly summarize the applicable legal standards here. These are templates for commonly used standards. (Note: As a style point, some JAGs prefer to include the legal standards in their Analysis or Discussion section, just prior to applying the relevant facts to that standard.)

a. **Reprisal.** Reprisals against military members for making protected communications are prohibited under 10 U.S.C. § 1034. AFI 90-301 sets forth the “acid test” for evaluating reprisal allegations. The “acid test” consists of four questions:

- 1. Did the member make or prepare a communication protected by statute?**
- 2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?**
- 3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?**
- 4. Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?**

When analyzing question 4, the IO is required to consider the following five factors: (a) reasons stated by the responsible official for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant's performance and conduct; (c) consistency of the action(s) of responsible management official(s) with past practice; (d) motive of the responsible management official for the action; and (e) procedural correctness of the action.

If questions 1 through 3 of the “acid test” are answered in the affirmative and question 4 is answered in the negative, a *prima facie* case of reprisal exists. If the answer to any of the first three questions is “no,” reprisal cannot be substantiated. However, where appropriate, the underlying personnel action should then be analyzed to determine whether an abuse of authority occurred.

b. **Abuse of Authority.** (Add this language if citing abuse of authority in the alternative to reprisal or in cases where reprisal was not substantiated) Reprisal is a subset of abuse of authority. As such, even if the facts do not constitute reprisal, they may rise to the level of abuse of authority. (AFI 90-301, para 3.17.1.3.) AFI 90-301 defines “abuse of authority” as an *arbitrary or capricious* exercise of power by a military member or a federal official or employee that *adversely affects* the rights of any person or

that results in personal gain or advantage to the abuser. Courts have interpreted the arbitrary and capricious standard in the context of government agency action under 5 USC § 706, the Administrative Procedure Act (APA).⁹⁶ This precedent can be summarized into a test for abuse of authority:

1. Did the responsible management official's (RMO's) actions either:

- a. Adversely affect the rights of any person? (e.g., demotion, referral OPR, etc.)**

or

- b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)**

and

2. At the time of the action:

- a. Did the RMO act within the authority granted under applicable regulations, law or policy?**

and

- b. Was the RMO's action based on relevant data and factors?**

and

- c. Was the RMO's action rationally related to the relevant data and factors?**

If both Questions 1(a) and (b) are answered "no," then it is not necessary to consider Question 2. If either part of Question 1 ((a) or (b)) is answered "yes", proceed to Question 2. *In answering Question 2, IGs should examine the RMO's action very narrowly, giving the RMO's decision substantial deference (great weight) without substituting one's judgment for that of the RMO.* In so doing, if the answer to Question 2, parts (a), (b) and (c) is "yes," the action should not be considered "arbitrary and capricious." If the answer to any part of Question 2 is "no," then the action was "arbitrary and capricious" (a clear error of judgment) and the action amounts to abuse of authority

⁹⁶ Courts traditionally apply a "narrow and deferential" review of the action and will not substitute its own judgment for that of the agency. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). This narrow review asks whether the government action is "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute." *Id.* The government actor must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)) Ultimately, the reviewing court must find a "clear error of judgment" to find an action arbitrary and capricious. *Id.* See also *Dep't of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002)(discussing arbitrary and capricious standard)).

c. Mental Health Evaluation Referral Procedures:

1. **Coercion:** *AFI 44-901, 1 March 2000*, paragraph 4.1. states, "Supervisory personnel, including commanders, may encourage Air Force members to voluntarily seek mental health care.... Supervisors and commanders may not, however, under any circumstances attempt to coerce members to voluntarily seek a mental health evaluation." To coerce means, "to compel to an act or choice."

Merriam-Webster On-Line Dictionary, <http://www.m-w.com/dictionary>.

Conversely, voluntary means, "proceeding from the will or from one's own choice or consent." *Id.* The U.S. Supreme Court has analyzed voluntariness in both the context of confessions (5th Amendment) and consent searches (4th Amendment) by using the "totality of all the circumstances" test. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (S.Ct. 1973). The military has adopted this approach. U.S. v. Ellis, 57 MJ 375 (CAAF 2002); U.S. v. Radvansky, 45 M.J. 226, 229 (CAAF 1996); Military Rule of Evidence 314(e)(4)[hereinafter M.R.E.].

Military courts have held that the totality of the circumstances include:

- the individual's condition, to include health, age, education, intelligence, experience, length of military service; and
- the conditions of the environment where the exchange took place, including the length of the conversation, the use of force, threats, promises or deceptions, and knowledge of the right to refuse consent

See, e.g., Payne v. Arkansas, 356 U.S. 560, 566 (1958); U.S. v. Watson, 423 U.S. 411, 424-5 (S.Ct. 1976); Schneckloth, 412 U.S. at 226-27; U.S. v. Goudy, 32 M.J. 88, 91 (CMA 1991); U.S. v. Middleton, 10 M.J. 123, 133 (C.M.A. 1981); Mil. R. Evid. 314 (e)(5).

2. **Procedural Violations:** The procedures for referring Air Force members for a command-directed mental health evaluation are outlined in (*cite as alleged: AFI 44-109, paragraph 4, et al; DoDD 6490.1; DoDI 6490.4*)(*Note--refer to SAF/IGQ Guidelines for Framing Mental Health Evaluations to determine whether allegation was properly framed. Then, briefly state the underlying issue and the applicable paragraph.*) In this case the issue is whether the subject, complainant's first sergeant, had the authority to order the complainant to undergo a psychological exam. AFI 44-109, paragraph 4.2 states:

Only the member's commander may direct the member to undergo a mental health evaluation or to submit to involuntary admission to an inpatient medical or mental health (psychiatric) unit. This provision applies to members of the Air Force Reserve and Air National Guard (Reserve members) on active and weekend duty status.

d. **Restriction.** A military member may not be restricted or prohibited from making a protected communication. (10 U.S.C. § 1034; DoDD 7050.6; AFI 90-301, para. 3.16) Proper analysis of a restriction complaint requires an in-depth review of both of the following two issues: (1) **Responsible management official (RMO) intent:** what was the intent of the RMO who allegedly restricted the member?, and (2) **Reasonable complainant's belief (objective standard):** would a reasonable person, under similar circumstances, believe he/she was actually

restricted from making a protected communication based on the RMO's actions? AFI 90-301, para. 3.38.

e. *Discuss, as necessary, any other legal standard alleged, such as Joint Ethics Regulation, an Air Force Instruction etc.*

5. ANALYSIS: *This is an allegation-by-allegation review of whether IO reasonably applied preponderance of the evidence standards to the facts to support IO's conclusions. The analysis should have subsections for each allegation in the ROI.*

a. **Allegation 1:** *On or about XX Month 200X, (Subject Rank/Name), (Subject Unit), restricted (Complainant's Rank/Name) access to appropriate avenues of redress by ordering him or her not to go outside his/her chain of command in violation of 10 USC 1034. (Type the allegation verbatim from the case file. This assists in finding discrepancies. Do this for each allegation.)*

b. *The degree of detail and analysis necessary will be driven by case complexity and thoroughness of the case file. If the JA simply disagrees with the IO's findings (and conclusions), then document the rationale in the legal review. (AFI 90-301, para. 2.61.3.1) A disagreement is not necessarily the same as "legal insufficiency." **While conducting the legal review, JAGs must not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge.** Reasonable minds may differ in these cases. **If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient.** For more details about the mechanics of conducting the case file review, See Judge Advocate (JA) Primer: "Legal Sufficiency Review" for Inspector General (IG) Investigative Case Files (November 2005 ver.)*

c. **(MAJCOMS ONLY):** *MAJCOMS may incorporate lower-level legal reviews by reference and prepare an abbreviated review (if the report is legally sufficient and the lower-level JA thoroughly reviewed the investigation) except for allegations involving reprisal and O-6 subjects. The best practice is for MAJCOMs to conduct complete legal reviews on all allegations involving O-6 allegations and the "Big 3"-- restriction, reprisal and improper mental health evaluation referrals.*

d. **(REPRISAL CASES ONLY)** *The ROI must contain the IO's acid test analysis for each reprisal allegation or the report is not legally sufficient. For example: The IO properly applied the "acid test" to analyze these allegations. Evidence from the IG case file showed that.... Be alert for cases where reprisal is not substantiated, but there is evidence of abuse of authority, as defined in AFI 90-301, Terms. Review abuse of authority in the alternative if reprisal is not substantiated.*

e. *Always include a conclusion for each allegation, such as: For all of these reasons, we concur with the IO's assessment that Allegation 4 should be **SUBSTANTIATED** for restriction.*

6. ERRORS AND ANOMALIES: *The legal review must ensure the investigative process was properly followed, the analysis of the facts and circumstances is reasonable, and the appropriate legal standards were applied to the facts. If the ROI is legally sufficient, but could have been more thorough in some respect, the JAG should provide this feedback to the IO in this section. For common IG case file errors, see: Judge Advocate (JA) Primer: "Legal Sufficiency Review" for Inspector General (IG) Investigative Case Files. Always include a statement about the effect of these errors on the overall legal sufficiency, such as: We note that the Investigating Officer (IO) failed to properly tab the file in accordance with Attachment 10 to AFI 90-301. We find that this error does not cause this ROI or the investigation to be legally insufficient.*

7. CONCLUSION: The report of investigation is legally sufficient. The IO has complied with all applicable legal and administrative requirements in conducting this investigation. The report addresses all of the matters under investigation and the findings are supported by a preponderance of the evidence. Conclusions reached are consistent with those findings. *(If not, discuss what specific steps are needed to make the ROI legally sufficient. The IO should be able to take your legal review as a road map to correct his/her report.)*

NAME, Rank, USAF
Duty Title

I concur.

NAME, Rank, USAF
Staff Judge Advocate

Attachment:
Case File

ATTACHMENT 6 - Matrix: Levels of Legal Review Required

Type:	Base Level	MAJCOM, JFHQ-(State), DRU or FOA	SAF/IGQ	Rationale
Reprisal Allegation	Yes (N.1)	Yes (N. 2)	Maybe (N. 3)	DoD is final review authority.
Allegation involving O-6, O-6 Select or GS equivalent subject (any wrongdoing)	Yes (N.1)	Yes (N.2)	Maybe (N.3)	High profile and interest cases; SOUIF implications
Restriction Allegation	Yes (N.1)	Recommended (N. 4)	Maybe (N.3)	DoD reviews (programmed to be final review authority in draft DoDI 7050.6)
Improper Mental Health Evaluation Allegation	Yes (N. 1)	Recommended (N. 5)	Maybe (N.3)	DoD reviews
Abuse of Authority Allegation	Yes (N. 1)	Maybe (N.6)	Maybe (N.3)	Typically is in the alternative to reprisal, which DoD reviews as final authority
Any non-Big 3 (reprisal, restriction, or improper MHE) or O-6 Allegations	Yes (N.1)	Maybe (N.6)	Maybe (N.3)	
RCA	Recommended (N.7)	Maybe (N.7)	Maybe (N.3)	All RCAs that recommend dismissal of reprisal go to DoD for final approval
NAF or higher authority writes an Addendum	N/A	Yes (N.2)	Maybe (N.3)	All disputed findings in case file must be resolved.

Notes:

1. AFI 90-301, para. 2.6.1.1. requires JA to conduct a written “legal sufficiency” review for all IG ROIs.
2. AFI 90-301, para. requires JA to conduct an additional independent legal review at the Major Command (MAJCOM) Joint Force Headquarters (JFHQ-(State)), Forward Operating Agency (FOA) or Direct Reporting Unit (DRU) levels in cases involving allegations against a colonel (or equivalent), involving reprisal, *or* where a higher authority includes an *addendum* (such as when higher headquarters disagree with lower-level findings). (AFI 90-301, para. 2.61.4., 2.71.3. and 2.72.1.)
3. The SAF/IGQ legal advisor reviews all IG case files forwarded to SAF/IGQ, regardless of the type of allegation. The legal advisor, in his or her discretion, may choose to issue a separate written legal opinion for HQ JAA signature. Typically, this occurs in cases involving disagreement between the base and HHQ levels, containing significant legal or administrative deficiencies or where SAF/IGQ acts as the MAJCOM (for all ANG and USAFA cases). The SAF/IGQ legal advisor also reviews all RCAs forwarded to SAF/IGQ, that recommend dismissal of reprisal allegations. In his or her discretion, the SAF/IGQ legal advisor may issue a written legal opinion to support dismissal or recommend investigation.
4. The AFI conflicts on whether an additional independent legal review is required in restriction cases or whether a MAJCOM or HHQ JA can “adopt” a lower level legal review. (AFI 90-301, para. 2.61.4; *but see* para. 3.39.2) However, in the draft DoDI 7050.6, DoD will soon become the final approval authority in all restriction cases. SAF/IGQ strongly encourages MAJCOMs, FOAs and DRUs to conduct an additional legal review for all restriction allegations.
5. The AFI does not currently require an additional review in cases involving improper MHE referral cases. These cases are reviewed at the DoD level. SAF/IGQ strongly encourages MAJCOMs, FOAs and DRUs to conduct an additional legal review for all MHE.
6. The MAJCOM/JA, in its discretion, may choose to conduct a legal review in cases involving abuse of authority or any non-Big 3/O-6 allegations. Typically, this will occur in “mixed cases”—those involving Big 3 or O-6 and other allegations. SAF/IGQ strongly encourages MAJCOMs, in “mixed cases,” to conduct a written legal review of the entire case file, not just the Big 3 or O-6 allegations.
7. While the AFI does not require a “legal review” for RCAs, SAF/IGQ strongly recommends, at a minimum, a base level legal review of any RCA that recommends dismissal of any reprisal allegations. All such RCAs get forwarded, through channels, to DoD, for final approval. For this reason, MAJCOMs or SAF/IGQ may choose to conduct an independent review and/or issue a written concurrence or dissent. Any disagreements should provide a sufficient rationale.

The Secretary of the Air Force
Office of the Inspector General
Complaints Resolution Directorate



*Inspector General
Guide for
Investigating Officers*

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Foreword

The Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) administers the Air Force Inspector General (IG) Complaints Resolution Program for the Air Force community. The IG Complaints Resolution Program is a leadership tool to promptly and objectively resolve problems affecting the Air Force mission. When necessary, the IG accomplishes this through objective fact-finding in the form of IG complaint analyses and investigations that address both the concerns of complainants and the best interests of the Air Force. AFI 90-301, *Inspector General Complaints Resolution* (8 February 2005), establishes the procedural requirements for the Complaints Resolution Program and IG investigations. This guide focuses on the duties and responsibilities of the Investigating Officer (IO). It does not supersede the direction contained in AFI 90-301, but hopefully presents the IO with a guide more specifically tailored to his or her important duties.

I would like to formally acknowledge the following personnel for their assistance with and dedication to this project: Mr. (b)(6) (AF/JAA), Col (b)(6) (Director, SAF/IGQ), Col (b)(6) (SAF/IGS), Lt Col (b)(6) (SAF/IGS), Lt Col (b)(6) (AF/JAA), Ms. (b)(6) (SAF/IGQ-FOIA), Mr. (b)(6) (b)(6) (AMC/IGQ), Mr. (b)(6) (AFRC/IGD), and Mr. (b)(6) (12 AF/IG).

//signed//

(b)(6) Major, USAF
Legal Advisor, SAF/IGQ

Chapter 1: Introduction

- 1.1. Guide Overview.** The intent of this guide is to provide Investigating Officers (IOs) investigating Inspector General (IG) complaints the tools they need to effectively conduct IG investigations.
- 1.2. Authority to Conduct IG Investigations.** The Secretary of the Air Force has sole responsibility for the function of the Inspector General of the Air Force (Title 10, United States Code, Section 8014). When directed by the Secretary of the Air Force or the Chief of Staff, the Inspector General of the Air Force (SAF/IG) has the authority to inquire into and report upon the discipline, efficiency, and economy of the Air Force and performs any other duties prescribed by the Secretary or the Chief of Staff. Pursuant to AFI 90-301, *Inspector General Complaints Resolution*, authority to investigate IG complaints within the Air Force rests with IG offices at all organizational levels. To conduct an IG investigation, IOs must be appointed in writing by an “appointing authority,” typically a wing commander or, when delegated this authority, the wing IG.
- 1.3. Purpose of the IG System.** An IG investigation is one aspect of the IG complaints resolution system. IGs have a number of tools to resolve complaints, including dismissal, referral, assist, and transfer. The IO normally only becomes involved when these other tools have not resolved the complaint, and the IG has determined an investigation is appropriate. IG investigations are administrative in nature – they are fact finding rather than judicial proceedings. They are not criminal proceedings in which proof beyond a reasonable doubt is required but administrative investigations providing commanders with facts upon which to base decisions. Investigations require collection of documents, taking sworn testimony from complainants, subjects, and other witnesses, and documentation of the findings in a Report of Investigation (ROI).
- 1.4. Standard of Proof.** The standard of proof for an IG investigation is a “preponderance of the credible evidence.” When it is more likely than not that events have occurred as alleged, a preponderance of the evidence exists, and the IO may consider the allegation to be substantiated. Put another way, the IO may substantiate a finding when the greater *weight* or *quality* of the evidence indicates the alleged misconduct occurred. When weighing the evidence, IOs should consider factors such as witness demeanor, the witness’s knowledge, bias, motive, intent and the ability to recall and relate events. At all times, you as the IO may use your own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses you interview. However, you must fully document these inferences in the ROI.

Chapter 2: General Considerations.

2.1. Matters Appropriate for IG Investigation. Complaints of any one of the “Big Three” issues – reprisal, restriction, or improper mental health evaluation referral – must be handled within the IG system. At their discretion, IGs may also choose to investigate other types of alleged wrongdoing, including abuse of authority; fraud, waste or abuse; and other violations of a law or regulation. AFI 90-301 more fully lays out what matters are and are not appropriate for IG investigation; this guide seeks to merely highlight certain issues for IOs.

2.1.1. Reprisal. Reprisal is a violation of Title 10 of the United States Code, Section 1034. Reprisal occurs when a responsible management official (RMO)¹ takes (or threatens to take) an unfavorable personnel action; or withholds (or threatens to withhold) a favorable personnel action, to retaliate against a member of the armed forces who made or prepared to make a protected communication. Any lawful communication, regardless of the subject, to an IG or to Congress, is considered protected. Additionally, a protected communication occurs when a member who reasonably believes he/she has evidence of a violation of law or regulation (regardless of whether he/she is the victim), makes a lawful communication disclosing this to an authorized recipient, such as a commander or first sergeant.

AFI 90-301 sets forth an “acid test” for evaluating reprisal allegations. The “acid test” consists of four questions:

1. Did the member make or prepare a communication protected by statute?
2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?
3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?
4. Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

When analyzing question four, the IO is required to consider the following five factors: (a) reasons stated by the RMO for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant’s performance and conduct; (c) consistency of the action(s) of RMO(s) with past practice; (d) motive of the RMO for the action; and (e) procedural correctness of the action. If

¹ Responsible Management Official and other terms used in this guide are defined in Attachment 1 of AFI 90-301. Definitions can be extremely helpful to you in analyzing whether an allegation is substantiated.

questions one through three of the “acid test” are answered in the affirmative and question four is answered in the negative, reprisal exists. If the answer to any of the first three questions is “no,” or if the answer to question four is “yes,” reprisal cannot be substantiated. However, where appropriate, the underlying personnel action should then be analyzed to determine whether an abuse of authority occurred.

2.1.2. Restricted Access (Restriction). 10 U.S.C. §1034 also states that a military member may not be restricted or prohibited from making a protected communication to authorized recipients. Restriction can result from either private or public statements that may reasonably discourage Air Force members from using appropriate grievance channels, such as MEO, IG, etc. Proper analysis of these complaints requires an in-depth review of both of the following issues: (1) What was the intent of the RMO who allegedly restricted the member?; and (2) Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a protected communication based on the RMO’s actions? An example of restriction would be if, during a commander’s call, a squadron commander were to tell the squadron that all problems must go through him or her first. However, if during a commander’s call, the commander were to tell the squadron that he or she prefers to solve problems within the chain of command and also informs the squadron that they are free to file complaints by any other means, without fear of retribution, this would not constitute restriction.

2.1.3. Improper Mental Health Evaluation (MHE) Referrals. These cases typically involve coercion, improper procedures, or reprisal.

2.1.3.1. Coercion. Commanders and other supervisory personnel may encourage an individual to seek an MHE on his or her own, but they may not coerce the member to do so.² The difference between encouragement and coercion is often very difficult to discern. Typically, when an Airman reports to Life Skills, he or she completes an intake form that asks whether the Airman has come to Life Skills voluntarily. While an indication on the form that the Airman is there voluntarily may be compelling evidence, it does not necessarily end the inquiry. In deciding whether a commander or supervisor’s action constitutes coercion, IOs might consider factors such as the complainant’s age, intelligence, experience, length of military service, the environment, and whether the complainant knew of his or her right to refuse to voluntarily seek a mental health evaluation. A classic example of coercion is as follows: A1C Gant has been acting strangely. He recently told his commander that he was “losing it,” and going to “go postal on someone.” The commander meets with A1C

² See AFI 44-109, Paragraph 4.1.

Gant at 1600 on a Friday before a three-day weekend. He tells A1C Gant that he's not getting released for the weekend until he "volunteers" to go to mental health and get checked out. A1C Gant, feeling he has no choice in the matter, "volunteers" to go to mental health, escorted by his two supervisors.

2.1.3.2. Improper Procedures. If a commander suggests that a member obtain help at Life Skills and the member refuses, the commander is left with the option of referring the member for a mental health evaluation (MHE). Only a commander can "direct" a member to undergo an MHE.³ Special procedures apply to involuntary referral of military members for a MHE, and these procedures vary based on whether the situation is an "emergency" or a "non-emergency." In all MHE referral cases, the commander is required to notify the member in writing of his or her rights.⁴ A procedurally improper MHE referral case will ordinarily not involve an in-depth review of the commander's intent or motives – in many cases involving substantiated MHE referral allegations, the commander or other personnel had good intentions toward the member but violated a procedural requirement.

2.1.3.3. MHE as Reprisal. Sometimes a complainant will allege his or her commander referred him or her for an MHE in reprisal for making a protected communication. IGs will treat such cases as potential violations of 10 U.S.C. §1034 and frame the allegation as reprisal.

2.1.4. Abuse of Authority. IGs often receive complaints that a commander or other person in a position of authority has abused his or her authority through some action. IGs have discretion whether to investigate abuse of authority allegations or whether to handle them through some other means, such as referral to a commander. The definition of abuse of authority in the Air Force is "an arbitrary or capricious exercise of power by a military member or a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to the abuser."⁵ A suggested test that expands upon this definition is included as Attachment 2 to this guide. An example of abuse of authority may be if a supervisor writes a poor EPR on an Airman for refusing to take part in an off-duty squadron booster club fundraising event that is supposed to be voluntary. Abuse of authority is not a "catch-all" standard for actions that just don't seem fair – many "unfair" actions will not rise to the level of an abuse of authority. In addition, it is often possible that a standard other than abuse of authority might better describe the misconduct alleged. For example, some

³ See AFI 44-109, Paragraph 4.2.

⁴ See AFI 90-301, Paragraph 3.26.2 and DoDI 6490.4, Paragraph 6.1.1.4.1.

⁵ See AFI 90-301, Attachment 1.

abusive conduct might actually rise to the level of violating Article 93 UCMJ, *Cruelty and Maltreatment*.⁶

2.1.5. Fraud, Waste or Abuse (FWA).⁷ As with abuse of authority, IGs are granted discretion whether to investigate fraud, waste or abuse complaints or whether to handle them through some other means. Fraud is any intentional deception designed to unlawfully deprive the Air Force of something of value, or to secure a benefit, privilege, allowance, or consideration to which an individual is not entitled.⁸ Actions that constitute fraud may be more appropriately framed against other regulations and statutes, such as the Joint Ethics Regulation or the Uniform Code of Military Justice. “Abuse” is the intentional wrongful or improper use of Air Force resources.⁹ Examples include misuse of rank, position or authority that causes the loss or misuse of resources such as tools, vehicles, computers or copy machines. Abuse allegations may involve unnecessary purchases, such as disposing of newly acquired government furniture and acquiring new furniture merely because the supervisor’s tastes have changed. “Waste” is the extravagant, careless or needless expenditure of AF funds or the consumption of AF property that results from deficient practices, systems controls or decisions, as well as practices not involving prosecutable fraud.¹⁰

2.2. Matters Not Appropriate for an IG Investigation. The IG complaints resolution system is not an appropriate avenue for all types of complaints. AFI 90-301, Table 2.9, lists several types of complaints that are not appropriate for the IG complaints resolution system. In addition, if the member’s complaint centers on an adverse action for which another grievance channel is available, IGs generally must refer the complainant to the other grievance channel. Finally, if there is an allegation against an O-7 select or above, these issues must be referred to SAF/IGS (Senior Officer Inquiries). IOs should feel confident that any allegations they are directed to investigate are proper IG matters, as determining what matters are and are not appropriate for an IG investigation is the IG’s responsibility, not yours as the IO. If you are investigating an IG matter and discover evidence of other possible wrongdoing, you must confer with your IG and JAG to determine who should investigate that wrongdoing.

⁶ The explanatory notes of Article 93, UCMJ, state that violations of this article include assault, improper punishment, and sexual harassment. It also cautions that imposing “necessary or proper duties” does not constitute an Article 93 violation even though the duties might be arduous or hazardous.

⁷ FWA is not solely an IG matter. Depending on the circumstances, commanders or the Air Force Office of Special Investigations (AFOSI) might investigate FWA as a criminal matter. (AFI 90-301, Table 2.10, Rule 8)

⁸ See AFI 90-301, Attachment 1.

⁹ See AFI 90-301, Attachment 1.

¹⁰ See AFI 90-301, Attachment 1.

Chapter 3: The Investigative Team – Qualifications and Responsibilities

- 3.1. Investigative Team Overview.** A successful IG investigation requires the efforts of several key players: the appointing authority, the IG, the IO, the legal advisor, a technical advisor (if needed) and administrative assistants (if resources permit). This chapter addresses the qualifications and responsibilities of each team member.
- 3.2. Appointing Authority.** AFI 90-301, Paragraph 1.5, lists who may serve as an appointing authority. Most often, the appointing authority will be a wing commander, or the installation IG, if the wing commander appoints the IG in writing for this responsibility. The appointing authority directs an IG investigation and appoints investigating officers through an appointment letter, and approves the ROI once it is complete. You will receive an appointment letter from the appointing authority containing framed allegations, a deadline, and other instructions. The appointment letter serves as your source of authority to conduct the investigation.
- 3.3. The IG.** The IG is responsible for training you and ensuring you succeed in your role as IO. The IG will provide you with facilities, help you arrange witness interviews, and provide administrative support. The IG is charged with training IOs and performing a quality review of all ROIs.
- 3.4. The Legal Advisor.** Legal advisors play a critical role in the IG investigative process. Every IO is assigned a legal advisor who will assist you with all aspects of your investigation. The legal advisor should make him or herself readily accessible during the investigation and should provide an “informal” legal review of your report of investigation (ROI) to highlight any areas for improvement or legal issues. After your report is complete, another attorney (normally a different one from the legal advisor) will conduct a formal legal review of the ROI.
- 3.5. The IO.** The IG, legal advisor, and others provide support, but you, the IO, are ultimately charged with investigating the matter at hand. An IO must be equal or senior in grade to the most senior subject (unless the IG obtains a waiver), must not be in the chain of command of any subject, and must be unbiased and objective. The IO must have a substantial breadth of experience, exceptional maturity, and demonstrated sound judgment.¹¹ The IO also must be fully available to conduct the investigation – not scheduled for leave, temporary duty, separation, retirement or other commitments that would detract from the investigation. If you believe you have duties that preclude you from giving the investigation your full attention, or if you have an existing relationship with a witness, complainant or subject that might reflect negatively on your objectivity, you need to raise this issue immediately to the IG.

¹¹ See AFI 90-301, Attachment 1.

3.5.1. Investigative Duties. Throughout the course of the investigation, you will:

- Thoroughly gather all necessary facts, through witnesses, documents or other items of evidence, to help the appointing authority make an informed decision.
- Investigate only the items outlined by the appointing authority directs. If new or different issues come to light during the investigation, the IO has a duty to notify the appointing authority for further guidance.
- Consult with the legal advisor when legal issues arise, such as whether to read Article 31 rights or how to confront a witness who refuses to testify. You should work closely with the legal advisor throughout the investigation.
- Be professional at all times. This requires you to be objective, neutral and fair. You should adopt a friendly, but not familiar, attitude. You should not disclose witness identities or opinions; deceive, browbeat, threaten, coerce, or make promises; or shout, lose composure, or otherwise show emotion or argue.
- Treat all information gathered as part of the IG investigation process as “For Official Use Only.”

3.5.2. Post-Investigative Duties. Once you have gathered the evidence, you will:

- Write an ROI that considers both sides of the issue, supports your findings based upon the preponderance of the evidence, and sufficiently documents how you reach your conclusions.
- Organize the case file in accordance with guidance found in Attachment 10 to AFI 90-301.
- Obtain a legal review of the ROI from a legal advisor.
- Forward the case file to the appointing authority for action.

3.6. Technical Advisor. It may be necessary for the appointing authority to appoint a subject matter expert to assist you. The appointing authority should provide contact information for technical advisors in your appointment letter or, if a later need arises, in a separate technical advisor appointment letter. For example, if the allegation deals with improper official travel, experts in the servicing base finance office can identify and explain applicable provisions of the travel regulations. Because technical advisors are part of the investigative team, they also have an obligation to protect the privacy of the parties and witnesses. Technical advisors can provide testimony like any other witness or, upon the

request of the IG, provide a separate written technical review of the case file after you write the ROI.

3.7. Administrative Assistant. Depending upon case complexity, the appointing authority or IG may assign you one or more administrative assistants. An administrative assistant can facilitate witness interviews, copy necessary documents and even act as a witness to the testimony. As part of the investigative team, assistants have an obligation to protect the privacy of all concerned. Normally, an administrative assistant will be appointed in writing, and the appointment letter will delineate the administrative assistant's obligations. During the investigation, administrative assistants should report to the IO.

Chapter 4: Initiating the Investigation (The Appointing Authority)

- 4.1. Frame the Allegations.** Assisted by a legal advisor and IG, the appointing authority frames allegations *before* appointing an IO. You will receive the allegations as an attachment to your IO appointment letter. It is vitally important that you receive clear allegations to provide you with a direction for your investigation. An allegation must identify a specific person and clearly state what that person allegedly did wrong. The most common weakness in IG investigations is that allegations are vague, poorly worded, or allege conduct that does not amount to wrongdoing. Allegations should precisely identify who the subject is, what that person is alleged to have done, what standard was violated, and when the wrong allegedly occurred.¹² If you do not understand the allegations, or if as the investigation proceeds your allegations do not seem to provide you with enough direction, consult with the IG and your legal advisor.
- 4.2. Appointment Letter.** Once the appointing authority decides an investigation is needed, he or she appoints an IO in writing. The appointing authority should provide you a letter of appointment. The appointment letter generally outlines the scope of the investigation, provides the name and contact information of your legal advisor, the name and contact information of your technical advisor (if any), authorizes you to collect evidence, requests recommendations if desired, establishes the ROI completion suspense date and states that the investigation is your primary duty until completion. The appointment letter is your authority to conduct an investigation, swear witnesses, and examine and copy documents, files, and other data relevant to the investigation. For purposes of the investigation, you are an extension of the appointing authority. Because you may need to show the appointment letter to other agencies to obtain their information, the appointing authority should include the allegations to be investigated as an attachment to the appointment letter, thereby protecting the privacy of other parties. You can then show the appointment letter to any person to obtain information without disclosing the actual allegations or names of people involved. A sample appointment letter is located at Attachment 6 to AFI 90-301.

¹² See AFI 90-301, Paragraph 2.12.1.

Chapter 5: Conducting the Investigation

5.1. Preparation Tips. The end result of an IG investigation typically reflects the amount of preparation put into the investigation. You should meet with your legal advisor and IG for any training and for assistance in forming an investigative plan, proof analysis and interview questions before initiating the investigation.

5.1.1. Investigative Plan. AFI 90-301, Attachment 7, contains a sample investigative plan. The main idea of the investigative plan is to provide a road map for the IO – what facts you know at this point, what standards are at issue, what evidence you will need to gather, and when you plan to accomplish key tasks. Your IG should be able to provide you with assistance in developing an investigative plan, and may have begun to develop one for you already.

5.1.2. Proof Analysis Matrix (PAM). The PAM is a tool for identifying the evidence needed to prove or disprove each allegation. It affords a reference outline for the analysis section of the ROI. The PAM should be thoroughly developed and revised continuously throughout the investigation. As such, it will serve as a solid template for the ROI. The preferred practice is to build the proof analysis around the “elements” of the law, rule or policy violated, including any definitions. Definitions are a critical starting point to determining whether a law, rule or policy was violated. For example, in a reprisal case, the PAM would be structured around the four-part “acid test” laid out in AFI 90-301, and would include definitions of such key terms as “protected communication” and “unfavorable personnel action.” Understanding the law, rule or policy is a prerequisite to determine whether it was violated. The legal advisor is invaluable in this area. A sample PAM for a reprisal case can be found at Attachment 1 to this guide.

5.1.3. Question Formulation. Work closely with your IG and legal advisor when preparing interview questions to ensure the questions are relevant, organized, thorough, and in correct form.

5.1.3.1. Relevance. The key to relevance is whether the information sought might have an effect on the outcome of the case. The interview questions should focus on the facts and circumstances surrounding, and leading up to, each allegation. Information that relates to the elements laid out in the proof analysis will always be relevant.

5.1.3.2. Organization. The best interviews start with background and build up to the pivotal question or issue. Ask pertinent background questions first. Work the witness toward the more difficult subjects. While there is no cookie-cutter method to ensure effective interviews, the recommended approach is to review events chronologically rather than by allegation (e.g., Thursday, then Friday, rather than allegation 1, then allegation 2). Jumping from allegation to allegation often results in skipping around in time and can be confusing to the person being

interviewed and reviewers reading the transcript. Using a chronology is helpful in keeping questions in a logical sequence.

5.1.3.3. **Thoroughness.** Thoroughness is required in all IG investigations. Look beyond who, what, when, where and how. Investigations need to address the “why,” regardless of whether motive has been specifically outlined as an element in a proof analysis matrix. Motive is always relevant. Be sure to:

- Pursue an issue when there is an indication the witness has additional information
- Find the source of second-hand information so that first-hand information may be obtained
- Determine the basis for witness opinions (i.e., A: “In my opinion, he’s not a truthful person.” Q: “What leads you to believe that?” A: “He lied to me three times.” Q: “Explain”)
- Ask for clarification when answers contain technical jargon, acronyms, slang or colloquial expressions
- Seek facts, not conclusions (i.e., A: “He was drunk”; Q: “What gave you that impression?” A: “He smelled like beer, his eyes were bloodshot, he was slurring his speech and couldn’t stand up without swaying.”)

5.1.3.4. **Form of Interview Questions.** Let the witness tell what happened and refrain from asking questions that suggest answers. Questions that either assume the answer or leave the witness no choice but to state a particular response (yes or no) are leading questions. Leading questions are generally less useful in getting at the truth, because the end goal is for the witness to testify, not you. Do not ask compound questions. A compound question is one that contains several questions in one. Compound questions can confuse the witness and often result in one answer, making it impossible later to determine which question the witness answered (e.g., Q: “Did you take Amn Dempsey to the store with you, or did you go alone?” A: “Yeah.”)

5.2. Evidence Collection. Evidence is anything from which you determine the facts in a case. Evidence can be testimonial or physical, direct or circumstantial. Seek evidence that is accurate and, where possible, comes from individuals with direct knowledge. You should evaluate evidence while collecting it, and updating your proof analysis as you collect evidence is an excellent way to evaluate your evidence. Evidence collection often has a ripple effect – the disclosure of one piece of evidence often drives the need to confirm it, or refute it, through other evidence. Any evidence that is relevant should be gathered, even if it is hearsay, circumstantial, photocopied, or otherwise not the “best evidence.” The best practice is then to trace that evidence back to a more reliable source. (e.g., Q: “Do you know anything about Col McBride threatening A1C Oliver with an

Article 15?” A: “I heard something about that, but I wasn’t there.” A: “Can you tell me who told you about that so I can interview that person?”)

5.2.1. **Testimony.** In IG investigations, the majority of evidence comes from witness testimony. Testimony includes oral statements, written statements and IO summaries of witness interviews. Testimony can be powerful, as in the case of a hand-written confession. On the other hand, testimony is based on a person’s memory, so it may be incorrect or incomplete. Before testifying, all witnesses should receive a Privacy Act statement (see Attachment 5 for a sample.)

5.2.1.1. **Witness Availability.** Work through the appointing authority to make the witness available for interviews. Most witnesses are willing to cooperate with an IO. In the case of the unwilling witness, the means and ability to require their cooperation will vary depending on the witness’ status.

5.2.1.1.1. **Active Duty Military.** The witness’ commander can order the witness to testify. Military witnesses have a duty to testify and can only refuse to answer questions that may incriminate them. (See paragraph 2.1.5, Rights Advisement.)

5.2.1.1.2. **DoD Civilians.** A DoD civilian employee’s commander can direct the witness to testify. Like military witnesses, DoD civilians have a duty to testify and can only refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.3. **Civilians.** Civilians not employed by the government cannot be ordered or directed to testify. This group includes contractor employees, dependents of active duty military, non-DoD affiliated civilians, and non-appropriated fund (NAF) employees. The IO can always invite civilians to testify, but if the person refuses, the IO has no power to make them testify. (See Attachment 4, witness invitation letter.) Like all other witnesses, civilians can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.4. **Retirees.** Retirees, unless they are recalled to active duty, cannot be compelled to testify. As in the case of civilians, the IO can invite a retiree to testify, but if the person refuses, the IO cannot force them. Like all other witnesses, retirees can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.5. **Minors.** Minors (usually defined as people under age 18) fall into the category of “civilians,” and the same rules apply. Additionally, even if a minor agrees to testify, the IO must first obtain the consent of a parent. A parent or guardian must be present for all interviews of minors. Like all other witnesses,

minors can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.6. Air National Guard and Reserve Personnel. Air National Guard or Reserve component members not in a duty status (Annual Training or Inactive Duty for Training) cannot be required to participate in an IG investigation. However, Guard or Reserve members who are in full-time civilian status (such as Air Reserve Technicians) can be directed to appear, as with any civil service employee. If a Guard or Reserve member who is not in military or civil service status does not agree to participate while on non-duty status, the IO can request the owning commander place the member on orders to provide testimony. Again, Air National Guard and Reserve personnel may refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.2. Order of Witnesses. Each witness must be interviewed individually. AFI 90-301 requires you to interview the complainant first and the subjects or suspects last. The recommended sequence is: (1) the complainant; (2) subject matter experts; (3) regular witnesses; (4) subjects or suspects.¹³ Inexperienced IOs are inclined to resolve cases quickly by talking to subjects or suspects first. This is a bad idea. Interviewing the subject last ensures you have learned the necessary information to ask the right questions. This process can also enhance truth telling, as people are more likely to be truthful if they know the IO has information from others. If the subject interview is last, you can also challenge any statements that are inconsistent with other evidence you have already received. Finally, interviewing the subject last allows you to advise the subject of all adverse information against them and decreases the need to re-interview.

5.2.1.3. Interview Locations. Choosing the correct interview location can prevent a myriad of problems. The IG should provide a private interview room. In general, it is preferable to interview a witness at the IG-provided room rather than at the witness's duty location. If the witness is located at another installation or location, you have several options: (1) personally interview the witness at their location to observe their demeanor, which can be an important indicator of truthfulness; (2) delay the interview until the witness returns, if their absence is temporary and time permits; (3) conduct a telephonic interview; (4) mail, e-mail or fax the witness written questions and have them provide a sworn, written response; or (5) ask the witness to provide a sworn statement. In general, if a face-to-face interview is simply not possible, telephonic interviews are the best option. However, the IO can arrange to have an IG at the witness's location

¹³ AFI 90-301, Paragraph 2.42.

observe the witness's demeanor during the interview and verify the identity of the witness. If a telephone interview of a subject is conducted, you still must arrange to hand off the subject to the commander or a representative (See paragraph 2.1.9 below.)

5.2.1.4. **Testimony Format.** All witnesses must be placed under oath before testifying.¹⁴ This puts the witness on notice that the investigation is a serious matter and lets him or her know he or she could be criminally liable for failing to tell the truth. AFI 90-301, Attachments 8, 9, and 28 have interview formats for witnesses that include oaths. Explain to the witness before the read-in that you will be asking the witness to swear or affirm (the main difference being that affirming does not include the phrase "so help you God.") If a witness, previously sworn, must be re-interviewed, you do not need to re-administer the oath, but can simply remind the witness that he or she is still under oath and obtain the witness's acknowledgement that he or she understands. All witness interviews should be recorded.¹⁵ You must arrange to transcribe the testimony of the complainant, subject/suspect, and all key witnesses.¹⁶ Digital recorders can make transcription easier and less expensive, and are now considered the norm in IG investigations. For witnesses whose testimony is not a central part of the investigation, summarized testimony may be acceptable at the discretion of the appointing authority. See Attachment 6 for a template for summarized testimony.

5.2.1.5. **Rights Advisement.** During any IG investigation, rights advisement for subjects, suspects or witnesses may become an issue. Work very closely with the legal advisor whenever there is a question about whether an individual should be read his or her rights.

5.2.1.5.1. **Military.** The mere fact that someone is the subject of an IG investigation does not automatically trigger the need for a rights advisement. The test is whether the IO, at the time the military subject is interviewed, either believes or reasonably should believe the individual committed an offense under the UCMJ or other criminal code. If so, then the subject or witness should be considered a suspect. You must advise suspects of their Article 31(b), UCMJ rights, using the format in Attachment 9 to AFI 90-301. Cases involving Guard and Reserve personnel are further complicated by their status at the time of the alleged conduct and the time of interview. Consult with the legal advisor in these cases.

¹⁴ AFI 90-301, Paragraph 2.42.2.

¹⁵ AFI 90-301, Paragraph 2.42.2.3.

¹⁶ AFI 90-301, Paragraph 2.42.2.4.

- 5.2.1.5.2. **Civilian.** Even if suspected of an offense, a civilian witness or subject need not be advised of their Fifth Amendment (“Miranda”) rights when interviewed as part of an IG investigation. Such rights are only required in conjunction with custodial interrogations (i.e., interrogations in which the interviewee is not free to leave at will). IG investigation interviews do not meet the threshold requirement for custodial interrogations. Even though you do not need to advise civilian witnesses of their Fifth Amendment rights, they may still invoke such rights and choose to remain silent if circumstances warrant.
- 5.2.1.6. **Third Party Presence During Interviews.** An interview will normally only involve you and the witness. Sometimes a technical advisor or administrative assistant appointed to assist you will accompany you during interviews. Also, while interviewing witnesses of the opposite sex, you may want an assistant present to avoid any appearance of impropriety. Although you can have another person present during witness interviews, that person should not ask questions unless the appointing authority designates that person as an IO.
- 5.2.1.6.1. **Labor Union Representatives.** AFI 90-301, paragraph 2.44, sets out certain situations when labor union representatives may be present for an interview of a civilian who is part of a collective bargaining unit. Work closely with your legal advisor to determine whether a labor union representative should be allowed to be present during an interview and to define the participation that representative may have during the interview.
- 5.2.1.6.2. **Attorneys.** Only a suspect has the right to have an attorney present during an interview. The attorney may not answer questions for the suspect. Witnesses and subjects may consult with their attorneys, but are not permitted to have attorneys present during interviews.¹⁷
- 5.2.1.6.3. **Other Personal Representatives.** As a general rule, third-party representatives for witnesses and subjects are not permitted to be present during IG investigation interviews. Consult with the legal advisor when special circumstances arise, such as a request for a crime victim to have a Victim Witness Assistance Program (VWAP) representative present.
- 5.2.1.7. **Confidentiality.** Communications made to the IO during an IG investigation are not privileged. Witness testimony can be revealed in specific situations, so never promise confidentiality to a witness. However, the disclosure of these communications will be limited. The

¹⁷ See AFI 90-301, paragraph 2.43.

ROI will be marked “For Official Use Only” and treated as closely-held information.¹⁸

5.2.1.8. **Immunity.** General court-martial convening authorities have the authority to grant witnesses immunity from prosecution in exchange for providing testimony. Subordinate commanders do not have this authority, and neither do you. Never make promises to a witness that could be interpreted as *de facto* immunity (e.g., “Don’t worry; you won’t get in trouble.”) If a witness requests immunity or some other protection as a condition to providing a statement, consult with the IG and JA before proceeding.

5.2.1.9. **Chief of Staff Handoff Policy.** CSAF’s 26 November 2002 Policy for Investigative Interviews applies to IG investigations. This policy requires a person-to-person handoff of all subjects and suspects, and any distraught witnesses following an investigative interview. The handoff must take place between the IO and the individual’s commander or the commander’s designated representative. The policy applies to all subjects, suspects, or distraught witnesses, regardless of rank or position. You need to document the handoff in the ROI or during the testimony of the witness. You must arrange for this handoff in advance, and explain it to the subject or suspect up front.¹⁹

5.2.2. **Physical Evidence.** Physical evidence consists of documents, computer records, photographs, and objects (e.g., tools), to name a few examples. While no specific “chain of custody” requirements are imposed on IG investigations, you should still take care to secure evidence as best as possible.

5.2.2.1. **Objects.** Occasionally, an IO will have to collect objects as part of an IG investigation.²⁰ Work with the legal advisor to obtain, secure and store the evidence. Obtain photographs of the objects to include in the case file.

5.2.2.2. **Documents.** Documentary evidence may be in the form of handwritten notes, correspondence, reports, newspapers, inventories and computer records such as e-mails. Written documentation, if authentic, can provide powerful evidence to help you reach a finding. Anytime a witness discusses a particular document during testimony, ensure the testimony identifies the document (e.g., “my letter, dated X, subject X”). If it would be helpful, you can create or have witnesses create documents to illustrate points in the investigation. This is called “demonstrative evidence.” For example, you can have the witness diagram a location and where people were standing at a given time. Other examples of demonstrative evidence include organizational

¹⁸ See AFI 90-301, Paragraph 2.3.

¹⁹ See AFI 90-301, Paragraph 2.46.

²⁰ IOs considering searching and seizing evidence must consult their legal advisor.

wiring diagrams and maps. Demonstrative evidence should be thoroughly and accurately labeled.

5.2.2.3. **Circumstantial Evidence.** Especially in reprisal cases, you will need to prove issues such as motive, intent or knowledge. Because you cannot read minds, the chance of finding “direct” evidence of a person’s state of mind is remote. Instead, you will need to rely largely on circumstantial evidence in such cases. Circumstantial evidence is evidence that tends to prove the existence of a fact, but does not absolutely make it necessarily true. For example, if you are trying to prove that a commander reprised against an Airman, the only direct evidence – evidence that if true would necessarily prove this fact – might be if the commander testifies that he or she did in fact reprise. On the other hand, there may be quite a bit of circumstantial evidence to prove the commander reprised against an Airman, such as: witnesses testified that the commander seemed upset at the Airman’s protected communication; the commander has never responded to any other member of the unit in such a harsh fashion; or the commander has made disparaging comments about the IG system in the past. None of these pieces of evidence proves that the commander necessarily reprised against the Airman – in other words, other explanations are possible – but they may well lead you to conclude that it is more likely than not that the commander reprised. Circumstantial evidence can be as compelling as direct evidence and often will be at the center of your analysis.

5.2.2.4. **Computer Evidence.** You can obtain e-mails, electronic documents, or other evidence on a computer system by asking the complainant or another witness to provide copies of such evidence. Occasionally, you may want to access a subject or witness’s e-mail or computer files without their consent to obtain evidence. You must consult with your legal advisor if you are considering accessing any person’s computer without their consent in order to prevent a possible unlawful search and seizure under the Fourth Amendment.

5.2.3. **Adding New Allegations.** Sometimes an IG investigation may discover additional possible misconduct that should either be investigated by the IG or by another office or agency. For example, an IO examining allegations of reprisal might find credible evidence that restriction has also occurred. Conversely, the IO investigating allegations of reprisal might find evidence that much more serious misconduct, such as larceny, has taken place. The IO has no authority to investigate these new matters unless appointed to do so. The IO’s course of action depends on when the evidence of additional misconduct is discovered.

5.2.3.1. **During the Investigation.** If a witness’s testimony or other evidence raises the possibility of additional misconduct by the subject or another person, approach the IG to decide whether the additional issues will be investigated separately (either as a separate IG

investigation or through some other investigation) or as part of the current IG investigation. If after consultation with the legal advisor, the IG decides to expand the scope of the current investigation, the IG will ensure the appointing authority signs a new appointment letter authorizing you to examine the additional allegations. If any subjects have already been interviewed who are also subjects of the new allegations, you must re-interview those subjects to advise them of the additional allegations and give them a chance to respond.

5.2.3.2. Post-Investigation. The more challenging scenario occurs when a later reviewer, such as the attorney conducting the legal review, notices that the evidence raises possible misconduct the ROI failed to address. When this occurs, the reviewer, the IG and the IO should meet to discuss possible courses of action. If the ROI already contains all necessary information to address the additional misconduct, the IG may simply choose to have the appointing authority add the new allegations, reinterview the subjects to allow them to present any additional defense, and have the IO analyze the additional allegations in the report. If additional evidence must be gathered to properly analyze the additional misconduct, the IG will need to decide whether to have the IO (upon the appointing authority's direction) expand the investigation or to conduct an entirely new investigation into the additional misconduct. While individual cases vary, in general, it is preferable to keep the whole case together by investigating all related misconduct in one investigation. If the IG elects not to take this route, the original ROI should document the fact that additional misconduct raised by the investigation will be investigated separately.

5.2.4. How Much Investigation is Enough? You should consider the seriousness of the allegations, including the implications for both the subject and the complainant, in assessing whether the investigation has been sufficiently conducted. In general, cease investigating when you have enough evidence to support a conclusion on the allegations, and additional investigation is unlikely to yield evidence significant enough to change the outcome. If a complainant or subject has suggested additional witnesses to interview or evidence to review, you must either pursue these leads or fully document why doing so would not be likely to yield significant, relevant evidence.

5.2.5. Prepare to Write. Before beginning to write the report, organize all your evidence. Transcripts of all testimony must be obtained and reviewed – don't rely on your memory to pull together all the most relevant statements by witnesses. The IG is responsible for providing you with a private area in which to write your report, and all necessary supplies (such as a computer and printer).

Chapter 6: Report Writing

6.1. ROI Format. Two terms are used to describe the product the IO produces. The ROI is the product the IO writes. It contains an explanation of the IO's authority, lists the allegations, details the facts of the case, analyzes the evidence, and summarizes the IO's conclusions. The "case file" is the broader term for the entire binder of material the IO submits. The case file includes the ROI at Section II, but also includes witness interview transcripts, documentary evidence, administrative documents, legal reviews, and other materials. The ROI – the written report at Section II of the case file – must be a stand-alone document. It must reference all essential facts, documents, portions of regulations, interviews, etc., so that a reviewer can arrive at a determination without reference to information outside the report.²¹ Write the ROI as if the reader had no prior knowledge of the case. The basic parts of the ROI are described in AFI 90-301, Attachment 12.

6.1.1. Authority and Scope. Attachment 12 to AFI 90-301 provides the language you should use to describe your authority to conduct the investigation. Simply fill in the blanks and paste this information directly into Section II, Tab A of the case file.

6.1.2. Introduction: Background and Allegations. In Section II, Tab B, provide a brief background of events that led to the alleged violations. You need to include a reference for every factual statement in this portion of the report. An example is: "MSgt Wilcox called Amn Moseby a 'pig' and a 'loser.' (Section III, Tabs D-1, p.3; D-5, p. 6; E-6, p. 2)" If you can cite to specific line numbers on a page, your report will be even more helpful. You will also list all allegations in this section of the report, exactly as the appointing authority framed them.

6.1.3. Findings, Analysis, and Conclusion. This section will begin with more detailed explanation of the underlying facts of the case. Include every relevant fact in this portion of the report – do not assume that the reader knows what is in the testimony or documentary evidence. In this initial portion of Section II, Tab C, you are not drawing any conclusions about the allegations. Simply present all sides of the case – if witnesses disagree about what happened, explain the differences. You will have a chance to explain your conclusions about what really happened later in this tab. This portion of the report also may discuss any other issues that arose during the investigation (for example, why you chose not to interview a witness the complainant or subject). While no specific format is required, generally you will find it easiest and most logical to state the most relevant facts in chronological order. Finally, after laying out all the relevant facts, you will

²¹ AFI 90-301, Paragraph 2.51.1.

analyze each allegation. This is where you will finally have the chance to explain your position as to whether the allegations substantiated. You want to explain your position using a solid logical thought process. You have invested significant time and effort gathering the facts – don't waste this effort with a poorly supported analysis. While no one format for writing your analysis is required, one helpful method for analyzing each allegation is to use the IFRAC method (Issues, Facts, Rules, Application, Conclusion). The IFRAC method of analytical writing simplifies the organization of the Findings, Analysis and Conclusion section of the ROI. (See Attachment 3 for an example of IFRAC in action).

- 6.1.3.1. Issue.** The allegations, as framed by the appointing authority, are the issues you must resolve. You must address each of the allegations separately. Start the analysis of each allegation by first typing out, word for word, the original allegation. The wording of the allegation drives the analysis. Do not combine allegations in an attempt to simplify the process and *do not* change the wording of the allegation as framed by the appointing authority.
- 6.1.3.2. Facts.** After you have identified the issue, pull out the key facts that relate to the particular allegation at hand from the more comprehensive Background section you have already written. Again, support each fact with citations to relevant evidence. A fact is not a fact until it is supported with evidence. Many cases contain some evidence that points toward substantiation and some that points toward non-substantiation. You must take great pains to present the full story. As with the background section, for every factual assertion you should cite to evidence in the case file that supports that assertion.
- 6.1.3.3. Rules.** Once the issue and facts have been identified, you will next focus on the applicable rules or "law" that guide you in resolving the issue. These rules come from sources such as regulations (AFIs, DoDDs, etc.), laws (statutes, the UCMJ, etc.), and policies (administrative decisions, local policy letters, etc.) Document what the relevant parts of the rules are. For example, if the allegation involved an AFI violation, annotate the AFI number, name and effective date (e.g., AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996) and quote the applicable portions of the instruction, including any definitions. Summarizing rules can be dangerous, as many of them were carefully crafted. Use the original language from the instruction or other rule.
- 6.1.3.4. Analysis.** Now you will take the facts you have spelled out, apply them to the rules of law you have listed, leading you toward your conclusion. This requires analytical thinking. Consider the facts surrounding the issue, assess the preponderance of the evidence, and explain why you believe the allegation is or is not substantiated. The

reader must be able to follow your thought process. When finished reading the ROI, the appointing authority and other reviewers should feel comfortable that it is complete and that the conclusion naturally follows from the facts presented. To ensure the ROI is thorough and balanced, keep in mind the “Three C’s” of analytical thinking and writing: *credibility*, *corroboration*, and *clarity*. Analysis requires more than just listing the facts and leaping to a conclusion. It requires a window into your thought process. The reader needs to appreciate why you weighed some items of evidence more heavily than others.

6.1.3.4.1. Credibility. When different witnesses tell opposing stories, you will have to assess who is more likely to be believed. The importance of documenting credibility determinations cannot be overemphasized. This is the one area where you have an advantage over subsequent reviewers – you are the only one who gets to interview the witness, and you are in the best position to determine whether the witness is telling the truth. The extent to which you document why you believe one witness is more credible than another witness largely determines how much deference reviewers will give your findings. This may require you to assess and comment upon factors such as:

- Witness demeanor (Did the witness seem hostile, uncomfortable, or at ease answering the question?)
- Nonverbals (Did the witness provide body language that made him or her seem evasive -- for example, shifting in the chair, looking away, lowering his or her voice?)
- Bias (Did the witness have a shaded viewpoint of the events at the time they occurred – for example, he or she was best friends with the subject?)
- Motive to lie (Does the witness have a reason to withhold the truth now – for example, does he or she has a personal interest in the outcome of the investigation?)
- Knowledge (Is the witness’s testimony based on personal knowledge or second-hand information?)
- Perception (Did the witness have a clear view or hearing of the event or was he or she far away?)
- Veracity (Does the witness have a history of being truthful?)
- Any other information that may affect credibility

6.1.3.4.2. Corroboration. When testimony is corroborated by other credible evidence or testimony, witness credibility is enhanced. Always discuss any evidence that supports, or does not support, witness testimony.

6.1.3.4.3. Clarity. Clarify contradictions before finalizing the investigation. Whenever abbreviations or terms are used for the first time, spell them out or explain them. Avoid the use of slang, unfamiliar jargon, or obscene and profane language unless it is necessary.

6.1.3.5. Conclusion. Each allegation should be answered in a separate finding that states whether it was **substantiated** or **not substantiated**. No other conclusions (such as “partially substantiated”) are proper. If the evidence is in conflict and cannot be reconciled, that simply means that the facts did not satisfy the proof by a preponderance of the evidence standard and therefore, the allegations are not substantiated. Summarize your conclusion and briefly state the reasons for the conclusion. For example, the conclusion can state, “The preponderance of the credible evidence indicates that Lt Col Thompson reprised against SSgt Cruz by threatening to downgrade SSgt Cruz’s EPR as a result of SSgt Cruz’s MEO complaint. Numerous witnesses agree that Lt Col Thompson threatened to mark SSgt Cruz down to a 3 or 4 EPR, and nothing in SSgt Cruz’s record suggests she had any performance or conduct shortcomings. Accordingly, I find Allegation 1 to be **substantiated**.”

6.1.4. Recommendations. If the appointing authority desires recommendations for corrective action, the appointment letter will state this. Do not make recommendations unless specifically directed. If you have not been tasked to provide recommendations, but feel it would be appropriate to do so, discuss the issue with the appointing authority and request permission to include recommendations. Recommendations should be tied to the findings and stated as succinctly and objectively as possible. Do not recommend specific punishments or administrative actions. If you believe a subject or other person should be disciplined, simply recommend the commander consider taking “appropriate disciplinary action” against that person. Recommendations are not binding on the appointing authority or a subject’s commander.

6.2. Case File. AFI 90-301, Attachment 10, contains a case file format for non-senior officer investigations. The attachment describes where to place documents such as witness interview transcripts, documentary evidence, and administrative documents.

6.2.1. Legal Reviews. All ROIs must receive a legal review by the installation JA office. The legal review will address whether: 1) each allegation has

been addressed; 2) the allegations allege a violation of law, regulation, procedure or policy; 3) the IO reasonably applied the preponderance of the evidence standard in arriving at findings; 4) the conclusions are supported by, and consistent with, the findings; 5) the investigation complies with all applicable legal and administrative requirements; 6) any errors or irregularities exist, and if so, what is their legal effect. The legal review may disagree with your findings and conclusions, in which case the appointing authority will determine which position to support. The legal reviewer, however, should not deem a ROI “legally insufficient” and send it back for rework merely because the reviewer personally disagrees with the IO’s findings and conclusions. Legal reviewers should use great caution not to substitute their judgment for yours, particularly in cases where the ROI contains thoroughly documented credibility determinations.

6.2.2. Technical Reviews. If a technical review was conducted, tab all technical reviews in the same order in which they are referenced in the ROI.

6.2.3. Appointing Authority Action. After the legal review is completed, the appointing authority will either approve or disapprove the ROI, in writing. If the appointing authority disagrees with one or more of your findings and conclusions, the appointing authority will document the rationale for the disagreement and state his or her position on the substantiation or nonsubstantiation of the allegation(s) in an “addendum” to the ROI.

6.2.4. Addendum. An addendum is a document a reviewer authors to overturn the findings on one or more allegations, or to further explain the reason for agreeing with the findings. An addendum can also be used to slightly re-word allegations, so long as the fundamental nature of the allegations does not change. The appointing authority or a higher-level IG reviewer has the authority to author an addendum.²²

6.3. Report Markings. The following language should be placed at the bottom of each page of the ROI: “This is a protected document. It will not be released (in whole or in part), reproduced, or given additional dissemination (in whole or in part) outside of Inspector General channels without prior approval of The Inspector General, SAF/IG, or designee. FOR OFFICIAL USE ONLY.” Control the number and distribution of copies. Do not show the report or any portion of it to any witness, with the sole exceptions of showing summarized testimony to witnesses to get their concurrence that the testimony is accurate, and showing exhibits to witnesses as a part of questioning.

²² AFI 90-301, paragraph 2.72.

Chapter 7: Post-Report Duties of the IO

- 7.1. Rework.** Both the IG and the legal office will conduct reviews of the ROI. Depending on the type of allegations involved, the case may also receive reviews by higher-level IGs and legal advisors. All cases involving allegations of reprisal, restriction, or improper mental health evaluation referral will be reviewed at the MAJCOM, SAF/IGQ, and DoD/IG levels. Any IG or JA review may send the ROI back for rework if the ROI lacks sufficient evidence to determine the substantiation or nonsubstantiation of the allegations, if the ROI fails to explore allegations raised by the complaint, or if the ROI is otherwise not legally or administratively sufficient. As the IO, you remain responsible for completing any rework directed by a review of the ROI.
- 7.2. Confidentiality.** IG records and information are not released unless release is approved through a formal official use request, FOIA request, or Privacy Act request.²³ Do not discuss your knowledge of the case with co-workers, friends, or anyone else who does not have an official need to know the information.
- 7.3. Records.** Any notes or other documents you have collected that were not included in the ROI should be turned in to the IG.

²³ AFI 90-301, Chapter 4.

Attachment 1: Sample PAM for a Reprisal Allegation

Elements	Definitions	Testimony	Documents
Did [the aggrieved party] make or prepare to make a communication protected by statute?	Protected communication: 1) any lawful communication to any member of Congress or IG/IG investigative staff; or 2) any lawful communication not conveying an admission of misconduct, violation of the UCMJ, or violation of other applicable criminal statutes, when the disclosing member reasonably believes he or she has evidence of a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.	D-1, pp. 12-15 (complainant – complained to IG about fraud, waste and abuse)	E-1 (prior complaint to IG)
Was an unfavorable personnel action taken or threatened or was a favorable action withheld or threatened to be withheld following the protected communication?	Personnel action – any action taken on a member of the armed forces that affects or has a potential to affect (for example a threat) that military member's current position or career.	D-1, pp. 15-17 (described referral EPR) D-2, pp. 9-13 (subject stated he issued the referral EPR)	E-2 (the referral EPR, dated after the protected communication)
Did [the responsible management official] know about the protected communication?	Responsible management official – 1) Officials who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management action; 2) Officials who decided to take, withhold, or threaten the management/personnel action; 3) Any other	D-2, pp. 7-8 (subject stated he knew of prior IG complaint) D-7, pp. 4-5 (IG stated he talked to subject about prior IG	E-3 (IG records of prior IG complaint – show IG talked to subject to resolve complaint)

	official(s) who approved, reviewed, or indorsed the management/personnel action.	complaint)	
Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?			
Reasons stated by the RMO for taking, withholding, or threatening the action.		D-2, pp. 20-24 (subject stated he issued the referral EPR because of complainant's three LORs and one Article 15, all of which came before the previous IG complaint.)	E-4 to E-8 (the LORs and Article 15)
Reasonableness of the action taken, withheld, or threatened considering the complainant's performance and conduct.		<p>D-2, pp. 25-26 (subject explains why he thought a referral EPR was proper based on the misconduct).</p> <p>D-9, p. 3 (JAG reviewed the EPR; advised a referral EPR was appropriate).</p> <p>D-3, pp. 4-6 (subject's supervisor advised a referral EPR was appropriate).</p>	E-10 (cover page and relevant portion of AFI on referral EPRs – language about when referral EPRs are appropriate).

Consistency of the actions of the RMO with past practice.		D-2, pp. 25-26 (subject has issued three other referral EPRs in the past year).	E-9 (this is the second referral EPR the complainant has received).
Motive of the RMO for deciding, taking, or withholding the personnel action.		<p>D-2, pp. 26-28 (subject's philosophy on why he considers himself a "tough rater.")</p> <p>D-2, pp. 28-29 (subject states he was not offended by the prior IG complaint)</p> <p>D-7 and D-8 (co-workers do not consider subject the type of person who would reprise).</p>	E-3 (IG records of previous complaint – complaint was dismissed and nothing happened to subject – less motive to reprise).
Procedural correctness of the action.		<p>D-9 (JAG said he reviewed the referral EPR before issued)</p> <p>D-10 (personnel expert says referral EPR was accomplished correctly)</p>	E-10 (AFI on referral EPRs)

Attachment 2: Proposed Test for Abuse of Authority

If an allegation of reprisal does not meet the definition of reprisal under 10 U.S.C. §1034, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, Paragraph 3.17.1.3.) Abuse of authority is an arbitrary or capricious exercise of power that adversely affects the rights of any person or results in personal gain or advantage to the abuser. (AFI 90-301, Attachment 1) Courts have interpreted the arbitrary or capricious standard in the context of government agency action under 5 U.S.C. § 706, the Administrative Procedure Act.²⁴ This precedent can be summarized into a test for abuse of authority:

1. Did the responsible management official's (RMO's) actions either:
 - a. Adversely affect the rights of any person? (e.g., demotion, referral OPR, etc.) or
 - b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

and

2. At the time of the action:
 - a. Did the RMO act within the authority granted under applicable regulations, law or policy? and
 - b. Was the RMO's action based on relevant data and factors? and
 - c. Was the RMO's action rationally related to the relevant data and factors?

If both questions one (a) and (b) are answered "no," then it is not necessary to consider question two. If either part of question one (a) or (b) is answered "yes," the IO should proceed to question two. If the answers to question two, parts (a), (b) and (c) are "yes," the action should not be considered "arbitrary or capricious." If the answer to any part of question two is "no," giving substantial deference to the decision of the RMO, then the action was "arbitrary or capricious" and the action amounts to abuse of authority. The factors in question four of the reprisal Acid Test can also assist the investigating officer in determining whether abuse of authority has occurred. (AFI 90-301, Attachment 21)

²⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)); see also *Dep't of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002) (discussing the arbitrary or capricious standard).

Attachment 3: “IFRAC” Sample

Issue/Allegation: On or about 6 August 2006, Col Jim Schofield, 569 MDG/CC, reprimed against SrA Jonathan Redus by issuing him nonjudicial punishment under Article 15, UCMJ, in violation of 10 U.S.C. §1034, because SrA Redus made a protected communication.

Facts:

SrA Redus was assigned to the 569 MDG in early April 2006 as an x-ray technician. (Section III, Tab D-1, p. 2) He served in this capacity without serious incident until the incidents involved in this complaint. The group commander, Col Schofield, described SrA Redus’s performance during his first few months as “good but not great.” (Section III, Tab D-2, pp. 3-4)

In late July 2006, SrA Redus was experiencing a problem with his military pay. Apparently, DFAS was withholding about \$200 a month from SrA Redus’s pay as recoupment for a debt it believed SrA Redus owed the government. SrA Redus believed this was an error. (Section III, Tab D-1, pp. 4-5) SrA Redus visited the base finance office and was told he had to call the DFAS help line. (Section III, Tabs D-1, p. 5; D-6, pp. 3-4) The DFAS help line was apparently unable or unwilling to stop the recoupment action. (Section III, Tab D-1, p. 6)

On or about 31 July 2006, after he received his Leave and Earnings Statement for July, SrA Redus decided to pursue this matter further. He made an appointment at the installation IG’s office for 1330 that afternoon. (Section III, Tabs D-1, pp. 7-8; D-4, pp. 4-5; E-2) SrA Redus spoke with the Superintendent at the IG office, who took in the complaint. The Superintendent promised to look into the matter and get back with SrA Redus. (Section III, Tab D-4, p. 6) As part of his complaint analysis, the Superintendent spoke with Col Schofield by telephone on 1 August 2006. (Section III, Tabs D-2, p. 5; D-4, p. 7; E-3, p. 2) The Superintendent dismissed the complaint on 12 August 2006. (Section III, Tab E-3)

On 6 August 2006, Col Schofield issued SrA Redus an Air Force Form 3070, Record of Nonjudicial Punishment Proceedings.²⁵ The form notified SrA Redus that Col Schofield was considering nonjudicial punishment action because SrA Redus had allegedly failed to pay just debts, failed to report for duty on time on several occasions, and had disobeyed a physician’s order concerning placement of x-rays in patient records. (Section III, Tabs D-2, pp. 9-10; D-4, p. 6; E-1) While the form was actually served on 6 August, several witnesses agreed that Col Schofield had decided by 3 August to issue nonjudicial punishment to SrA Redus. (Sections III, Tabs D-2, pp. 8-9; D-3, p. 6; D-4, pp. 7-8; D-7, p. 4) SrA Redus submitted a response to the proposed Article 15 action on 10 August 2006, essentially asking Col Schofield not to reduce him in rank or impose

²⁵ Col Schofield imposed nonjudicial punishment because the squadron commander, Lt Col Gedman, was on an extended TDY. (Section III, Tab D-2, p. 3)

forfeitures of pay. Col Schofield considered this response, and imposed the following punishment on 12 August 2006: suspended reduction to A1C, extra duties for 45 days, and a reprimand. (Section III, Tab E-1)

SrA Redus filed this complaint with the installation IG's office on 13 August 2006.

Rule:

Reprisals against military members for making protected communications are prohibited under 10 U.S.C. §1034. The *DoD Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, IGDG 7050.6, and AFI 90-301 set forth the "acid test" for evaluating reprisal allegations. The "acid test" consists of four questions:

1. Did the member make or prepare a communication protected by statute?
2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?
3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?
4. Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

When analyzing question four, the investigating officer is required to consider the following five factors: (a) reasons stated by the responsible official for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant's performance and conduct; (c) consistency of the actions of responsible management officials with past practice; (d) motive of the responsible management official for deciding, taking, or withholding the personnel action; and (e) procedural correctness of the action.

If questions one through three of the "acid test" are answered in the affirmative and question four is answered in the negative, an allegation of reprisal is substantiated. If the answer to any of the first three questions is "no," reprisal cannot be substantiated. However, if an allegation of reprisal does not meet the definition of reprisal, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, Paragraph 3.17.1.3.) Abuse of authority is an arbitrary or capricious exercise of power that adversely affects the rights of any person or results in personal gain or advantage to the abuser. (AFI 90-301, Attachment 1)

Application:

The first three questions of the Acid Test are answered “yes.” SrA Redus made a protected communication when he met with the IG Superintendent on 31 July 2006. The AF Form 3070 was an unfavorable personnel action, as it at least has the potential to impact SrA Redus’s career. Col Schofield knew of this protected communication before issuing the AF Form 3070, as the IG Superintendent spoke with him on 1 August 2006 about the complaint – five days before Col Schofield issued the action and two days before Col Schofield decided to issue the action.

As to question four, however, the preponderance of the evidence indicates Col Schofield would have imposed nonjudicial punishment on SrA Redus even if SrA Redus had not filed an IG complaint. An analysis of the following factors of question four of the Acid Test supports this conclusion:

Reasons stated by the responsible official for taking, withholding, or threatening the action: Col Schofield testified about his reasons for issuing the action, and his testimony mirrors the offenses listed on the AF Form 3070 – SrA Redus had displayed irresponsibility in his finances, been late for work several times, and disobeyed an officer’s order about placement of x-rays in the patient records. (Section III, Tab D-2, pp. 12-14) The evidence Col Schofield produced seems to support the validity of these reasons, and SrA Redus’s response to the Article 15 action did not dispute that he had committed these offenses. (Section III, Tabs E-1 and E-4)

Reasonableness of the action taken, withheld, or threatened considering the complainant’s performance and conduct: Nonjudicial punishment appears reasonable considering SrA Redus’s misconduct and past performance. While commanders typically apply graduated punishment and SrA Redus had not received any other “bad paper,” the offenses listed on the AF Form 3070 are fairly serious. Three witnesses, including the JAG Col Schofield consulted with, agreed that the seriousness of the offenses warranted a serious response such as Article 15 action. (Section III, Tabs D-3, p. 7; D-4, pp. 5-6; D-6, pp. 3-5) In fact, the JAG advised Col Schofield that SrA Redus’s misconduct could have warranted a summary court-martial if Col Schofield decided on this action. (Section III, Tab D-6, p. 5) In addition, none of SrA Redus’s past EPRs are outstanding, and witnesses generally agreed SrA Redus was not a stellar performer. (Section III, Tabs D-2, pp. 3-4; D-5, p. 5; D-7, p. 3; E-6; E-7) Imposing nonjudicial punishment in this instance appears to be reasonable.

Consistency of the actions of responsible management officials with past practice: SrA Redus is the only Airman on whom Col Schofield has imposed nonjudicial punishment in his 11 months as Medical Group Commander. (Section III, Tab D-2, p. 11) However, group commanders typically do not issue Article 15 actions, leaving this to squadron commanders. Col Schofield testified that he did issue three other Article 15 actions while he was a squadron commander, and one of these was for failure to pay just debts. (Section III, Tab D-2, pp. 11-12) Capt Kelleher, the JAG who advised Col Schofield on SrA Redus’s Article 15, said his impression is that Col Schofield consistently takes a tough approach to disciplinary issues. (Section III, Tab D-6, p. 8)

Other witnesses seemed to agree with this assessment. (Section III, Tabs D-5, p. 7; D-8, pp. 3-4; D-9, p. 3)

Motive of the responsible management official for deciding, taking, or withholding the personnel action: Col Schofield appeared to have no motive of reprisal in issuing the Article 15 action. While he did issue it just days after SrA Redus's IG complaint, there is little evidence other than proximity in time to connect the IG complaint and the Article 15 action. Col Schofield was not the target of SrA Redus's 31 July IG complaint and thus would have little reason to be upset with SrA Redus for filing the complaint. The IG Superintendent agreed Col Schofield did not seem upset by the 31 July IG complaint. (Section III, Tab D-4, p. 8) The evidence seems fairly clear that SrA Redus did in fact commit the misconduct alleged in the Article 15 action, and while Col Schofield did not actually decide to issue nonjudicial punishment to SrA Redus until 3 August, he did discuss this option with Capt Kelleher on 30 July – one day before SrA Redus's protected communication. Capt Kelleher testified that while Col Schofield did not agree to do an Article 15 action on 30 July, he got the impression Col Schofield was leaning that way. (Section III, Tab D-6, p. 10) Col Schofield provided reasonable testimony about his motive, stating that failure to pay just debts is a particularly serious offense in his mind because so many resources are available to Airmen. (Section III, Tab D-2, pp. 16-18) He stated that he understands the role of the IG and does not hold it against SrA Redus for exercising his right to see the IG. In fact, he said he considered it a positive mark in SrA Redus's favor that he was attempting to do something to straighten out his financial situation. (Section III, Tab D-2, p. 19) The preponderance of the evidence indicates Col Schofield was motivated by a legitimate desire to discipline SrA Redus, not by reprisal.

Procedural correctness of the action: The Air Force Form 3070 appears to have been completed in a procedurally correct manner. A legal review found it legally sufficient. (Section III, Tab E-1, p. 2)

Conclusion:

The preponderance of the evidence indicates Col Schofield would have issued nonjudicial punishment to SrA Redus had SrA Redus not made his protected communication. Other than the fact that the Article 15 action came soon after the IG complaint, no evidence indicates Col Schofield issued the Article 15 action in reprisal for SrA Redus's protected communication. Therefore, I find Allegation 1 is **not substantiated**. Additionally, since Col Schofield's action was based on evidence of SrA Redus's UCMJ violations and since a commander has a responsibility to discipline members for their misconduct, Col Schofield did not abuse his authority in issuing nonjudicial punishment to SrA Redus.

Attachment 4: Witness Invitation Letter

IOs can invite civilian witnesses who are not DoD employees, but they need not appear. The best practice is for the IO to personally telephone the civilian witness and invite him or her to testify, using the language in this letter as a “script.” Otherwise, the IO can provide the witness an invitation letter, using the recommended sample below.

(IO’s name, rank, and office symbol)

Address

City/State/ZIP

Mr./Ms. _____

Address

City/State/ZIP

Dear Mr./Ms. _____

I have been appointed by [the appointing authority] to conduct an IG Investigation involving allegations of [general nature of the allegation – NO NAMES]. You are invited to appear as a witness as your participation will significantly contribute to the investigation. You are requested to appear at the IG’s office, [building and room number], Other AFB, at [time and date]. Please contact me by [suspense date] to let me know whether you can appear on this date, or need to arrange another mutually convenient time for your interview. My phone number is _____. Thank you for your assistance. I look forward to our meeting.

Sincerely

NAME, Rank, USAF
Investigating Officer

Attachment 5: Sample Privacy Act Statement

Policy: The Privacy Act statement is required to be read and acknowledged by each witness at the beginning of the interview process.

Authority: Title 10, United States Code, Sections 8013 and 8020, and Executive Order 9397.

Principal Purpose: Information is collected during an inquiry or investigation to aid in determining facts and circumstances surrounding the allegations. The information is assembled in report format and presented to the Appointing Authority as a basis for DoD or Air Force decision-making.

The information may be used as evidence in judicial or administrative proceedings or for other official purposes within the DoD. Disclosure of Social Security number, if requested, is used to further identify the individual providing the testimony.

Routine Uses: Routine uses include:

Forwarded to federal, state, or military and local law enforcement agencies for law enforcement purposes

Used as a basis for summaries, briefings, or responses to members of Congress or other agencies in the Executive Branch of the Federal Government

Provided to Congress or other federal and state agencies when determined to be necessary by The Inspector General, USAF

For any of the blanket routine uses published by the Air Force (AFDIR 37-144, Privacy Act System of Records, formally AFP 4-36)

Mandatory or Voluntary Disclosure:

FOR MILITARY PERSONNEL: Disclosing your Social Security number is voluntary. Disclosing other personal information relating to your position responsibilities is mandatory and failure to do so may subject you to disciplinary action.

FOR DEPARTMENT OF THE AIR FORCE CIVILIANS: Disclosing your Social Security number is voluntary. However, failure to disclose other personal information in relation to your position responsibilities may subject you to adverse personnel action.

FOR ALL OTHER PERSONNEL: Disclosing your Social Security number and other personal information are voluntary. No adverse action can be taken against you for refusing to provide information about yourself.

I acknowledge that I have received a copy of this statement and understand it.

Witness

Attachment 6: Standard Format for Summarized Testimony

SUMMARIZED SWORN TESTIMONY OF (RANK AND LAST NAME)

Summarized (sworn [and taped]) testimony of (rank and name of witness), (witness' duty position), (location), obtained by interview at (location), (date), from (time) to (time) hours by (rank and name of IO).

Full name of witness:

Grade of witness:

Organization:

Duty assignment of witness:

Write the following:

I interviewed (witness name) and advised (him)(her) of the nature of the investigation. I informed (witness name) of the authority for the investigation and of (his)(her) rights, as applicable.

The following is a summary of this witness' sworn testimony or statement: (Present a summary of the key points the witness made in response to questioning. It is critical the testimony reflect all the facts pertinent to the allegations.)

Note: After the last line of summarized testimony, place the advisement and certification statements below (verbatim). Directly below the statements, type the IO's signature block. On the bottom right side of each summarized statement, place the witness' last name in all caps and put the tab number and letter as listed in the index of the IG case file. Do not place the signature elements alone on a separate page. At a minimum, ensure three lines of testimony are carried over with the signature elements.

I advised (witness name) that this is an official investigation, and ordered (or directed to persons not subject to the UCMJ) (him)(her) not to divulge the nature of this investigation or the questions and answers, or discussions included in this interview with anyone except a chaplain, a union representative (if appropriate) or counsel unless otherwise authorized by the appointing authority, higher authority, or me.

Note: *The IO must review the recorded interview tapes and transcript/summary to ensure accuracy.*

I certify the above to be a true summary of sworn (or affirmed) testimony given on (date) at (place).

Signature of IO and Date

**The Secretary of the Air Force
Office of the Inspector General
Complaints Resolution Directorate**



***Commander-Directed
Investigation
(CDI)
Guide***

SAF/IGQ
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DSN 425-1531
Current: as of 7 July 2006

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FOREWORD

The Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) administers the Air Force Inspector General (IG) Complaints Resolution Program to resolve problems affecting the Air Force mission. When appropriate, the IG refers complaints to command channels for resolution. The commander may decide that a particular matter requires objective fact-finding in the form of a commander-directed investigation (CDI). At this time, there are no Air Force Instructions (AFIs) prescribing an investigative process; therefore, SAF/IGQ developed this guide. The guide provides suggested procedures for commanders and their investigative teams to conduct prompt, fair and objective investigations. Based upon expert input from the field, we have significantly revised the CDI Guide to include more definitive guidance, investigative tips and user-friendly templates.

SAF/IGQ would like to provide special thanks to Major (b)(6) (AF/JAA) and Colonel (b)(6) (Legal Advisor, SAF/IGS) for making the vision of a better CDI Guide a reality. SAF/IGQ also would like to formally acknowledge the following personnel for their assistance with and dedication to this project: Mr. (b)(6) (AF/JAA), Col (b)(6) (b)(6) (Director, SAF/IGQ), Col (b)(6) (SAF/IGR), Lt Col (b)(6) (AF/JAA), Lt Col (b)(6) (SAF/IGS), Lt Col (b)(6) (ACC/JAM), Maj (b)(6) (SAF/IGQ); Maj (b)(6) (Legal Advisor, SAF/IGQ), SMSgt (b)(6) (SAF/IGQ); Mr. (b)(6) (AFLOA/JACL), Mr. (b)(6) (ACC/IGQ), Mr. (b)(6) (b)(6) (AFRC/IGD), Mr. (b)(6) (AMC/IGQ) and Ms. (b)(6) (SAF/IGQ-FOIA).

CHAPTER 1. INTRODUCTION

1.1. Guide Overview. The intent of this guide is to provide commanders and their investigative team members the tools they need to effectively conduct commander-directed investigations (CDI).

1.2. Authority to Conduct CDIs. Commanders serving no lower than squadron level or equivalent or appointed in accordance with (IAW) AFI 51-604 and AFI 38-101 (on G-series orders) have the inherent authority to conduct a CDI to investigate matters under their command, unless preempted by higher authority.¹

1.3. CDI Purpose. The CDI is a tool to gather, analyze and record relevant information about matters of primary interest to those in command. The CDI is an extension of the commander's authority to investigate and to correct perceived problems within the command. As such, the CDI is internal to the command concerned.

1.4. CDI Types. There are two reasons a commander may want to conduct a CDI--to investigate systemic (or procedural) problems or to look into matters regarding individual conduct or responsibility. When a CDI's primary focus is to look at a particular individual, the Investigating Officer (IO) must be careful to protect the individual's rights *and* to preserve commander's disciplinary options. In some cases, the IO will need to read witnesses their UCMJ Article 31 rights.² Especially if a situation involves potential misconduct by an individual, the commander and the IO should work very closely with a legal advisor.

1.5. Standard of Proof. The standard of proof for a CDI is a **preponderance of the evidence**. When it is **more likely than not** that events have occurred as alleged, there is a preponderance of the evidence, and the IO may consider the events proven. After weighing all the evidence, the IO may substantiate a finding when the greater weight or quality of the evidence points to a particular conclusion as more credible and probable than the reverse. Certainly, the amount of evidence is something to consider, but lots of bad evidence will not trump a smaller amount of good evidence. Some additional things to consider when weighing the evidence are witness demeanor, opportunity for knowledge, bias, motive, intent and the ability to recall and relate events. At all times, IOs may use their own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses they interview.

¹ Higher authority includes specific Air Force directives that delineate organizations responsible to address particular issues or to conduct specific investigations. (See Attachment 2, Referral Agencies and Appropriate Grievance Channels, and Attachment 3, Administrative Investigations Summary)

² See *Chapter 5, the CDI (IO's Job)*.

CHAPTER 2. GENERAL CONSIDERATIONS

2.1. Matters Appropriate for a CDI. Commanders may use a CDI to resolve a variety of issues. Generally speaking, commanders investigate “command matters.” Commanders should consult with their SJA when they have questions about whether or not a CDI is appropriate for a particular issue.

2.1.1. “Command Matters.” Command matters are issues of primary interest and importance. As such, commanders possess the inherent authority to investigate when necessary and to correct problems within their command. Command matters include a wide array of issues and circumstances that involve people, processes and materials under their command.

2.1.2. Abuse of Authority. Abuse of authority is one example of a “command matter.”³ Anyone who holds authority over others has the potential to abuse that authority. The definition of abuse of authority in the Air Force is “an *arbitrary or capricious* exercise of power by a military member or a federal official or employee that *adversely affects* the rights of any person or that *results in personal gain or advantage* to the abuser.”⁴ (See Attachment 4, SAF/IGQ Abuse of Authority Test) For example, if a group commander directs one of her squadron commanders to deny an NCO’s reenlistment, this would probably be an abuse of authority, because it prevented the subordinate commander’s free exercise of discretion.⁵ Another possible scenario for abuse of authority is where a SNCO creates what many Airmen have referred to as a “hostile work environment” for behavior such as using foul language, practicing favoritism, routinely yelling, etc.⁶ However, abuse of authority is not a “catch-all” standard for actions that just don’t seem fair. While actions certainly may not be fair, they don’t always rise to the level of abuse of authority. Many times it is possible that a standard, other than abuse of authority, might better describe the misconduct alleged. In the earlier example of an abusive SNCO, it is possible the abusive conduct might actually rise to the level of violating Article 93 UCMJ, *Cruelty and Maltreatment*. Commanders should work closely with their JAGs and IGs when considering a CDI to investigate allegations of abuse of authority.

2.2. Matters Not Appropriate for a CDI. Not every issue lends itself to a CDI. Below we provide a non-exhaustive list of issues that are not appropriate for a CDI and should or must be handled by other means.

2.2.1. Covered by Other Established Grievance or Appeal Channels. In some instances, Air Force directives delineate responsible organizations to resolve particular issues or to conduct certain types of investigations. (See Attachment 2, Referral Agencies and Appropriate Grievance Channels; Attachment 3, Administrative Investigations Summary). It is important to note that

³ Although IGs *may* investigate abuse of authority, they may also refer such issues to command.

⁴ AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005, Attachment 1, Terms.

⁵ Since reenlistment is not a military justice matter, the higher commander’s actions do not qualify as “unlawful command influence.”

⁶ “Hostile work environment” (HWE), despite its use in common parlance, is a Military Equal Opportunity (MEO) term of art, defined in AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996, as a type of gender discrimination. An example of MEO HWE would be displaying posters of scantily-clad females in the breakroom. Because HWE has a specialized meaning, it’s best to avoid using it in a generic context.

commanders are not permitted to take a complaint submitted to the IG and to resolve it through a CDI.⁷ Finally, as a general rule, commanders should not use a CDI to investigate matters such as *Privacy Act* violations that could expose the Air Force to civil liability.⁸ There are other authorities empowered to consider *Privacy Act* violations.

2.2.2. IG “Big Three.” Congress has specifically designated the IG as the appropriate agency to investigate allegations involving reprisal, restriction and improper mental health evaluation (MHE) referrals—“The Big Three.”⁹ Reprisal, a violation of 10 U.S.C. § 1034, occurs when a commander or supervisor takes (or threatens to take) an unfavorable personnel action; or withholds (or threatens to withhold) a favorable personnel action, to retaliate against a member of the armed forces who made or prepared to make a protected communication.¹⁰ Military members may not be *restricted* or prohibited from making a protected communication to authorized recipients, such as appropriate grievance channels (MEO, IG, Congress, etc.) Improper MHE referral cases typically involve situations where the commander or a supervisor either coerced a member to seek a MHE or otherwise failed to follow the procedures outlined in AFI 44-109, DoDD 6490.1 or DoDI 6490.4 in referring an individual for a MHE.¹¹ Only IGs can investigate the “Big Three.” *A CDI is never appropriate for “Big Three” allegations.* Allegations related to IG “Big Three” (reprisal, restriction, improper MHE referral) have unique reporting requirements.¹² Personnel must immediately report all allegations of misconduct by a Colonel, Colonel-select, or GS/GM-15 as well as allegations of “Big Three” misconduct (by subjects of any rank) to SAF/IGQ, through their local installation IGs.¹³ Additionally, AFI 90-301, Table 3.3, Rule 1 requires personnel to provide copies of any material collected addressing Colonel (or Equivalent) misconduct.

2.2.3. Senior Official Misconduct. Only SAF/IGS (Senior Official Inquiries) handles and investigates complaints against O-7 selects (and above) and civilian equivalents.¹⁴ If there is an allegation against an O-7 select or above, a commander will not conduct a CDI into the matter, but rather will immediately report that allegation to SAF/IGS.¹⁵

⁷ AFI 90-301, para. 1.26.1.

⁸ AFI 33-332, *Privacy Act Program*, 24 January 2004 states that base-level Privacy Act Officers investigate allegations of Privacy Act violations.

⁹ See 10 U.S.C. § 1034, as implemented by DoD Directive (DoDD) 7050.6, *Military Whistleblower Protection*, 23 June 2000 and Public Law 102-484, Section 546, *National Defense Authorization Act for Fiscal Year 1993*, 23 October 1992, as implemented by DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997.

¹⁰ *All communications* to an IG or Congress are considered protected. Additionally, when members who reasonably believe they have evidence of a *violation of law or regulation* (even if they are not the victim), disclose this to an authorized recipient, it is a protected communication. For more information about reprisal, see AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005.

¹¹ Only commanders can “commander-direct” subordinates to a MHE.

¹² AFI 90-301, paras. 3.18; 3.29; 3.35; 3.10; 3.3.

¹³ AFI 90-301, para. 3.8.1.

¹⁴ AFI 90-301, para. 3.2.1.

¹⁵ AFI 90-301, para. 3.2.2. and Attachment 16.

2.2.4. “Self-Investigation.” While it seems obvious, commanders should not investigate or direct a CDI into allegations pertaining to their *own* alleged misconduct. Self-investigation, or even the appearance of such, can create negative perceptions and adversely impact the effectiveness of command. Typically, the appropriate venue to address issues involving a commander will be the next higher echelon of command or an outside agency.

2.2.5. Sexual Assault. Allegations of sexual assault (rape, nonconsensual sodomy, indecent assault or attempts to commit these) trigger Air Force sexual assault response procedures.¹⁶ Upon receiving a report of sexual assault report, commanders should immediately contact the Air Force Office of Special Investigations (AFOSI), the lead agency for investigating sexual assault allegations. AFOSI has a duty to contact the Sexual Assault Response Coordinator (SARC).

2.2.6. Domestic Abuse. The Air Force instituted response procedures for reports of adult domestic abuse or violence.¹⁷ Upon receiving a report of domestic abuse or violence, commanders should immediately contact law enforcement in accordance with local procedures.

2.3. Matters in the “Gray” - Proceed with Caution. Certain matters *may* be appropriate for a CDI, but should be carefully considered and closely coordinated with other agencies prior to investigation by command.

2.3.1. Fraud, Waste and Abuse (FWA).¹⁸ FWA falls within the purview of several agencies, including the IG, AFOSI and command. Once aware of FWA allegations, commanders should first coordinate with the IG, who may further coordinate with AFOSI. Essentially, the IG has right of first refusal to investigate allegations of FWA.

2.3.2. UCMJ Offenses. Wrongdoing may rise to the level of a UCMJ violation. For example, an AFI violation could also be a violation of Article 92, UCMJ, *Failure to Obey Order or Regulation*. Usually law enforcement should investigate serious offenses for which the punishment is likely to be non-judicial punishment (NJP) or court-martial. Before launching a CDI into potential UCMJ offenses, commanders should consult with their JAG about whether the matter would be better handled by Security Forces or AFOSI.

¹⁶ The AF sexual assault policy provides for a “restricted reporting” option that enables victims to report allegations of sexual assault to specified personnel (health care providers and victim advocates) *without* triggering an investigation. Reports of sexual assault through other reporting channels (law enforcement, chain of command) constitute “unrestricted” reporting.

¹⁷ The AF initiated a “restricted reporting” option for adult victims of domestic violence. Any report of a domestic incident made through reporting channels such as the victim’s chain of command or law enforcement agency triggers “unrestricted” reporting. Disclosures of domestic violence of abuse to commanders are considered unrestricted.

¹⁸ “Fraud” is any intentional deception designed to unlawfully deprive the AF of something of value or to secure from the AF for an individual a benefit, privilege, allowance, or consideration to which he or she is not entitled. “Waste” is the extravagant, careless or needless expenditure of AF funds or the consumption of AF property that results from deficient practices, systems controls or decisions, as well as practices not involving prosecutable fraud. “Abuse” is the intentional wrongful or improper use of AF resources (misuse of rank, position or authority that causes the loss or misuse of resources such as tools, vehicles, computers or copy machines). AFI 90-301, Atch 1, Terms.

2.3.3. MEO. Commanders should inform the installation Military Equal Opportunity Office (MEO) upon receipt of any allegations of discrimination based on color, national origin, race, ethnic group, religion or sex, including sexual harassment. Although it's possible MEO will defer to command to resolve such matters through CDI, MEO has the right of first refusal.

2.4. Completion Timelines. The commander should establish a specific suspense date to have the investigation completed and annotate the suspense in the Investigating Officer (IO) appointment letter. (See Attachment 5, Sample IO Appointment Letter) In most cases, CDIs should be completed within 45 days. Because lengthy investigations impact unit morale, IOs should request and justify their extensions in writing. The initiating commander has the sole authority to grant or deny extensions.

CHAPTER 3. CDI TEAM – QUALIFICATIONS & RESPONSIBILITIES

3.1. CDI Team Overview. A successful CDI requires the efforts of several key players: the commander (appointing authority), the IO, the JAG, technical advisors (if needed) and administrative assistants (if resources permit).¹⁹ This chapter addresses the qualifications and responsibilities of each CDI team member.

3.2. Appointing Authority. Commanders serving at no lower than squadron level or equivalent or appointed IAW AFI 51-604 and AFI 38-101 (on G-series orders) have the ability to initiate a CDI. The initiating commander is the appointing authority. The appointing authority initiates a CDI by appointing a qualified IO, in writing. (See Attachment 5, Sample IO Appointment Letter) The appointing authority has specific duties with respect to the IO and the final report.

3.2.1. Duties to the IO. The appointing authority will provide the IO:

- An appointment letter (See paragraph 4.2. and Attachment 5);
- Framed allegations, as an attachment to the IO appointment letter (Attachment 5);²⁰
- Prior to the investigation, copies of any materials related to the investigation;
- Suitable workspace, computers, administrative support and technical assistance;
- Access to witnesses and documents within the commander's authority;
- Oversight by keeping open lines of communication with the IO.

¹⁹ While not a part of the CDI team, *per se*, the installation IG can provide the IO valuable guidance and training.

²⁰ Commanders should work closely with their JAG in framing allegations. For more information on the commander's duties in initiating a CDI, including framing allegations, see Chapter 4.

3.2.2. Post-Report Duties. As discussed more fully in paragraph 6.1.10, after consideration of the entire file, the appointing authority approves or disapproves the IO's findings, conclusions and recommendations and takes appropriate corrective action.

3.3. The IO. If the investigation has individual subjects, the IO should be equal or senior in grade to the most senior one and not in their chain of command. In all cases, the IO should be mature and experienced. Generally, the IO will be a senior NCO or an officer in the grade of captain or above. With commander concurrence, the IO could be selected from a different unit. IGs and their staff members are not eligible to be IOs for CDIs.²¹ The IO should also be fully available to conduct the CDI unhampered by leave, temporary duty, separation, retirement or other commitments that would detract from the investigation. In complex cases, the commander might consider appointing an Assistant IO. All IOs should be trained to conduct thorough, fair and objective investigations.²² The IO has specific duties before, during and after the investigation.

3.3.1. Pre-Investigative Duties. Before beginning an investigation, the IO will:

- Review this guide;
- Review all materials provided by the appointing authority;
- Review the regulations, directives, instructions, manuals and guidance relating to the allegations;
- Formulate an investigative plan and proof analysis (Attachment 7) in conjunction with the legal advisor;
- Coordinate with the commanders of any necessary witnesses to arrange for witness availability.

3.3.2. Investigative Duties. Throughout the course of the investigation, the IO will:

- Be thorough by gathering all necessary facts, through witnesses, documents or other items of evidence, to help the commander make an informed decision;
- Stay on task by investigating only the items outlined by the commander in the appointment letter. If new or different issues come to light during the investigation, the IO has a duty to bring these to the commander for the way ahead (see paragraph 5.3);
- Consult with the IO's legal advisor when legal issues arise, such as whether to read Article 31 rights or how to confront a witness who refuses to testify. The IO should work closely

²¹ AFI 90-301, para. 1.27.3.

²² At a minimum, the CDI IO should be thoroughly familiar with this guide and the SAF/IGQ web-based Investigating Officer Toolkit (<https://www.ig.hq.af.mil/igq>). Commanders should select IOs who have previously attended the SAF/IG, or equivalent, Investigating Officer Course, if possible. Course dates, locations and a graduate listing are available on the SAF/IGQ website.

with the legal advisor to refine the investigative plan and proof analysis;

- Be professional at all times. This requires the IO be objective, neutral and fair. IOs should adopt a friendly, but not familiar, attitude. IOs should not disclose witness identities or opinions; deceive, browbeat, threaten, coerce, or make promises; shout, lose composure, or otherwise show emotion or argue;
- Treat all information gathered as part of the CDI process as *For Official Use Only*.

3.3.3. Post-Investigative Duties. Once the IO has gathered the evidence, the IO will:

- Write a fair and balanced report of investigation (ROI) that considers both sides of the issue, supports the “right” answer based upon the preponderance of the evidence, and sufficiently documents the deliberative process;
- Organize the ROI case file in accordance with guidance found in chapter 6 below and Attachment 16 to this guide;
- Obtain a legal review of the ROI from a JAG, preferably not the one who served as the legal advisor;
- Forward the ROI case file to the appointing authority for action.

3.4. The JAG. JAGs play a critical role in the CDI process. Each CDI should involve two JAGs: the legal advisor and the JAG who conducts the CDI legal sufficiency review.

3.4.1. The Legal Advisor. The JAG legal advisor for the CDI should be someone other than the JAG who will ultimately conduct the post-investigation legal sufficiency review. Prior to the IO’s appointment, the legal advisor will assist the commander in framing the allegations. After the IO is appointed, the legal advisor should meet with the IO before the investigation begins to train the IO (if necessary) and assist the IO in formulating the proof analysis and interview questions. The legal advisor advises the IO during the investigation, as issues may arise.

3.4.2. The JAG Conducting the Post-CDI Legal Sufficiency Review. The JAG who conducts the legal review should be someone other than the legal advisor. For specific details on the legal sufficiency review, see paragraph 6.1.9 below. (See Attachment 8, sample legal review of CDI case file)

3.5. Technical Advisor. It may be necessary for the commander to appoint a technical advisor (a subject-matter expert) to consult with, or provide subject matter expertise for the IO. The commander should provide contact information for technical advisors in the IO’s appointment letter or, if a later need arises, in a separate technical advisor appointment letter. (See Attachment 9 for sample Technical Advisor appointment letter). For example, if the allegation deals with improper official travel, experts in the servicing base finance office can identify and explain applicable provisions of the Joint Federal Travel Regulation (JFTR) or Joint Travel Regulation (JTR). Because technical advisors are part of the investigative team, they have an

obligation to protect the privacy of the parties and witnesses. Technical advisors can provide testimony like any other witness or, upon the IO's request, provide a separate written technical review of the case file after the IO writes the report of investigation (ROI). (See Attachment 10, sample technical review)

3.6. Administrative Assistant. Depending upon case complexity, the commander may wish to assign the IO one or more administrative assistants. Administrative assistants can facilitate witness interviews, copy necessary documents and even act as witnesses to testimony. The commander should consider maturity and judgment before detailing prospective assistants to the IO. As part of the investigative team, assistants have an obligation to protect the privacy of all concerned. The commander can detail these assistants verbally, in the IO appointment letter, or in a separate letter. (See Attachment 11, sample Administrative Assistant appointment letter) The preferred practice is to provide the administrative assistant an appointment letter that delineates their obligations. During the CDI, administrative assistants should report to the IO.

CHAPTER 4: INITIATING THE CDI (COMMANDER'S JOB)

4.1. Frame the Allegations. Assisted by a JAG, the commander frames allegations *before* appointing an IO. The allegations will be an attachment to the IO appointment letter. (Attachment 5) Framing allegations is the **single most important factor** in the pre-investigative stage. Commanders and their legal advisors should carefully, clearly and concisely identify the specific processes to be reviewed and/or any laws, rules, or policies that an individual may have violated.

4.1.1. Allegation Requirements. Allegations will focus the entire investigation, so it's particularly important they be done correctly. An allegation targeting a specific person must clearly state what that person allegedly did wrong. The most common weakness in CDIs is that allegations are vague, poorly worded, or allege conduct that does not amount to wrongdoing. CDI allegations should precisely identify who, what, when, and how (if known). If a UCMJ offense is alleged, use the sample specification in the Manual for Courts-Martial (MCM).

4.1.1.1. Who. When the CDI focuses on a person, the allegation must indicate the subject's full name and rank (e.g., Senior Master Sergeant Jack Hammer). If the subject's duty position is relevant to the alleged violation (e.g., Contracting Squadron Superintendent), it should also be included. When multiple subjects are alleged to have committed the same or similar misconduct, use a separate allegation for each subject. The allegation should not identify the complainant as the complainant. (e.g., "SMSgt X did whatever to SrA Y, the complainant".)

4.1.1.2. What. Allegations must either identify a violation of law, policy or regulation (e.g., Article 93, UCMJ) or a broken process (e.g., tool accountability). If alleging a violation of law, rule or policy, each allegation must address a violation of only one law, rule or policy (e.g., not Article 93, UCMJ and abuse of authority). The law, rule or policy cited in the allegation must be the correct citation (e.g., not "fraud, waste and abuse" but DoDD 5500.7-R, *Joint Ethics Regulation*, paragraph X).

4.1.1.3. When. The allegation, to the extent practicable, should precisely indicate the applicable dates of the alleged violations. Unless the IO is sure of the exact date of the incident, the date is written as “on or about.” If the actions occurred during or between certain dates, use “between on or about X May 200X and X July 200X.”

4.1.1.4. How. The allegation must provide sufficient notice of how a law, rule or policy was allegedly violated.

4.1.1.5. Allegation Example. Master Sergeant Jack Hammer, Superintendent, 1st Contracting Squadron, **(WHO)** on or about XX November 20XX, **(WHEN)**, did maltreat Senior Airman Standup Guy, a person subject to his orders, by repeatedly using profanity towards him, calling him names and hitting him **(HOW)**, in violation of Article 93, UCMJ. **(WHAT)**

4.2. Appoint the IO. Once the commander decides an investigation is needed, he or she appoints an IO in writing. The commander should provide the IO a letter of appointment. (See Attachment 5, sample IO appointment letter) The appointment letter generally outlines the scope of the investigation, provides the name and contact information of the IO’s legal advisor, the name and contact information of the IO’s technical advisor (if any), authorizes the IO to collect evidence, requests recommendations if desired, establishes the CDI completion suspense date and states that the CDI is the IO’s sole duty until completion. The appointment letter is the IO’s authority to conduct an investigation; swear witnesses; and examine and copy documents, files, and other data relevant to the investigation. For purposes of the CDI, the IO is an extension of the appointing commander. Because the IO may need to show the appointment letter to other agencies to obtain their information, the commander should include the allegations to be investigated *as an attachment* to the appointment letter, thereby protecting the privacy of other parties.

4.3. Arrange the Logistics. Commanders initiating a CDI are responsible for providing the necessary manpower, supplies and funding support. To protect and secure investigative details, the IO will require a private office or work area from which to conduct the investigation as well as a dedicated computer (preferably a laptop), printer, phone and fax lines. In complicated cases the commander may also appoint an administrative assistant.

CHAPTER 5. CONDUCTING THE CDI (IO’S JOB)

5.1. Preparation Tips. The end result of a CDI typically reflects the amount of preparation put into the investigation. The IO should meet with his or her legal advisor for any training and for assistance in forming an investigative plan, proof analysis and interview questions before initiating the investigation.

5.1.1. “Proof Analysis.” The proof analysis is a tool for identifying the evidence needed to prove or disprove each allegation. It affords a reference outline for the analysis section of the ROI. The proof analysis should be thoroughly developed and revised continuously throughout the investigation. As such, it will serve as a solid template for the ROI. The preferred practice is to build the proof analysis around the “elements” of the law, rule or policy violated, including its

definitions. Definitions are a critical starting point to determining whether a law, rule or policy was violated. For example, in a cruelty and maltreatment case (Article 93, UCMJ), the first element is that the alleged victim was “subject to the orders of the accused.” If the IO does not understand that “subject to the orders of the accused” includes not only those persons under the direct or immediate command of the accused but also *all persons who by reason of some duty are required to obey the lawful orders of the accused*, then the IO may reach incorrect conclusions. The same logic applies to any violation. Understanding the law, rule or policy is a prerequisite to determine whether it was violated. The legal advisor is invaluable in this area.

5.1.2. Question Formulation. IOs should work closely with their legal advisors when preparing interview questions for relevance, organization, thoroughness and form.

5.1.2.1. Relevance. The key to relevance is *whether the information sought might have an effect on the outcome of the case*. The interview questions should focus on the facts and circumstances surrounding, and leading up to, each allegation. Information that relates to the issues and concepts outlined in the proof analysis will always be relevant: who, did what, to whom, when and how.

5.1.2.2. Organization. The best interviews start with background and build up to the pivotal question or issue. Ask pertinent background questions first. Work the witness toward the more difficult subjects. While there is no cookie-cutter method to ensure effective interviews, the recommended approach is to review events chronologically rather than by allegation (e.g., Thursday, then Friday, rather than allegation 1, then allegation 2). Jumping from allegation to allegation often results in skipping around in time and can be confusing. Using a chronology is helpful in keeping questions in a logical sequence.

5.1.2.3. Thoroughness. Thoroughness is required in all CDIs. IOs need to look beyond who, what, when, where and how. They need to address the “why,” whether or not motive has been specifically outlined as an element in a proof analysis. Motive is always relevant. IOs need to:

- Pursue an issue when there is an indication the witness has additional information;
- Find the source of second-hand information so that first-hand information may be obtained;
- Determine the basis for witness opinions (i.e., A: “In my opinion, he’s not a truthful person.” Q: “What leads you to believe that?” A: “He lied to me three times.” Q: “Explain”);
- Ask for clarification when answers contain technical jargon, acronyms, slang or colloquial expressions;

- Seek facts, not conclusions (i.e., A: "He was drunk"; Q: "What gave you that impression?" A: "He smelled like beer, his eyes were bloodshot, he was slurring his speech and couldn't stand up without swaying").

5.1.2.4. Form. IOs need to let the witness tell what happened and refrain from asking questions that suggest answers. Questions that either assume the answer or leave the witness no choice but to state a particular response (yes or no) are leading questions. Leading questions are generally less useful in getting at the truth. IOs may want to ask leading questions when confirming known facts or when rephrasing an answer the witness previously provided. The end goal is for the witness to testify, not the IO. A sure sign of a leading question is the suffix, "Is that correct?" Also, IOs should not ask compound questions. A compound question is one that contains several questions in one. Compound questions can confuse the witness and often result in one answer, making it impossible later to determine which question the witness answered (e.g., Q: "Did you take Ann Smith to the store with you, or did you go alone?" A: "Yeah.").

5.2. Evidence Collection. Evidence is anything from which the IO determines the facts in a case. It can be testimonial, physical, or circumstantial. IOs should seek evidence that is accurate and, where possible, from individuals with direct knowledge. IOs should assess and evaluate evidence *while* collecting it. The most effective IOs update their proof analysis continually throughout the investigation. Evidence collection often has a ripple effect -- the disclosure of one piece of evidence often drives the need to confirm it, or refute it, through other evidence.

5.2.1. Testimony. In this section, we discuss the practical aspects of procuring testimony in general and in these various formats. In CDIs, the majority of evidence is witness testimony. Testimony includes oral statements, written statements and IO summaries of witness interviews. Testimony can be powerful, as in the case of a hand-written confession. On the other hand, testimony is based on a person's memory, so it is often incorrect or incomplete. Before testifying, all witnesses should sign a Privacy Act statement, Attachment 6.

5.2.1.1. Witness Availability. IOs should work through the owning commander to make the witness available for interviews. Most witnesses are willing to cooperate with an IO. In the case of the unwilling witness, the means and ability to require their cooperation will vary depending on the witness' status.

5.2.1.1.1. Active Duty Military. The witness' commander can order the witness to testify. Military witnesses have a duty to testify and can only refuse to answer questions that would tend to incriminate them. (See paragraph 5.2.1.5, Rights Advisement)

5.2.1.1.2. DoD Civilians. A DoD civilian employee's commander can direct the witness to testify. Like military witnesses, DoD civilians have a duty to testify and can only refuse to answer questions that would tend to incriminate them.

5.2.1.1.3. Civilians. "Civilian" witnesses cannot be ordered or directed to testify. This includes contractor employees, dependents of active duty military, non-DoD affiliated civilians, and non-appropriated fund (NAF) employees. The IO can always invite civilians to testify, but if the

person refuses, the IO has no power to make them testify. (See Attachment 12, witness invitation letter).

5.2.1.1.4. Retirees. Retirees, unless they are recalled to active duty, cannot be compelled to testify. As in the case of civilians, the IO can invite a retiree to testify, but if the person refuses, the IO can't force them. (See Attachment 12)

5.2.1.1.5. Minors. Minors fall into the category of "civilians," and the same rules apply. Additionally, even if a minor agrees to testify, the IO must first obtain the consent of a parent. A parent or guardian must be present for all interviews of minors. [Suggestion: the IO should have the parent co-sign any statement of a minor.]

5.2.1.1.6. Air National Guard; Reserve Personnel. Air National Guard or Reserve component members not in a duty status (Annual Training or Inactive Duty for Training) cannot be required to participate in a CDI interview. If they do not agree to participate while on non-duty status, the IO can request the owning commander place the member on orders to provide testimony.

5.2.1.2. Order of Witnesses. Each witness must be interviewed individually. The recommended sequence is: (1) the complainant; (2) subject matter experts; (3) regular witnesses; (4) subjects or suspects. Inexperienced IOs are inclined to resolve cases quickly by talking to subjects or suspects first. Bad idea. Interviewing the subject last ensures the IO has learned the necessary information to ask the *right* questions. This process can also enhance truth telling, as people are more likely to be truthful if they know the IO has information from others. If the interview is last, the IO can challenge also any statements that are inconsistent with other evidence. Finally, interviewing the subject last allows the IO to advise the subject of *all* adverse information against them and decreases the need to re-interview.

5.2.1.3. Interview Locations. Choosing the correct interview location in advance can prevent a myriad of problems. Choose a place that is relatively private and secure. Some options are listed below.

5.2.1.3.1. Local Options. The IO has several options when interviewing local witnesses, including the witness' duty location or a neutral location. The positive aspects of interviewing witnesses on their "turf" is that they may be more at ease and willing to share information and have ready-access to information, records, or documents. The downside of interviewing people in their own areas includes a lack of privacy (unwanted interruptions) and the possibility of generating rumors.

5.2.1.3.2. Remote Witnesses. If the witness is located at another installation or location, the IO has several options: (1) personally interview the witness at their location to observe demeanor and non-verbals, important indicators of truthfulness; (2) delay the interview until the witness returns, if their absence is temporary and time permits; (3) conduct a telephonic interview; (4) mail, e-mail or fax the witness written questions and have them provide a sworn, written response; or (5) ask the witness to provide a sworn statement.

5.2.1.4. Testimony Format. The IO can obtain testimony in a variety of formats, but all testimony should be under oath. Regardless of form, testimony should always include the full names, office designation, and unit for each witness. (See Attachment 13 for interview script).

5.2.1.4.1. Under Oath. All testimony should be taken under oath. It puts the witness on notice that the CDI is a serious matter and lets them know they could be criminally liable if they fail to tell the truth. Swearing or affirming (oath with phrase “so help you God” deleted) witnesses is simple. (See Attachment 13). An IO is authorized to administer oaths in the performance of such duties under UCMJ, Article 136 (active duty military); 10 U.S.C. § 936 (Air National Guard and Air Reserve members performing inactive duty training); 5 U.S.C. § 303 (for civilian IOs); and as authorized by a state Code of Military Justice, a state statute, or a state regulation (IOs in Air National Guard in Active Guard Reserve (AGR) status performing AGR duty under Title 32).²³ If a witness, previously sworn, must be re-interviewed, the IO does not need to re-administer the oath, but can simply remind the witness that they are *still* under oath and obtain the witness’ acknowledgement that they understand.

5.2.1.4.2. Written Statements. Written witness statements typically comprise the bulk of witness testimony in a CDI. A witness’ sworn statement should either be written legibly or typed. The best practice is to document statements on an AF IMT 1168, *Statement of Suspect/Witness/Complainant*. All witnesses should sign their statements under oath. The AF IMT 1168 contains the oath. The AF IMT 1168 also includes a rights advisement, which is critical to a suspect interview. If the AF IMT 1168 is not used, then the IO may use the template located at Attachment 14 to this guide. *Regardless of format used, if a witness makes any pen-and-ink changes to their written statement, the IO should have the witness initial the change.*

5.2.1.4.3. Tape-Recorded. Unlike an IG investigation, *there is no requirement that the IO tape-record witness testimony.* Considering the limited scope and purpose of most CDIs, tape-recorded testimony will be the exception, not the rule. IOs should request permission from the commander-appointing authority prior to taping any witness interviews. There are pros and cons to tape recording witness testimony (to include a subject interview). Tape recorders, in good working order, accurately capture interview contents. On the other hand, being taped makes most witnesses nervous, and tapes must be safely stored and transcribed.²⁴ Never allow witnesses to tape-record interviews. If a witness records their CDI interview without permission, the IO should request the individual voluntarily relinquish the tape for inclusion in the official record. An IO is the agent of the commander; the release authority for CDI records rests with that commander. If the individual declines to provide the tape voluntarily, the IO should give the person a lawful order (or, in the case of a civilian, the IO should direct the person) to surrender it, subject to disciplinary action if they refuse.

²³ IOs performing AGR status in Title 32 should consult with their legal advisor to determine the source of their authority to administer oaths.

²⁴ IOs who tape-record witness testimony must work closely with the JAG regarding when and how to dispose of such recordings.

5.2.1.4.4. Verbatim. Verbatim testimony means testimony, usually previously recorded, has been transcribed word for word. Transcription will add significant time and expense to the investigation. If the witness' testimony was important enough to tape-record, it follows that their testimony is important enough to be transcribed. When the IO seeks permission from the commander to tape-record witness interviews, also seek funding authorization for transcription services.

5.2.1.4.5. Summarized. Although the preferred practice is to obtain written, sworn statements from witnesses, the IO may choose to interview and prepare summaries of the testimony of nonessential witnesses. Nonessential witnesses may include character witnesses, witnesses with limited personal knowledge or those who have been called to corroborate other evidence. The IO should never summarize the testimony of a complainant or a subject. It is best practice to have the witness sign the summarized statement, under oath, to certify its validity. (See Attachment 15, for Summarized Testimony template)

5.2.1.4.6. Telephonic. If the witnesses are unavailable for face-to-face interviews, but are important to the CDI, the IO may want to arrange a telephonic interview from their local SJA office. This way the IO may ask a local JAG to administer the oath to and verify the identity of the witness. Any prepared statements, whether by the individual or the IO, can be faxed or e-mailed for signature.

5.2.1.5. Rights Advisements. During any CDI, rights advisement for subjects, suspects or witnesses may become an issue. The IO should work very closely with the legal advisor whenever there is a question about whether an individual should be read their rights.

5.2.1.5.1. Military. The mere fact that someone is the subject of a CDI does not automatically trigger the need for a rights advisement. The test is whether the IO, at the time the active duty military subject is interviewed, either believes or reasonably should believe the individual committed an offense under the UCMJ or other criminal code. If so, then the subject or witness should be considered a *suspect*. The IO should advise suspects of their Article 31(b), UCMJ rights. Cases involving Guard and Reserve personnel are further complicated by their status at the time of the alleged conduct and the time of interview. Consult with the legal advisor in these cases.

5.2.1.5.2. Civilian. Even if suspected of an offense, a civilian witness or subject need not be advised of their Fifth Amendment ("Miranda") rights when interviewed as part of a CDI. Such rights are only required in conjunction with *custodial* interrogations (i.e., interrogations in which the interviewee is not free to leave at will). CDI interviews do not meet the threshold requirement for a custodial interrogation. The lack of a requirement to advise civilian witnesses of their Fifth Amendment rights does not preclude them from invoking such rights and choosing to remain silent if circumstances warrant.

5.2.1.6. Third-Party Presence During Interviews. An interview will normally only involve the IO and the witness. Sometimes a technical advisor or administrative assistant appointed to assist the IO will accompany the IO during interviews. For example, while

interviewing witnesses of the opposite sex, the IO may want an assistant present to avoid any appearance of impropriety. Additionally, if the testimony of a particular witness is especially important to the investigation, the IO may want a third party present to take notes and act as a witness to what is said. Although the IO can have team members present during witness interviews, generally speaking witnesses cannot have third parties present. This section discusses how to proceed when a witness requests that a third party be present during their CDI interview.

5.2.1.6.1. Labor Union Representatives. Civilian subjects or witnesses who are members of collective bargaining units, and their labor unions, have specific rights with regard to labor organization presence during interviews. An IO must extend to a labor organization the opportunity to attend the interview of a collective bargaining unit employee, if the investigation concerns a *grievance* (complaint by an employee about any term or condition of employment) and the interview amounts to a *formal discussion* (employee attendance required, structured, agenda, etc.)²⁵ Presence by the bargaining unit representative is an institutional right for protecting the bargaining agreement. The role of the labor organization is that of an interested observer. Employees also have the right, during an *investigatory interview* conducted by a representative of the Air Force, where the employee reasonably believes discipline may occur as a result, to request the presence of a representative from the labor organization that represents the bargaining unit to which the employee belongs (“Weingarten” rights). To exercise this right, the employee must request representation. *There is no duty for the IO to advise the employee of this right.* When this right is invoked, the IO may wait until a representative from the labor organization arrives or inform the witness that if a representative is desired, no interview will take place, and the case will proceed without any input from the witness. The role of the representative is much greater here. The representative is a *personal representative* of the employee and may provide advice, consult with the witness, and suggest areas of inquiry, but may not obstruct the interview or instruct the witness not to answer legitimate questions. The situation can occur where both the rights of a labor organization and the rights of an employee arise and could result in two representatives from the labor organization. The Civilian Personnel Office and JAG legal advisor can help the IO navigate the unique labor law issues present at each base.

5.2.1.6.2. Attorneys. Only a *suspect* has the right to have an attorney present during an interview. (See paragraph 5.2.1.5.1) The attorney may not answer questions for the suspect. Witnesses and *subjects* may consult with their attorney, but are not permitted to have an attorney present during the interview.

5.2.1.6.3. Other Personal Representatives. As a general rule, third-party representatives for witnesses and subjects are not permitted to be present during CDI interviews. The IO should consult with the legal advisor when special circumstances arise, such as a request for a crime victim to have a Victim Witness Assistance Program (VWAP) representative present.

²⁵ CDIs do not usually concern grievances; the bargaining unit employee has not made a complaint prior to the investigation.

5.2.1.7. Confidentiality. Communications made to the IO during a CDI are not privileged or confidential. However, the IO's disclosure of these communications (and the identity of the person who provided the information) will be limited to an official need-to-know. The CDI ROI will be marked "***For Official Use Only***" (FOUO) and treated as closely-held information.

5.2.1.8. Immunity. General Court-Martial Convening Authorities (GCMCAs) have the authority to grant witnesses immunity from prosecution in exchange for providing testimony; not subordinate commanders or IOs. The IO should never make promises to a witness that could be interpreted as *de facto* immunity (e.g., "Don't worry, you won't get in trouble.") If a witness requests immunity or some other protection as a condition to providing a statement, the IO will consult with the commander and SJA before proceeding.

5.2.1.9. Chief of Staff Hand-Off Policy. The CSAF's 26 November 2002 Policy for Investigative Interviews applies to CDIs. This policy requires a person-to-person hand-off of all subjects and suspects, and any distraught witnesses following an investigative interview. The hand-off must take place between the IO and the individual's commander or the commander's designated representative. The policy applies to everyone, regardless of rank or position. The IO needs to document the hand-off in the ROI, normally somewhere in the witness' testimony. (See Attachment 14, witness statement format)

5.2.2. Physical Evidence. Physical evidence consists of documents, computer records, photographs, and objects (e.g., tools), to name a few. IOs must ensure evidence is properly collected, handled and secured. For more information, IOs should contact their legal advisor.

5.2.2.1. Objects. Occasionally, an IO will have to collect tangible items of evidence as part of a CDI. Consider our earlier example of a tool accountability CDI. Assume several witnesses testified that they saw five torque-wrenches with government markings in Amn Snuffy's car, and the IO ultimately locates the five wrenches.²⁶ The IO would work in tandem with the legal advisor and AFOSI to secure and store the evidence. The IO would obtain photographs of the wrenches to include in his ROI.

5.2.2.2. Documents. Documentary evidence may be in the form of handwritten notes, correspondence, reports, newspapers, inventories and computer records such as e-mails. Written documentation, if authentic, gives the IO a snapshot in time.²⁷ Anytime a witness discusses a particular document during testimony, the IO should ensure the testimony identifies the document (e.g., "my letter, dated X, subject line "quote"). If it would be helpful, the IO can create or have witnesses create documents to illustrate points in the investigation – demonstrative evidence. For example, the IO can have the witness diagram a location and where people were standing at a given time. Other examples of demonstrative evidence include: organizational

²⁶ IOs considering searching and seizing evidence must consult their legal advisor.

²⁷ Identifying a document by its author is known as authentication. The IO should mention in the ROI when a witness authenticates a document.

wiring diagrams, chronologies²⁸ and maps. Demonstrative evidence should be labeled thoroughly and accurately.

5.2.3. Circumstantial Evidence. At times, the IO will need to prove the intangible, such as motive, intent or knowledge. Because the IO cannot read minds, the chance of finding “direct” evidence of such things is remote. Circumstantial evidence is evidence that tends to prove the existence of a fact. For example, Able may have seen Ben shoot Cain. Able could provide direct evidence about what he saw. On the other hand, Able may have walked into a room seconds after hearing a gunshot, seen Ben standing over Cain with a smoking gun, and heard Ben yell, “Die, scum!” The circumstantial case against Ben would include the gun, Ben’s yell and maybe even a large insurance policy that Ben just took out on Cain’s life. Circumstantial evidence can be as compelling as direct evidence.

5.2.4. Computer Evidence. Occasionally, an IO may want to access a subject’s or witness’ e-mail or computer files for evidence of wrongdoing. Generally, real-time monitoring, such as intercepting e-mails *en route* to their destination, is out of the question. For the most part, searching information on local hard drives is not an option for an IO in a CDI. The IO may be able to access computer files if the computer is shared by more than one user or is in a non-private area, for example, files or e-mails stored on a network (shared) drive. Such a search will require the crossing of some significant hurdles.²⁹ The bottom line is that IOs should consult their legal advisors when considering the search and seizure of computer evidence.

5.3. Adding New Allegations. Sometimes a CDI may raise additional allegations. This typically occurs during the investigation when a witness’ testimony reveals additional misconduct, or when a later reviewer raises issues that were not addressed in the investigation.

5.3.1. During the Investigation. If a witness’ testimony, or other evidence, raises the possibility of additional misconduct of the subject or another person, the IO should approach the commander to decide whether the additional issues will be investigated separately or as part of the on-going investigation. If after consultation with the legal advisor, the commander expands the scope of the CDI, the appointment letter should be amended. Subjects must be advised of their alleged wrongdoing when they are interviewed. If a subject has already been interviewed, but was not been given adequate opportunity to respond to the substance of all misconduct under investigation, the subject should be informed and re-interviewed.

5.3.2. Post-Investigation. The more challenging scenario occurs when a later reviewer, such as the JAG conducting the legal review, discovers misconduct that was not addressed in the ROI. When this occurs, the reviewer should discuss with the IO whether the alleged misconduct was investigated, but just not documented in the case file. If such is the case, the IO can include a brief memorandum for record in the case file. If the alleged misconduct was not considered, the IO should consult with the commander to determine a course of action. If additional

²⁸ Building a timeline of events is a useful tool to visualize complex and interrelated events.

²⁹ To prove a need in these cases, IOs must show the search is reasonable (they reasonably expect to find what they’re looking for) and the investigation must be work related (CDIs generally are).

investigation is warranted, the commander will decide whether to reopen the CDI or consider the issue in a separate CDI. The CDI case file should include documentation as to the final disposition of the issue, typically in the ROI “Background” section.

5.4. How Much Investigation is Enough? Due process requires more rigorous investigative efforts when the stakes are higher. IOs should consider the seriousness of the allegations, including the implications for both the subject and the complainant, in assessing whether the CDI was sufficiently conducted. For example, the resources expended on a CDI looking into an improper purchase of a pager might be significantly different than a case involving alleged improper purchases of multiple plasmascreen TVs.

CHAPTER 6. CDI REPORT WRITING

6.1. Suggested CDI Investigative File Format. The CDI ROI must be a stand-alone document. All essential facts, documents, portions of regulations, interviews, etc., must be included in the report so that a reviewer can arrive at a determination without reference to information outside the report. The IO should write as if the reader had no prior knowledge of the case. The following is the suggested format to ensure the CDI contains everything the commander will need to make an informed decision in the case. Section I includes the authority for the investigation; Section II includes the ROI; Section III includes evidence; Section IV contains reviews and final action. Attachment 16 to this guide provides an outline of the ROI sections described in detail below, and can be included as a Table of Contents, immediately after the title page. (See Attachment 17 for sample ROI).

6.1.1. Appointment and Tasking Letters. Tab A. This tab immediately follows the Table of Contents. (Attachment 16) Under this tab, the IO includes the original letter of appointment with attachments, amendments, and any tasking letters received from higher authorities referring to the case.

6.1.2. Authority and Scope. Tab B. In this tab, the IO documents his or her source of authority to conduct the CDI and states the purpose of the CDI. In this section, the IO also lists the allegations investigated. See Attachment 17 for a template.

6.1.3. Background and Allegations. Tab C. The IO provides the factual background leading up to the alleged events. The most difficult part of report writing is to sort through all the information gathered, determine which facts are important and document them in a logical manner. In so doing, the IO must be careful to present both sides of the case, not merely those facts that support his ultimate conclusion. The IO should tie every statement in this section to at least one piece of evidence in the file, referencing its location (e.g., “MSgt Hammer called Amn Snuffy a ‘pig’ and a ‘loser.’ (Tabs, F-1, p.3; F-5, p. 6 and G-6)”) The most helpful way to present facts is in chronological order. Those who read the CDI ROI will generally be limited to the facts within, so IOs must be thorough. The facts are the heart of any case. In this section, the IO also discusses any other issues that arose during the investigation (e.g., documenting why a requested witness was not interviewed). (See Attachment 17 for a sample Background)

6.1.4. Findings, Analysis and Conclusion. Tab D. IOs invest significant time and effort gathering facts. Much of this effort can go unnoticed if the facts are hidden somewhere in a poorly organized ROI. One helpful method for analyzing each allegation is to use the **IFRAC** method (Issues; Facts; Rules; Application; Conclusion).

6.1.4.1. “IFRAC” Method.³⁰ This method of analytical writing simplifies the organization of the Findings, Analysis and Conclusion section of the ROI. (See Attachment 17, Findings, Analysis and Conclusion section for an example of IFRAC in action).

6.1.4.1.1. Issue. The allegations, as framed by the commander, are the issues that the IO must resolve. IOs must address each of the commander’s concerns separately. The IO should start analysis of each allegation by first typing out, word for word, the original allegation. The wording of the allegation drives the analysis. Do not combine allegations in an attempt to simplify the process. For example, a CDI involving maltreatment would begin as follows:

Allegation 1. Master Sergeant Jack Hammer, Superintendent, 1st Contracting Squadron, on or about XX November 20XX, did maltreat Senior Airman Standup Guy, a person subject to his orders, by using profanity towards him, calling him names and hitting him, in violation of Article 93, UCMJ.

6.1.4.1.2. Facts. After identifying the issue, the IO should discuss the key facts, *relevant to the particular allegation at hand*, from the more comprehensive Background section. In most cases, there will be evidence to support two entirely different conclusions—substantiated and not substantiated. The IO must take great pains to present the full story. As noted above, the IO should tie every statement of fact to at least one piece of evidence cited in the case file. (e.g., “MSgt Hammer called Amn Snuffy a “pig” and a “loser.” (Tabs, F-1, p.3; F-5, p. 6 and G-6)

6.1.4.1.3. Rules. Once the issue and facts have been identified, the IO must next focus on the applicable rules or “law” for guidance in resolving the issue. These rules come from sources such as regulations (AFIs, DoDDs, etc), laws (statutes, UCMJ, etc.), and policies (administrative decisions, local policy letters, etc). The IO should document the relevant portions of the rules. For example, if the allegation or issue involved an AFI violation, the IO should annotate the AFI number, name and effective date (e.g., AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996). Generally, IOs will want to *quote* the applicable portions of the instruction, including any definitions, verbatim from the source. Summarizing rules can be dangerous, as many of them were carefully crafted so they would have the desired impact. In cases involving UCMJ offenses, the IO should document the elements of the offense, as found in the MCM.³¹ In our example involving MSgt Hammer, the report might look like this:

³⁰ Adopted from *Law for Air Force Officers Third Edition, 2003* (7TH Print Run: Spring 2006), Faculty, Department of Law, United States Air Force Academy, pp. 1-16 – 1-17.

³¹ DA Pam 27-9, *Military Judge’s Benchbook*, is another excellent source of UCMJ elements and definitions. IOs should consult with their JAG legal advisors on the best “rules” to use in UCMJ cases.

Article 93, UCMJ, Cruelty and Maltreatment, requires proof of two elements:

1. That a certain person was subject to the orders of the accused and
2. That the accused was cruel toward, or oppressed, or maltreated that person.

“Any person subject to his orders” means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the accused.

The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense.... The imposition of necessary and proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

6.1.4.1.4. Analysis. In the analysis section, the IO takes the rules of law and applies them to the facts to resolve the issues. This requires analytical thinking. The IO considers the facts surrounding the issue, assesses preponderance of the evidence and explains *why* he sees it that way. The reader must be able to follow the IO’s thought process. When finished reading the ROI, the commander should feel comfortable that it is complete and that the conclusion follows from the facts presented. To ensure the ROI is thorough, fair and balanced, the IO should keep in mind the “Three C’s” of analytical thinking and writing: *credibility, corroboration, and clarity*. Analysis requires more than just listing the facts and leaping to a conclusion. It requires a window into the IO’s mind. The reader needs to appreciate *why* the IO weighed some items of evidence more heavily than others.

- **Credibility.** When there are opposing sides of a story, in assessing the preponderance of the evidence, the IO must document a credibility determination. This may require the IO to assess, and comment upon:
 - Witness demeanor (hostile, at ease?)
 - Nonverbals (evasive?)
 - Bias (best friends with the subject or mortal enemies?)
 - Motive to lie (personal interest in the matter or disinterested?)
 - Knowledge (personal knowledge or second hand?)
 - Perception (located next to the person or vision partially blocked?)
 - Veracity (character for truthfulness or a reputed liar?)
 - Any other information that may affect credibility (corroboration is discussed below.)

Documenting credibility determinations cannot be overemphasized. Without further explanation, the reader only has testimony and exhibits to review. Only the IO will have the opportunity to assess the witness' appearance and behavior during the investigation. (See Attachment 17, Findings, Analysis and Conclusion section for an example of an IO's credibility assessment)

- **Corroboration.** When testimony is corroborated by other credible evidence or testimony, witness credibility is greatly enhanced. The IO should always discuss evidence that supports, or does not support, witness testimony. With substantial agreement of the evidence, the IO's conclusions have a sound basis.
- **Clarity.** Clarify contradictions before finalizing the investigation. Whenever abbreviations or terms are used for the first time, spell them out or explain them. Avoid the use of slang, unfamiliar jargon, or obscene and profane language unless it is necessary.

6.1.4.1.5. Conclusion. Each allegation should be answered in a separate finding that states whether it was substantiated or not substantiated. If the evidence is in conflict and cannot be reconciled, that simply means that the facts did not satisfy the proof by a preponderance of the evidence standard and therefore, the allegations could not be substantiated. The IO should wrap up by *briefly* stating the reasons for the conclusion. For example, the conclusion can state, "The preponderance of the credible evidence indicates that MSgt Hammer called Amn Snuffy a "(bleep)ing pig" and a "dog" and hit him on the head five times during a staff meeting. I find Allegation 1 to be SUBSTANTIATED." The IO should also identify any mitigating or extenuating circumstances in this section of the report, especially if someone committed wrongdoing, but did so unintentionally. It would also be important to know if the individual already rectified the situation.

6.1.5. Recommendations. Tab E. If the commander desires recommendations for corrective action, the IO will be tasked in the appointment letter. Do not make recommendations unless specifically directed. If the IO was not tasked to provide recommendations, but feels it would be appropriate to do so, the IO should discuss the issue with the commander and request permission to include recommendations.³² Recommendations should be tied to the findings and stated as succinctly and objectively as possible. IOs should not recommend specific punishments or administrative actions. Recommendations are not binding on the commander.

6.1.6. Testimony. Tab F. The IO should first include an index of witnesses and tab each witness' sworn testimony in the order as in Attachment 16.

³² If the commander approves the IO's suggestion and permits recommendations, this fact should be documented in the report in some manner, possibly in the Background section.

6.1.7. Evidence. Tab G. The IO should first include an index of evidence and tab each evidentiary item in the order listed in Attachment 16.

6.1.8. Technical Reviews. Tab H. If no technical review was conducted, place a paper in this tab that says, “None.” Otherwise, tab all technical reviews in the same order in which they are referenced in the CDI ROI. (See Attachment 10 for a sample technical review)

6.1.9. Legal Review. Tab I. Prior to providing the final CDI case file to the commander for action, the IO should obtain a written “legal sufficiency” review. (See Attachment 8 to this guide for a sample legal review)

- Each allegation has been addressed
- IO applied preponderance of the evidence
- Evidence supports findings.
- Conclusions are supported by and consistent with the findings
- Errors or irregularities (if any) do not render case legally insufficient

The JAG reviewer should be someone other than the JAG legal advisor or a subordinate of the legal advisor. JAGs should not deem a ROI “legally insufficient” merely because they personally disagree with the IO’s findings and conclusions. The reviewing JAG can, if necessary, document their disagreement, while still deeming the ROI “legally sufficient.” JAGs should use great caution not to substitute their judgment for that of the IO, particularly in cases where the ROI contains thoroughly documented credibility determinations.

6.1.10. Appointing Authority Approval and Actions. Tab J. Upon receipt and review of the entire CDI case file, including the legal review, the initiating commander either “approves” or “disapproves” the CDI, in writing. (See Attachment 17 for template) If the commander disagrees with one or more of the IO’s findings and conclusions, the commander will document the rationale for the disagreement and final determination on the matter (substantiated or not substantiated) in an “addendum” to the ROI and include it in the case file. (See Attachment 17 for an example addendum).

6.1.11. Administrative Documents. Tab K. Include here any documents that do not otherwise fall into one of the other tabs, such as witness invitation letters, delay requests and extensions, etc.

6.2. Report Markings. Mark “*For Official Use Only*” (FOUO) at the top and bottom of each page. Mark all documents provided by the complainant during the course of the investigation as “**COMPLAINANT PROVIDED**” in the lower right-hand corner of each page. Classify reports according to the policies and procedures contained in security regulations.³³ Control the number and distribution of copies. *IOs will not provide draft or final copies of the CDI ROI, or disclose the IO’s opinion, to complainants, subjects, suspects, or witnesses for any purpose.*

³³ DoDD 5200.1-R; AFD 31-4, *Information Security*, and AFI 31-401, *Information Security Management*.

CHAPTER 7. POST-REPORT ACTIONS

7.1 Closure With Subjects, Suspects and Complainants. Final notification of CDI results is exclusively the commander's prerogative. The commander must make final notification of the CDI results to the complainant (if any) and subject, either verbally or in writing. Remember – the Privacy Act applies. See paragraph 7.4.1 below. A sample written case closure letter to complainant is included at Attachment 18.

7.2. Use of Results in Adverse Administrative Actions. The information obtained in a CDI, including an IO's findings and recommendations, may be used in any administrative action against an individual, whether or not that individual was designated as a subject or suspect. Commanders should consult their JAG prior to notifying any employee, whether civilian or military, of contemplated adverse action.

7.3. CDI "Appeals." There is no formal appeal process for a CDI. Considering an appeal is entirely within the discretion of the initiating commander and the next echelon of command. As a general proposition, the "appealing" party should provide additional information to justify a review. Simply disagreeing with the results does not ordinarily constitute sufficient justification for further review or additional investigation. Complainants and subjects may always appeal their cases to the Air Force Board for Correction of Military Records pursuant to AFI 36-2603, *Air Force Board for Correction of Military Records*, for substantive relief.

7.4. CDI Records Release. The initiating commander is the release authority for CDIs. Commanders should limit access to CDIs to officers and agencies within the AF with a need to know. Release CDIs outside the AF only as required by existing laws. Release should be kept to the minimum necessary to satisfy legal or AF requirements. CDIs may not be released, reproduced, or disseminated in whole or in part, or incorporated into another system of records without the express permission of the initiating commander. Commanders should coordinate any information release with their JAG.

7.4.1. Applicability of Privacy Act. The Privacy Act (PA) of 1974, 5 U.S.C. § 552a, applies to CDIs. In all correspondence relating to CDIs, including notification letters, commanders must refrain from using personal names, but may use the individual's duty title. This is to protect the privacy of individuals involved. Additionally, complainants, witnesses and others are not entitled to know what command action was taken against *subjects* or *suspects*. Commanders should consult their JAG with any questions relating to the PA and prior to authorizing release of a CDI to any person.

7.4.2. Retention of Records. The applicable systems notice (F051 AF JA I) requires commanders to destroy the CDI after a two-year retention period. This means if a CDI closes out (final approval) in February 2006, the commander would maintain it only until February 2008.

7.4.3. Trial or Defense Counsel Requests. Occasionally, trial or defense counsel will request a copy of a CDI to either prosecute or defend an administrative, Article 15 or court-martial action. The commander should provide trial counsel access to the CDI to support

command action. Access may entail providing trial counsel a copy or allowing them to review it. The commander should provide defense counsel access to the CDI, *through* trial counsel.

7.4.4. FOIA Requests. Commanders may receive requests under the Freedom of Information Act (FOIA) for copies of CDIs. If a commander receives a FOIA request directly, he should send it to the FOIA office for proper coordination. Once tasked by the FOIA office, the commander should work closely with the JAG to determine what, if any, portions of the CDI may be releasable. For more information about FOIA, see the AF FOIA website at: <http://www.foia.af.mil/>.

7.4.5. Obligation to Provide Adverse Information to IG. Where a CDI involves an officer in the ranks *O-4 through O-6*, commanders will provide SAF/IGQ (through their local IG) a copy of the ROI, the legal review, any command actions (Article 15s, LORs, LOCs, LOAs, or other records of corrective action) and any rebuttal or statement provided by the subject. See 10 U.S.C. § 615.

ATTACHMENT 1
References

General:

AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005

Computer Searches:

18 U.S.C. § 2510, *Electronic Communications Privacy Act*, 21 October 1986

18 U.S.C. § 2511, *Federal Wiretap Statute*

18 U.S.C. §§ 2701-2711, *Federal Wiretap Statute*

AFI 33-119, *Air Force Messaging*, 24 January 2005

AFI 33-129, *Web Management and Internet Use*, 3 February 2005

Records Release:

DoD Regulation 5400.7/AF Sup, *DoD Freedom of Information Act Program*, 24 June 2002

DoJ *Freedom of Information Act Guide* (May 2004) *currently under revision

AFI 33-332, *Privacy Act Program* (29 January 2004)

<https://afrims.amc.af.mil>

https://wwwmil.acc.af.mil/ja/civil_files/FOIA/foia.htm

<http://www.foia.af.mil>

<http://www.defenselink.mil/pubs/foi/index.html>

Other:

SAF/IGQ Website: <https://www.ig.hq.af.mil/igq/>

ATTACHMENT 2

References, Referral Agencies and Appropriate Grievance Channels

Commanders initiating investigations should be aware of the various issues and complaints that are addressed by AFIs. The following matrix provides for appropriate referral to agencies with programs for the redress of these complaints. This figure is not all inclusive of complaints that can be handled by other appeal channels. If a policy directive or instruction provides a specific means of appeal or redress of a grievance, the complainant should exhaust those appeal procedures.

	Type of Complaint	Referral Agency
1	Appropriated Fund employees -- conditions of employment (personnel policies, practices, and matters affecting working conditions) or, EEO issues (discrimination based on age, race, color, sex, religion, disability, or national origin), or reprisal against a civil service employee	Refer to the servicing Civilian Personnel Flight (CPF) for action in accordance with civilian grievance system (either administrative IAW AFI 36-1203 or negotiated IAW locally negotiated agreements). EEO Complaints should be referred to the Chief EEO Counselor for processing IAW AFI 36-1201.
2	Nonappropriated Fund (NAF) employee conditions of employment issues or reprisal	Servicing NAF Employment Office (conditions of employment) or the DoD/IG for reprisal allegations
3	Military Equal Opportunity and Treatment (MEO) Issues	Refer to local Military Equal Opportunity office -- AFI 36-2706
4	Administrative Separations	Refer to local Military Personnel Flight (MPF)--AFI 36-3208 (Enlisted), AFI 36-3207 (Officers), AFI 36-3209 (Reserves & ANG)
5	Air Force Reserve assignment matters	Refer to HQ AFRC/DP -- AFI 36-2115
6	Equal Opportunity in off-base housing	Refer to the Housing Referral Office--AFPD 32-60
7	Landlord or tenant disputes	Refer to Commander -- AFI 32-6001
8	Claims against the Government	Refer to SJA -- AFI 51-502
9	Correction of military records	Refer to SAF/MIBR (AFBCMR process) -- AFI 36-2603

	Type of Complaint	Referral Agency
10	Appeal of an Officer Performance Report (OPR), Enlisted Performance Report (EPR), or Promotion Recommendation Form (PRF)	Refer to SAF/MIBR (AFEARB process) -- AFI 36-2401
11	Support of Dependents and Private Indebtedness	Refer to subject's commander or DFAS -- AFI 36-2906
12	Suggestions	Refer to local Suggestion Monitor or AF/PE -- AFI 38-401
13	Change to an Instruction/Regulation or current policy guidance	Refer to appropriate HQ USAF OPR -- AFI 33-360, Vol. 1
14	LOC, LOR, or Article 15 (other than discrimination/reprisal)	Refer to chain of command or Area Defense Counsel (ADC) (or HQ AFLOA/JAJM)
15	Punishment under UCMJ	Refer to ADC or HQ AFLOA/JAJM -- AFI 51-201
16	Article 138, UCMJ (Complaint of Wrong)	Refer to CC who is subject of complaint -- AFI 51-904
17	Hazardous Working Conditions (unsafe or unhealthy)	Refer to SE -- AFI 91-301
18	Elimination From Training	Refer to HQ AETC/IG (AETC directives)
19	Medical Treatment	Refer to SG for Quality Assessment or Medical Incident Investigation (MII), AFI 44-119
20	Tricare Complaints	Refer to Tricare Benefits Services Office
21	Allegations of homosexual conduct	Refer to Commander -- AFI 36-3208 (Enlisted), AFI 36-3207 (Officers), AFI 36-3209 (Reserves & ANG)
22	Misuse or abuse of government vehicles	Refer to LGT -- AFI 24-301
23	Unprofessional relationships/adultery	Refer to Commander -- AFI 36-2909

	Type of Complaint	Referral Agency
24	Allegations regarding non-AF organizations or agencies	Refer to specific agency or Service IG or to Defense Hotline
25	Allegations of reprisal by DoD contractors	Refer to DoD/IG
26	Allegations against military defense counsel	Refer to Chief Circuit Defense Counsel
27	Anti-Deficiency Act violations	Refer to SAF/FM -- AFI 65-608
29	Contracting Issues	Refer to issuing contract unit or SAF/AQC
30	Privacy Act	Refer to Base Privacy Act Officer – AFI 33-332
31	HIPPA	Refer to SG channels

ATTACHMENT 3

Administrative Investigations Summary³⁴

In some instances, Air Force directives delineate responsible organizations to conduct certain types of investigations. Below is a summary of the most common of these investigations.

SAFETY INVESTIGATIONS (SIB)

- **Authority:** AFI 91-204 (implementing 10 USC 2254-2255, DoDI 6055.7)

- **Purpose:** To determine the cause of an accident to prevent future mishaps and recurrences of a similar nature. They are intended to find causes of mishaps to take preventive actions. They may not be used as evidence for punitive, disciplinary, or adverse administrative actions. The need for an SIB is determined based upon the type and category of mishap as discussed in Chapter 3 of AFI 91-204.

- **Investigative Resources:** Air Force Pamphlet 91-211, *USAF Guide to Aviation Safety Investigation*; NATO Standardization Agreements (STANAG) 3101, *Exchange of Accident/Incident Information concerning Aircraft and Missiles*; 3102, *Flight Safety Cooperation*; 3531, *Safety investigation Reporting of Accident/Incidents Involving Military Aircraft and/or Missiles*; and 3750, *Reporting and Investigation of Aircraft Incidents*.

ACCIDENT INVESTIGATIONS (AIB)

- **Authority:** AFI 51-503 (implementing 10 USC 2254-2255, DoDI 6055.7)

- **Purpose:** Produce a publicly releasable report of the facts and circumstances surrounding an aircraft or ground accident, to include a statement of opinion on the cause or causes of the accident; to gather and preserve evidence for claims, litigation, disciplinary, and adverse administrative actions; and for all other purposes. AIBs are required for Class A mishap (mishaps involving total mishap cost of \$1,000,000 or more, a fatality or permanent total disability, or destruction of an Air Force aircraft). AIBs are discretionary for other aviation mishaps causing damage or loss to DoD assets.

- **Investigative Resources:** AFI 51-503, *Aerospace Accident Investigations*

³⁴ Derived in large part from *ACC Commander's Guide to Investigations*, July 2004, <https://wwwmil.acc.af.mil/ja/civil.htm>.

FRIENDLY FIRE INVESTIGATIONS (FFI)

- **Authority:** DoDI 6055.7
- **Investigative Resources:** DoDI 6055.7, paragraphs E2.1.16, E4.6.3.5, E4.7 (AF also uses AFI 51-503)
- **Purpose:** Determine the facts of a FFI incident to guide further actions.

FLYING EVALUATION BOARDS (FEB)

- **Authority:** AFI 11-402, Chapter 4
- **Purpose:** Consider evidence concerning a rated member's professional qualification for aviation service, evaluate his potential for future rated duties, and make recommendations regarding his future flying duties to higher authorities.
- **Investigative Resources** - AFI 11-402 Chapter 4. *ACC/JA Guide Flying Evaluation Boards* at <https://wwwmil.acc.af.mil/ja/civil.htm>.

REPORTS OF SURVEY (ROS)

- **Authority:** AFMAN 23-220 (implementing AFD 23-2, AFI 23-111, DoD 7000.14-R)
- **Purpose:** A ROS authorizes adjustment of property accountability records; establishes pecuniary liability; prescribes corrective action to prevent recurrence of loss, damage or destruction of Air Force property; and serves as authority for effecting collection of an indebtedness.
- **Investigative Resources:** AFMAN 23-220, *Reports Of Survey For Air Force Property*

LINE OF DUTY (LOD)

- **Authority:** AFI 36-2910
- **Purpose:** Determination of whether certain diseases, injuries, or death suffered by military members are incurred while in a line of duty (LOD) status or as a result of a member's own misconduct.
- **Investigative Resources:** AFI 36-2910, *Line Of Duty (Misconduct) Determination*; AF Form 348; DD Form 261

INSPECTOR GENERAL (IG) INVESTIGATIONS

- **Authority:** AFI 90-301 (implementing 10 U.S.C. 8014 and 8020, 10 USC 1034, DoDD 7050.6)

- **Purpose:** Investigates allegations against Air Force personnel, programs or organizations that are either made to the IG or directed or initiated within IG channels. Sole authority to conduct investigations into allegations of reprisal, restriction and improper mental health evaluation referrals.

- **Investigative Resources:** SAF/IGQ *IO Toolkit*

<http://www.ig.hq.af.mil/igq/IO%20Toolkit/ToolkitMainMenu.htm>; SAF/IGQ *IO Guide*

http://www.ig.hq.af.mil/igq/Downloads/IO_Guide.doc; SAF/IGQ *JAG Guide to IG Investigations*

SECURITY FORCES OFFICE OF INVESTIGATIONS (SFOI)

- **Authority:** AFI 31-206 (Implementing 18 USC; 10 USC 801-940; RCM 704; MoU Between the DoJ and DoD Relating to the Investigation and Prosecution of Certain Crimes, August 1984; DoDD 1010.7; DoDD 5200.8; DoDD 5525.4DoDD 5525.5; and DoDI6055.4)

- **Purpose:** Criminal investigations of misdemeanor-type offenses and offenses addressing to installation security and traffic laws.

AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI)

- **Authority:** AFI 71-101 (implementing 10 U.S.C. 9027; DoDD 5505.1; DoDI 5505.10; DoDI 5505.2; DODI 5505.3; DODD 5505.8; and AFRPD 71-1

- **Purpose:** Criminal investigations of felony-type offenses.

ATTACHMENT 4
SAF/IGQ Abuse of Authority Test

The Air Force defines abuse of authority as “an *arbitrary or capricious* exercise of power by a military member or a federal official or employee that *adversely affects* the rights of any person or that *results in personal gain or advantage* to the abuser.” AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005, Attachment 1, Terms. Courts have interpreted the arbitrary and capricious standard in the context of government agency action under 5 U.S.C. § 706, the Administrative Procedure Act (APA). This precedent can be summarized into a test for abuse of authority:

1. Did the responsible management official’s (RMO’s) actions either:

a. Adversely affect the rights of any person? (e.g., demotion, referral OPR, etc.)

or

b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

and

2. At the time of the action:

a. Did the RMO act within the authority granted under applicable regulations, law or policy?

and

b. Was the RMO’s action based on relevant data and factors?

and

c. Was the RMO’s action rationally related to the relevant data and factors?

If both Questions 1(a) and (b) are answered “no,” then it is not necessary to consider Question 2. If either part of Question 1 ((a) or (b)) is answered “yes”, proceed to Question 2. *In answering Question 2, IGs and JAGs should examine the RMO’s action very narrowly, giving the RMO’s decision substantial deference (great weight) without substituting one’s judgment for that of the RMO.* In so doing, if the answer to Question 2, parts (a), (b) and (c) is “yes,” the action should not be considered “arbitrary and capricious.” If the answer to any part of Question 2 is “no,” then the action was “arbitrary and capricious” (a clear error of judgment) and the action is indicative of an abuse of authority.

ATTACHMENT 5
IO Appointment Letter
On Commander's Letterhead

FOR OFFICIAL USE ONLY

Date

(simulated 4 lines between date and header)

MEMORANDUM FOR MAJOR _____

FROM: ____/CC

SUBJECT: Commander-Directed Investigation (CDI) of the Accountability and Control of Maintenance Equipment, _____ Squadron *(Do not include the Complainant or Subject's names)*

1. You are appointed to conduct a CDI into all aspects of the facts and circumstances concerning *(give a brief listing of what is to be examined, but do not include the complainant or subject's names, e.g., the control of maintenance equipment belonging to the ____ squadron)*. This is your primary duty (no leave, temporary duty, or other duties) unless expressly discussed and permitted by me, until completion of this duty and submission of an acceptable report.
2. You are authorized to interview personnel, take sworn statements or testimony and examine and copy any and all relevant Air Force records, files, and correspondence germane to this investigation.
3. In conducting the CDI, follow the guidance in the *Commander-Directed Investigation Guide*. Prepare and submit to me a report of investigation in the format it describes. Submit the report to me by _____, unless I grant a written extension. *(Optional: Include recommendations you deem appropriate, in your report)*.
4. You will meet with _____ *(JAG name and contact information)*, your designated legal advisor for purposes of this CDI, prior to beginning your investigation. *(If applicable—You must also meet with _____ (Technical Advisor name and contact information), a person appointed by me to provide you technical advice on _____ (subject matter expertise)) (If applicable—I have appointed (Administrative Assistant name and contact information) to provide you administrative assistance throughout your investigation.)*
5. You may not release any information related to this investigation without my prior approval. This letter and the attached documents are marked FOR OFFICIAL USE ONLY and contain information that must be protected under the Privacy Act.

(simulated 4 lines between last paragraph and signature block)

FLY STRAIGHT, Colonel, USAF
Commander

FOR OFFICIAL USE ONLY

FOR OFFICIAL USE ONLY

Attachments:

1. Framed Allegations
2. Any evidence commander has for IO to review

cc:

(JAG name) ____ FW/JA

(Technical Advisor, if applicable)

(Assistant IO, if applicable)

(Administrative Assistant, if applicable)

FOR OFFICIAL USE ONLY

ATTACHMENT 6
Privacy Act Notice

PRIVACY ACT STATEMENT

Policy	<p><i>The Privacy Act statement is required to be read and acknowledged by each witness at the beginning of the interview process.</i></p> <p><i>The IO is required to have each witness read this statement and document it in their Report of Investigation.</i></p>
Authority	<p><i>Title 10, United States Code, Sections 8013 and 8020, and Executive Order 9397.</i></p>
Principal purpose	<p>Information is collected during an inquiry or investigation to aid in determining facts and circumstances surrounding the allegations. The information is assembled in report format and presented to the Appointing authority as a basis for DoD or Air Force decision-making.</p> <p>The information may be used as evidence in judicial or administrative proceedings or for other official purposes within the DoD. Disclosure of Social Security number, if requested, is used to further identify the individual providing the testimony.</p>
Routine uses	<p>Routine uses include</p> <ul style="list-style-type: none">• Forwarded to federal, state, or military and local law enforcement agencies for law enforcement purposes.• Used as a basis for summaries, briefings, or responses to members of Congress or other agencies in the Executive Branch of the Federal Government.• Provided to Congress or other federal and state agencies when determined to be necessary.

Disclosure or
non-disclosure

FOR MILITARY PERSONNEL: Disclosing your Social Security number is voluntary. Disclosing other personal information relating to your position responsibilities is mandatory and failure to do so may subject you to disciplinary action.

FOR DEPARTMENT OF THE AIR FORCE CIVILIANS: Disclosing your Social Security number is voluntary. However, failure to disclose other personal information in relation to your position responsibilities may subject you to adverse personnel action.

FOR ALL OTHER PERSONNEL: Disclosing your Social Security number and other personal information is voluntary. No adverse action can be taken against you for refusing to provide information about yourself.

SIGNATURE

ATTACHMENT 7
Proof Analysis

Allegation: DERELICTION IN THE PERFORMANCE OF DUTY (ARTICLE 92)
Captain Turner Defear, Flight Commander, 123rd MXS Squadron, who knew or should have known of his duties, between November 2004 to April 2006, was derelict in the performance of those duties in that he negligently failed to take corrective action (including a protective order for Ms. Fright) when he had reason to suspect Staff Sergeant Ben Wrong was using alcohol while he was participating in the Other AFB Alcohol Substance Abuse Program, in violation of Article 92, UCMJ.

ELEMENTS	DEFINITIONS	EVIDENCE & LOCATION
(1) That Capt Defear had a certain prescribed duty, that is: to take corrective action when he had reason to suspect SSgt Wrong was using alcohol while he was participating in the Other AFB Alcohol Substance Abuse Program	A duty may be imposed by regulation, lawful order or custom of the service. A person is "derelict" in the performance of duty when he negligently fails to perform them or when he performs them in a culpably inefficient manner.	Ms Fright (complainant) F-1 SSgt Wrong F-3 Capt Hands (Flight Surgeon), F-4 Capt Defear (subject), F-7 SSgt Wrong's OPRs, G-1 Mental health/social actions clinic records for SSgt Wrong, G-2 Outpatient records for SSgt Wrong, G-3 OMC inpatient records for SSgt Wrong, G-4 ADAPT Program regulations and guidance, G-5 Records of treatment committee meetings for SSgt Wrong, G-11
That Capt Defear knew or reasonably should have known of the assigned duty; and	That an individual reasonably should have known of duties may be demonstrated by regulations, manuals, customs, academic literature or testimony of persons who have held similar or related position or similar evidence.	Maj Doright (Section CC) F-6 Capt Defear (subject), F-7
That between November 2004 to April 2006 Capt Defear was derelict in the performance of that duty, by failing (negligently) to take corrective action (including a protective order for Mrs. Fright) when he had reason to suspect SSgt Wrong was using alcohol while he was participating in the Other AFB Alcohol Substance Abuse Program	"Dereliction" is defined as a failure in duty, a shortcoming, or delinquency. "Negligently" means an act or failure to act by a person under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably prudent person would have used under the same or similar circumstances. "Culpably inefficient " means inefficiency for which there is no reasonable or just excuse. It means a reckless, gross, or deliberate disregard for the foreseeable results of a particular act or failure to act.	Ms Fright (complainant) F-1 SSgt Wrong , F-3 PRP documentation, G-8 Security clearance related documents, G-9 Court-martial documents, G-10 Capt Hands (Flight Surgeon), F-4 Capt Defear (subject), F-7 OSI report, G-6

DA PAM 27-9 • 15 September 2002

ATTACHMENT 8
Legal Review of CDI Case File

XX Month 200X

MEMORANDUM FOR APPOINTING AUTHORITY

FROM: (Unit)/JA

SUBJECT: Legal Review of CDI Concerning Allegations of Maltreatment *(Note--use these terms and choose one(s) that summarize(s) the allegation(s))*

1. We have reviewed the above referenced commander-directed investigation (CDI) report of investigation (ROI) and case file and find it to be legally sufficient. *(If not legally sufficient, briefly state why)* The case may be forwarded to the appointing authority for final action.

2. **BACKGROUND:** *Explain here the parties, allegations and IO's conclusions as well as all the relevant facts of the case.*

a. Complainant, *(Rank/Name)*, was a *(duty position)* assigned to *(unit and base of assignment)*. There were *(#)* subjects. The first subject, *(explain the rank/name(s) of subject(s), their unit(s), and base(s) of assignment and relationship to the complainant)*. Subject number two.... The complaint alleged *(summarize the allegations)*.

b. The investigating officer (IO) determined the allegations were as follows:
(summarize findings --either substantiated or not substantiated--may have to list these out in bullet format if several).

c. *This series of paragraphs should provide whatever background information a reader will need to understand the findings, analyses, and conclusions of the IO. Look to the applicable law to determine what facts are relevant. **IMPORTANT!!!** Cite Section, Tab and page number in the ROI to support each fact. (Section III, Tab D-2, p. 2)*

3. **STANDARDS:** *Briefly summarize the applicable legal standards here. These are templates for commonly used standards. (Note: As a style point, some JAGs prefer to include the legal standards in their Analysis or Discussion section, just prior to applying the relevant facts to that standard.)*

4. **ANALYSIS:** *This is an allegation-by-allegation review of whether the IO properly applied preponderance of the evidence standards to the facts to support IO's conclusions. The analysis should have subsections for each allegation in the ROI.*

a. **Allegation 1:** *(Type the allegation verbatim from the case file. This assists in finding discrepancies. Do this for each allegation.)*

b. *The degree of detail and analysis necessary will be driven by case complexity and thoroughness of the case file. If the JA simply disagrees with the IO's findings (and conclusions), then document the rationale in the legal review. A disagreement is not necessarily the same as "legal insufficiency." While conducting the legal review, JAGs must not substitute their judgment for that of the IO. Reasonable minds may differ in these cases. If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient.*

c. *Always include a conclusion for each allegation, such as:* For all of these reasons, we concur with the IO's assessment that Allegation 4 should be **SUBSTANTIATED** for restriction.

5. ERRORS AND ANOMALIES: *The legal review must ensure the investigative process was properly followed, the analysis of the facts and circumstances is reasonable, and the appropriate legal standards were applied to the facts. If the ROI is legally sufficient, but could have been more thorough in some respect, the JAG should provide this feedback to the IO in this section. Always include a statement about the effect of these errors on the overall legal sufficiency, such as:* We note that the Investigating Officer (IO) failed to properly tab the file in accordance with the CDI Guide, we find that this error does not cause this ROI or the investigation to be legally insufficient.

6. CONCLUSION: The ROI is legally sufficient. The IO has complied with all applicable legal and administrative requirements in conducting this investigation. The report addresses all of the matters under investigation, and the findings are supported by a preponderance of the evidence. Conclusions reached are consistent with those findings. *(If not, discuss what specific steps are needed to make the ROI legally sufficient. The IO should be able to take your legal review as a road map to correct his/her report.)*

7. RECOMMENDATIONS: As appointing authority, you can either approve or disapprove the CDI. If you choose to disapprove the CDI, you should document your rationale and ultimate findings (substantiated or not substantiated) in an Addendum. Recommend you approve the CDI findings and conclusions, as written.

NAME, Rank, USAF
Duty Title

1st Ind, Appointing Authority

MEMORANDUM FOR RECORD

I concur / nonconcur.

NAME, Rank, USAF
Staff Judge Advocate

ATTACHMENT 9
Technical Advisor Appointment Letter

(Appointing Authority's Letterhead)
FOR OFFICIAL USE ONLY

Date

MEMORANDUM FOR LT COL _____

FROM: ____/CC

SUBJECT: Commander-Directed Investigation (CDI) of the Accountability and Control of Maintenance Equipment, _____ Squadron *(Do not include the Complainant or Subject's names)*

1. You are appointed as a technical advisor, in the area of _____ *(subject matter expertise: e.g., inventory control)* to assist Major _____ *(IO rank name)*, the appointed Investigating Officer (IO), in conducting a CDI into all aspects of the facts and circumstances concerning *(give a brief listing of what is to be examined, but do not include the complainant or subject's names, e.g., the control of maintenance equipment belonging to the ____ squadron)*. Your assistance includes, but is not limited to, consultation, expert witness testimony, and/or technical review of the final report of investigation, as directed by the IO.
2. The IO will obtain and provide you any materials necessary to assist him, such as sworn statements or testimony and relevant Air Force records, files, and correspondence germane to this investigation.
3. To perform your duties, you should become familiar with the guidance contained in the *Commander-Directed Investigation Guide*. Technical reviews should be written in the format contained therein.
4. Because you are part of the investigative team, you will be privy to sensitive information. You may not release any information related to this investigation without my prior approval. This letter and the attached documents are marked FOR OFFICIAL USE ONLY and contain information that must be protected under the Privacy Act.

FLY STRAIGHT, Colonel, USAF
Commander

cc:
(IO)

FOR OFFICIAL USE ONLY

ATTACHMENT 10

Technical Review

FOR OFFICIAL USE ONLY

Date

MEMORANDUM FOR IO

FROM: (OFFICE SYMBOL)

SUBJECT: Request for Technical Review, Commander-Directed Investigation (CDI) of the Abuse of Authority, Indefinite Grounding of Lt Col X, C-130 Pilot, _____ Squadron *(Do not include the Complainant or Subject's names)*

1. I have reviewed the above-referenced CDI report of investigation (ROI) and supporting case file. I concur with the findings and conclusions of the IO.
2. I believe the reasonableness of the actions *initially* taken against Lt Col X were correct in that sufficient managerial concerns over flight safety were justified. Additionally, the necessary management consultation and coordination were conducted to support the actions. That said, I also concur with the IO that proper procedures were not followed in removing the individual from the flying schedule for a protracted period of time. Had the original intent of not flying the individual for a few weeks been followed, I could have supported management in their position that this was a "reasonable" period of time. However, after several weeks had elapsed, the individual should have been formally grounded and appropriate administrative actions taken, to include a possible flying evaluation board.
3. In short, my technical review of the ROI and case file supports the IO. Should you have any additional questions, please contact me at DSN _____.

NAME, Rank, USAF
Regular Duty Title (e.g., Director of Operations)
CDI Technical Advisor

FOR OFFICIAL USE ONLY

ATTACHMENT 11
Administrative Assistant Appointment Letter

(Appointing Authority's Letterhead)
FOR OFFICIAL USE ONLY

Date

MEMORANDUM FOR SSGT _____

FROM: ____/CC

SUBJECT: Commander-Directed Investigation (CDI) of the Accountability and Control of
Maintenance Equipment, _____ Squadron *(Do not include the Complainant or
Subject's names)*

1. You are appointed as an administrative assistant to Major _____ (*IO rank name*), the appointed Investigating Officer (IO), with respect to the above-referenced CDI. As such, throughout the duration of the CDI, you will report directly to, and provide requested support, to the IO. This is your primary duty (no leave, temporary duty, or other duties), unless expressly discussed and permitted by the IO or me, until completion of this duty.
2. Because you are part of the investigative team, you will be privy to sensitive information. You may not release any information related to this investigation without my prior approval. This letter and the attached documents are marked FOR OFFICIAL USE ONLY and contain information that must be protected under the Privacy Act.

FLY STRAIGHT, Colonel, USAF
Commander

cc:
(IO)

FOR OFFICIAL USE ONLY

ATTACHMENT 12
Witness Invitation Letter³⁵

IOs can invite civilian witnesses, but they need not appear. The best practice is for the IO to personally telephone the witness and invite them to testify, using the language in this letter as a “script.” Otherwise, the IO can provide the witness an invitation letter, recommended sample below.

_____/CC (Commander’s Office Symbol)
Address
City/State/ZIP

Mr./Ms. _____
Address
City/State/ZIP

Dear Mr./Ms.

I have been appointed by _____ (same CC organization block as above) to conduct a Commander-Directed Investigation involving allegations of _____
(general information, NO PERSONAL NAMES, e.g., maltreatment of subordinates by 34 ABW/CCF. You are invited to appear as a witness as your participation will significantly contribute to the investigation. You are requested to appear at the Office of the Staff Judge Advocate (or other interview location) _____, Other AFB, at _____ a.m. on _____. Please contact me by _____ to let me know whether you can appear on this date, or need to arrange another mutually convenient time for your interview. My phone number is _____. Thank you for your assistance. I look forward to our meeting.

Sincerely

NAME, Rank, USAF
Investigating Officer

³⁵ Derived in large part from sample invitation letter, *AFLSA/JAJM Article 32 Investigating Officer’s Guide*.

ATTACHMENT 13
Interview Script

Do not read portions in italics or bold. Read only applicable portions. *IOs should fill out this script prior to each interview.*

INTRODUCTION

My name is _____. I have been appointed by _____ (*appointing authority*) to investigate allegations that:

For Subject or Suspect Interview: you may have _____ (read all allegations word-for-word.) If you desire, during this interview, you may comment on this information to give your side of the story. You may also show me evidence to contradict or explain allegations.

For Witness Interview: _____ (*Subject*) name) did _____ (*summarize the nature of the allegation or allegations, e.g., Col X abused his authority when he indefinitely grounded Lt Col Y, on or about DATE.*)

ADMINISTRATIVE MATTERS

a. Privacy Act Statement

During the course of this interview, I will ask you to furnish information about yourself. The Privacy Act of 1974 requires that I inform you of the authority for this requirement. The statement, which I am now handing you, serves this purpose (*hand statement, Attachment 6, to witness.*) Please read and sign the statement.

(IO takes signed statement from witness and says:) Thank you. This statement will become part of the official case file.

b. Statement Format

If the Witness statement will be summarized:

I will take notes of your interview and summarize your statement. After I prepare a summary of your testimony, I will ask you to read it carefully to be sure it is accurate. You may make any changes you think are necessary to accurately reflect your testimony. You will then sign the summary under oath. Your summarized statement will be included in my written report to _____ (name of appointing authority.)

If the Witness is providing a written sworn statement:

I will take notes of your testimony, but at the conclusion of our interview, I would like you to provide a written, sworn statement. Your statement will be included in my written report to _____ (name of appointing authority.)

If the Witness' testimony will be recorded and transcribed verbatim:

Your testimony will be recorded and transcribed so that a written report can be made available to the appointing authority, _____ (name of appointing authority). Please answer each question verbally, as the tape recorder cannot pick up any nods or gestures. Additionally, all of your statements will be on-the-record, whether the tape recorder is turned on or not.

OATH

Before we continue, I want to remind you how important it is to give truthful testimony. It is a violation of federal law to knowingly make a false statement under oath. I will now administer the oath. *(The IO may wish to ascertain whether the witness would prefer to affirm; use one or the other)* Please raise your right hand.

Swear. Do you solemnly swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

OR

Affirm. Do you solemnly affirm that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth?

REQUIRED BACKGROUND INFORMATION

If Not Recorded. I am documenting for my notes, the time, which is _____ on _____ (day, month, year). [We are the only persons present for this interview] *or* [Also present for the interview are: _____ (name, duties in reference to CDI, e.g., the technical advisor)].

Could you please tell me your full name: *(spell it out if unsure)*

Rank: *(Active, Reserve, Retired)*

Position:

Organization:

Social security number: *(voluntary)*

Address: *(home or office)*

If Recorded. The time is now _____ on _____ (day, month, year.) Persons present are the witness _____, the investigating officer(s) _____ [recorder(s) (if present)] _____ [And (others) (if present)] _____. We are located at _____.

Please state your:

Full Name: *(spell it out)*

Rank: *(Active, Reserve, Retired)*

Position:

Organization:

Social security number: *(voluntary)*

Address: (home or office)

RIGHTS ADVISEMENT

Before the interview, the IO must consult with the Legal Advisor to determine what, if any, rights advisement is required.

Witnesses/Subjects: *For Individuals To Whom the IO Does Not Intent to Read "Rights."* At this time, you are **NOT** suspected of any offense under the Uniform Code of Military Justice (UCMJ), federal, or local law. Therefore, you are not authorized to have legal counsel present, and I am not advising you of your Article 31 rights. In addition, AFI 90-301 mandates that you answer all questions except those that may incriminate you.

Suspects.

Before we begin our discussion, I want to make it clear that you have the following rights:

(1) For active duty personnel and USAFR/ANG personnel subject to the UCMJ:

Under Article 31 of the UCMJ: You may remain silent, that is say nothing at all; any statement you make, oral or written, may be used as evidence against you in a trial by court-martial or in other judicial or administrative proceedings; you have the right to consult a lawyer and to have a lawyer present during this interview; you have the right to military legal counsel free of charge; in addition to military counsel, you are entitled to civilian counsel of your own choosing, at your own expense; you may request a lawyer at any time during this interview; if you decide to answer questions without a lawyer present, you may stop the questioning at any time.

Do you understand your rights?

Do you want a lawyer?

Are you willing to answer questions? *(If yes, the IO proceeds to the Oath, above; If no, the IO concludes the interview: Because you have invoked your rights, this interview is concluded. You are free to leave.)*

(2) If the interviewee is NOT subject to the UCMJ at the time of the interview (e.g., Civilians, and USAFR/ANG personnel (depending on status), etc.):

Regardless of whether a collective bargaining agreement applies, ALL civilians, Reserve, and Air National Guard personnel should be advised of the following:

This is a non-custodial interview. While you have a duty to assist in this investigation and may face adverse administrative action for failing to cooperate, you will not be kept here involuntarily. You also have a right not to answer questions that are self-incriminating. You have a right to be fully informed of any allegations that have been made against you. Are you willing to answer questions? *(If yes, the IO proceeds to the Oath, above; If no,*

the IO concludes the interview: Because you have invoked your rights, this interview is concluded. You are free to leave.)

INTERVIEW

Proceed with questions necessary to obtain all direct knowledge of the matters under investigation

Suspected Crimes. *If during an interview the IO suspects a witness of having committed criminal offense(s): (a) Stop the interview and inform the witness of being recalled; (b) Consult with the JAG Legal Advisor regarding whether the witness should be read their rights based on gathered information and what offenses to cite during the rights advisement; (c) Recall the individual.*

Recalling Witnesses

Whose Status Has Not Changed (e.g., need for clarification interview). If it becomes necessary to recall an individual whose status as a witness remains unchanged, simply advise the individual that he or she was placed under oath previously and is still under oath.

Whose Status Changed (e.g., need for rights advisement). If it becomes necessary to recall an individual whose status has changed from subject or witness to suspect, advise the individual that he or she was placed under oath previously and is still under oath and then restart the script from the rights advisement portion.

Suspected False Statements or Representations. *If during the course of the interview the IO has reason to believe that the witness is providing false testimony, take a break and consult with the Legal Advisor. If applicable, the IO will read the appropriate statement to the witness as listed below.)*

1) For active duty personnel or USAF/ANG personnel subject to the UCMJ:

I consider it my duty to advise you that any person subject to the UCMJ who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement, knowing the same to be false, may be subject to action under the provisions of article 107, UCMJ. Additionally, under the provisions of article 134, UCMJ, any person subject to the UCMJ who makes a false statement, oral or written, under oath, not believing that statement to be true, may be punished as a court-martial may direct.

Do you understand?

2) For USAFR/ANG personnel and civilian employees not subject to the UCMJ:

I consider it my duty to advise you that under the provisions of Section 1001, Title 18, US Code, whoever in any matter within the jurisdiction of any department or agency of the

United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device, a material fact, or makes any false fictitious, or fraudulent statements or representations, shall be fined or imprisoned for not more than 5 years, or both. Additionally, any person who willfully and contrary to his or her oath testifies falsely while under oath may be punished for perjury in 18 U.S.C. § 1621.

Do you understand?

Fact-Finding Wrap-Up

End every interview with the following:

Do you have any further information, statements, or evidence, which you wish to present concerning the matters we have discussed?

Do you know of anyone else who can provide further information concerning these issues?

CONCLUDING REMARKS

Information Protection

This is an official investigation. It is protected in the sense that my report will be made to the appointing authority or higher authority for such use as deemed appropriate.

Non-Disclosure

(1) For active duty personnel and USAFR/ANG personnel subject to the UCMJ:

You are ordered not to divulge the nature of this investigation or the questions, answers, or discussions included in this interview with anyone except a chaplain, or your counsel if you have one until case closure or unless approved by me, the IG or the appointing authority or higher authority.

(2) If the interviewee is NOT subject to the UCMJ at the time of the interview (e.g., Civilians, and USAFR/ANG personnel (depending on status), etc.):

You are "directed" not to divulge the nature of this investigation or the questions, answers, or discussions included in this interview with anyone except a chaplain, (*for civilian employees only*, add: a union representative), or your counsel (if you have one) until case closure or unless approved by me, the IG or the appointing authority or higher authority.

All witnesses, regardless of status: If anyone should approach you regarding your testimony or the matters discussed here, you are required to report it immediately to me or _____ (state the name of the appointing authority.)

Information Release

I, as the investigating officer, am prohibited from providing a copy of your testimony to you. However, you may submit a request in writing for the report or any part thereof to the appointing authority or the Freedom of Information Act office. The release authority will evaluate your request under both the Freedom of Information Act and the Privacy

Act, and provide the releasable information to you. If this report becomes the basis of an adverse action against you, you (or your counsel) can request access to the report. It is entirely within the appointing authority's purview to provide you access to the relevant portions of the report to use in your defense.

Post-Interview Evidence

You may submit additional relevant information for my consideration, but if you wish me to consider the additional information before my investigation closes, I must receive that information on or before _____ (*insert date.*)

CSAF Hand-Off Policy

For subjects, suspects or distraught witnesses only.

In accordance with the CSAF Hand-off policy, I must personally refer you to your commander or designee, civilian leading an organization designated as a unit IAW AFI 38-101 or designee, first sergeant, or supervisor at the conclusion of this interview. I have coordinated this requirement with your commander. _____ (state the name of the individual who will accomplish the person-to-person hand-off) will meet you here as we conclude the interview.

*Note: If a military interviewee invokes his/her right to remain silent, the IO must inform the person receiving the hand-off **not** to violate this right by discussing any aspect of the investigation with the interviewee. The IO must document the hand-off within the report of investigation*

Final Remarks

Do you have any questions?

The time is _____. This interview is concluded. Thank you.

ATTACHMENT 14
Witness Statement Format

When possible, and particularly for suspect interviews, we recommend you use the AF Form 1168, *Statement of Suspect/ Witness/Complainant*, <http://www.e-publishing.af.mil/formfiles/af/af1168/af1168.xfd>. The AF Form 1168 contains an Article 31(b) UCMJ rights advisement, which is critical to document properly during suspect interviews. For subjects and witnesses, when it is not feasible to use the AF Form 1168, the IO may use the following format for an Affidavit. *If a suspect, subject or witness makes any corrections to their statement, the IO should have them initial the change.*

AFFIDAVIT

I am SSgt Ima Honest, 123rd MXS Squadron, Other AFB, USA. I have been SSgt Ben Wrong's co-worker for three years. We work together every day. We occasionally socialize off-duty, maybe twice a month. Capt Turner Defear is our Flight Commander. SSgt Wrong told me that Capt Defear gave him a stay-away order in April 2005. Capt Defear supposedly told SSgt Wrong not to visit Ms. Fright at the Family Support Center anymore. I, personally, was confused by the need for such an order. I worked with SSgt Wrong every day and did not see any evidence of alcohol abuse and unusual behavior. I know Ms. Fright and have known her for the entire time I knew SSgt Wrong. Ms. Fright, in my opinion, is not a very truthful person. I believe she was upset with SSgt Wrong because, in their divorce, he got the house and the dog. Ms. Fright ginned up some charges against SSgt Wrong, said he hit her with a hammer on the head. It was bogus. SSgt Wrong was court-martialed and acquitted. The doctor in the court-martial said the hammer wounds were self-inflicted. That's just sick. I think Capt Defear is the best commander on the planet.

I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement and it is true and correct to the best of my knowledge.

/s/ Ima Honest
IMA HONEST, SSgt, USAF

Subscribed and sworn to before me, a person authorized to administer oaths, this ____ day of ____, 20__.

(signature)
Investigating Officer

ATTACHMENT 15
Summarized Statement Format

SUMMARIZED TESTIMONY OF SSGT IMA HONEST

SSgt Ima Honest appeared at the investigation, was sworn, and testified substantially as follows:

I am SSgt Wrong's co-worker in the 123rd MXS Squadron. I have known SSgt Wrong for three years. We work together everyday. We occasionally socialize, off-duty, maybe twice a month. Capt Turner Defear is our Flight Commander. SSgt Wrong told me that Capt Defear gave him a stay-away order in April 2005. Capt Defear supposedly told SSgt Wrong not to visit Ms. Fright at the Family Support Center anymore. I, personally, was confused by the need for such an order. I worked with SSgt Wrong every day and did not see any evidence of alcohol abuse and unusual behavior. I know Ms. Fright and have known her for the entire time I knew SSgt Wrong. Ms. Fright, in my opinion, is not a very truthful person. I believe she was upset with SSgt Wrong because, in their divorce, he got the house and the dog. Ms. Fright ginned up some charges against SSgt Wrong, said he hit her with a hammer on the head. It was bogus. SSgt Wrong was court-martialed and acquitted. The doctor in the court-martial said the hammer wounds were self-inflicted. That's just sick. I think Capt Defear is the best commander on the planet.

I declare under penalty of perjury that the foregoing is true and correct. Executed at _____ Air Force Base, _____, on _____ 20 ____.

/s/ Ima Honest
IMA HONEST, SSgt, USAF

I declare under penalty that the foregoing in a true and correct summary of the testimony given by the witness. Executed at _____ Air Force Base, _____, on _____ 19 ____.

(signature)
Investigating Officer

ATTACHMENT 16
ROI Format
(Sample Table of Contents)

A CDI case file is a compilation of documents relevant to an investigation. CDI case files should be standardized. The figure below shows the standard case file format for CDIs.

Tab A: Appointment and Tasking Letters

Tab B: Authority and Scope

Tab C: Background

Tab D: Findings, Analysis and Conclusion

Tab E: Recommendations (if applicable)

Tab F: Testimony

Index of Witnesses

F(1) Complainant's Testimony

F(2) Subject's Testimony (list other subjects F(3), F(4) etc.)

F(#) Witness Testimony

Tab G: Evidence

Index of Exhibits

G(1) – G(#) – All exhibits

Tab H: Technical Reviews (if applicable)

Tab I: Legal Review

Tab J: Appointing Authority Approval and Actions

Tab K: Administrative Documents: Witness Invitation Letters, Memos, Progress Reports, or any other documents that do not fall neatly into Tabs A-J above.

ATTACHMENT 17
Report of Investigation

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**COMMANDER DIRECTED
REPORT OF INVESTIGATION**

PREPARED BY

MAJOR JAMES M. SPARKY

INVESTIGATING OFFICER

CONCERNING

ABUSE OF AUTHORITY & OTHER MISCONDUCT

XX JULY 20XX

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TABLE OF CONTENTS

Tab A: Appointment and Tasking Letters

Tab B: Authority and Scope

Tab C: Background

Tab D: Findings, Analysis and Conclusion

Tab E: Recommendations (if applicable)

Tab F: Testimony

Index of Witnesses

F(1) Staff Sergeant Roger Doger

F(2) Technical Sergeant Okey Dokey

F(3) Chief Wazzie Mean

F(4) *Would continue listing all other witnesses*

Tab G: Evidence

Index of Exhibits

G(1) MAJCOM UCI Report, dated X

G(2) *Would continue listing all exhibits*

Tab H: Technical Reviews (Not applicable)

Tab I: Legal Review

Tab J: Appointing Authority Approval and Actions

Tab K: Administrative Documents (None)

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Authority and Scope (*Authority and Scope will be included in Tab B, immediately following the placement of any Appointment and Tasking letters in Tab B*) Commanders have the inherent authority to conduct a CDI to investigate matters under their command, unless preempted by higher authority. Pursuant to this authority, (*Commander's rank, name, and duty title*) appointed (*Investigating Officer's rank and name*) on (*date of the appointment letter*) to conduct the Investigation into (*type verbatim from the synopsis in the IO appointment letter, paragraph 1*). The CDI was conducted from (*date*) to (*date*) at (*location*).

The IO investigated the following allegations: (*Type allegations verbatim from Attachment to IO appointment letter*)

Allegation 1. Between 1 March 2006 and 30 March 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, improperly used federal government personnel for unofficial purposes, in violation of DoDD 5500.7-R, paragraph 2-301 and 3-305.b., by using members of the Mission Support Flight to help him plant shrubbery at his personal residence, during duty hours.

Allegation 2. Between on or about 3 September 2005 and 15 February 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, abused his authority by making derogatory comments, using profanity and engaging in unprofessional emotional displays in violation of AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005.

(*Simulated Page Break*)

Background (*This is a sample Background, which would be included under Tab C*) This case involved two complainants, Staff Sergeant Roger Doger and Technical Sergeant Okey Dokey. (Tabs F-1 and F-2) During the relevant timeframe, both were assigned to the Mission Support Flight, 123rd Mission Support Squadron (123 MSS), Any Air Force Base, Pickastate. (Tabs F-1, p. 2; F-2, p. 2)

The allegations involved one subjects -- Chief Master Sergeant Wazzie Mean, the newly assigned Superintendent. (Tab F-3, pp. 2-3)

On or about 19 November 2005, the 123rd MSS failed a Unit Compliance Inspection (UCI). They received an overall "marginal" rating. (Tab G-3) TSgt Dokie, the MSS Superintendent at the time of the UCI failure, was subsequently relieved from that duty. (Tab F-2, p. 6)

Because of the flight's abysmal marks, the Wing Commander hand-selected CMSgt Mean as the new MSS Superintendent to turn the unit around. (Tab F-5, p. 4) CMSgt

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Mean had a reputation as the “fix-it” guy because he had previously done so at three other Mission Support Squadrons. (Tabs F-3, pp. 12-13; F-5, pp. 5-6) Other personnel moves occurred, including a PCS in of SSgt Doger. (Tab F-1, p. 5). Both SSgt Doger and TSgt Dokie believed *they* were there to “fix” the unit. (Tabs F-1, p. 6; F-2, p. 7)

CMSgt Mean arrived at Any AFB in late July 2005. (Tab F-3, p. 2) On 8 August 2005, shortly after his arrival, CMSgt Mean either threw or slammed an out-of-date internal operating instruction at or on a table during a NCO meeting. (Tabs F-1, p. 11; F-2, p. 27; F-5, pp. 26-27). In late August 2005, at the start of a staff meeting, Chief Mean struck a MSgt on the back of the head with his notebook. (Tabs F-9, p. 11; F-27, p. 33) In September 2005, when Chief Mean learned that a subordinate Senior Airman had not invited him to his Airman Leadership School graduation, he became visibly upset and shouted, “I could throw this (expletive) chair through the window.” (Tabs F-1, p. 38; F-2, p. 28) In early October 2005, when a Staff Sergeant corrected an inaccurate statement Chief Mean had made, the Chief took him into the office and said the next time that the Sergeant treated him like he was “his b*&ch,” that he would do everything in his power to “screw” the Sergeant’s career. (Section III, Tab D-25, pp. 11-13) During one incident, in November 2005, the Chief punted an Airman’s lunch down the length of the hallway in anger. (Tabs F-3, p. 9; F-2, p. 17) In December 2005, as the UCI re-do, or “Staff Assistance Visit,” drew closer, the Chief often yelled at people and threw his cell phone at them. (Tabs F-1, p. 37; F-9, p. 8) Most of these episodes involved the Chief’s use of profanity or were accompanied by derogatory comments to and about subordinates. Chief Mean called fellow Airmen, *including the commander*, “dumb a\$%.” (Tabs F-1, pp. 9, 12; F-3, pp. 15-16; F-10, pp. 8, 12; F-27, p. 16) He routinely referred to people as “stupid,” “retarded,” “idiot,” “pieces of crap,” and “(bleeping) moron (or retard).” (Tabs F-2, pp. 12, 36; F-3, pp. 9, 33; F-12, p. 11; F-22, p. 7) He referred to a particular MSgt as “the fat (f-word).” (Tab F-9, p. 11)

The UCI re-do took place in February 2006. In less than 180 days, Chief Mean and flight members transformed the 123rd MSS into “the best” in the MAJCOM. (Section III, Tab E-2) By the time of the SAV, all MSS programs met or exceeded AF and command standards. MAJCOM inspectors lauded Chief Mean as the MAJCOM’s “most effective Superintendent!” (Tab G-2)

Sometime shortly after the UCI re-do, in March 2006, Chief Mean asked two subordinates, SrA Ima Helper and A1C Will Follow, to help him with a home-improvement project at his on-base residence. Specifically, Chief Mean asked these Airmen to help him plant new shrubbery around the perimeter of his home. The Airmen agreed. (Tabs F-26, p. 14; F-28, p. 18) As will be discussed more fully below, the testimony conflicted on whether the project occurred on a Friday morning or over a weekend. (Tab D)

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Findings, Analysis and Conclusions. *(The below is a sample Findings, Analysis and Conclusions Section, which would be included under Tab D)*

Allegation 1. Between 1 March 2006 and 30 March 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, improperly used federal government personnel for unofficial purposes, in violation of DoDD 5500.7-R, paragraph 2-301 and 3-305.b., by using members of the Mission Support Flight to help him plant shrubbery at his personal residence, during duty hours. **SUSTANTIATED.**

Facts. *(Can cut and paste applicable facts out of Background section here).*

Sometime in March 2006, Chief Mean asked two subordinates, SrA Ima Helper and A1C Will Follow, to help him with a home-improvement project at his on-base residence. Specifically, Chief Mean asked these Airmen to help him plant new shrubbery around the perimeter of his home. The Airmen agreed. (Tabs F-26, p. 14; F-28, p. 18)

The witness testimony conflicted on whether the project occurred on a Friday morning or over a weekend. Chief Mean and the two involved subordinates, SrA Helper and A1C Follow testified that all involved in the project did so voluntarily and that the shrubbery planting occurred on a Saturday. (Tabs F-3, p. 14; F-26, p. 14; F-28, p. 18) Two other witnesses, TSgt Whistleblower and SSgt Straightandnarrow, indicated that the activity occurred at 1030 on a Friday. (Tabs F-10, pp. 16-17; F-13, pp. 24-25) TSgt Whistleblower, in particular, remembered it was a Friday, because he had asked the Chief to attend his wife's prenatal appointment, the Chief said no, and then left the building with SrA Helper and A1C Follow in his truck, loaded with shrubs. (Tab F-10, p. 16) TSgt Whistleblower felt this was a huge "foul" and wrote a memo for record (MFR) for his own personal file, which he provided to the IO. (Tab G-7)

As IO, I found the testimony of TSgt Whistleblower and SSgt Straightandnarrow more believable than that of the subject and his two Airman cohorts, for several reasons. TSgt Whistleblower's MFR was very convincing in that it documented the activity immediately when it occurred. Additionally, I found the testimony of Chief Mean to be questionable. When the IO conducted the interview of Chief Mean, he answered most questions in a clear voice, leaning slightly forward in his seat. When presented with direct questions regarding the shrubbery incident, the IO observed Chief Mean's face flushed, he paused and appeared to gather himself prior to answering the question, like he

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was deciding what to say. He also avoided answering several questions by redirecting the question back to the IO or answering with unrelated material. (Tab F-3, pp. 13-16) When he did answer questions about the shrubbery, he leaned back from the IO, lowered his voice and looked down at the floor. SrA Helper and A1C Follow had similar demeanors during their interviews. On the other hand, TSgt Whistleblower and SSgt Straightandnarrow appeared forthright and had no apparent bias or motive to provide untruthful testimony about the Chief. In fact, the Chief submitted TSgt Whistleblower as a UCI top performer and the TSgt was so recognized. For all of these reasons, I find that the shrubbery planting occurred on a Friday, a duty day, and not on the weekend.

Applicable Rules.

DoDD 5500.7-R (“Joint Ethics Regulation” or JER), paragraph 2-301., *Use of Federal Government Resources*., paragraph b. states, in part:

b. Other Federal Government Resources. Other than the use of Federal Government time authorized in accordance with subsection 3-300 of this Regulation, below; ***Federal Government resources, including personnel, equipment, and property, shall be used by DoD employees for official purposes only....***³⁶

(2) The use of personnel for non-Federal purposes is regulated by subsections 3-211³⁷ and 3-305 of this Regulation, below.

Paragraph 3-305.b. states:

b. Prohibited Uses. ***Because of the potential for significant cost to the Federal Government, and the potential for abuse, DoD employees, such as secretaries, clerks, and military aides, may not be used to support the unofficial activity of another DoD employee in support of non-Federal entities, nor for any other non-Federal purposes, except as provided in subsections 3-211 and 3-300.b. of this Regulation, above.***³⁸

Analysis. SrA Helper and A1C Follower, as USAF members, are considered federal government personnel, and therefore, government resources. Regardless of whether or not the Airmen “volunteered” for this “duty,” Chief Mean used these Airmen for unofficial purposes by having them plant shrubbery at his on-base

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³⁶ Bolded portions of the JER constitute punitive sections.

³⁷ DoDD 5500.7-R, paragraph 3-211. titled, “*Logistical Support of Non-Federal Entity Events*,” is not applicable.

³⁸ DoDD 5500-7-R, paragraph 3-300.b. is titled, “*Professional Associations and Learned Societies*.” It also does not apply.

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residence. As mentioned above, although the testimony conflicted on whether or not the shrubbery project occurred on a duty day, I found that it did. Specifically, the shrubbery planting occurred on Friday, 13 March 2006, at 1030 in the morning. (Tabs F-10, pp. 16-17; F-13, pp. 24-25 and G-7) The shrubby project was not an official project. It was not approved by command or otherwise mission-related. (Tab F-5, p. 7) Because the Chief engaged in non-Federal activities during the duty day, and employed government personnel to assist him, he violated the JER.

Conclusion. The preponderance of the evidence shows that between 1 March 2006 and 30 March 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, improperly used federal government personnel for unofficial purposes, in violation of DoDD 5500.7-R, paragraph 2-301 and 3-305.b., by using members of the Mission Support Flight to help him plant shrubbery at his personal residence, during duty hours. I conclude this allegation is **SUSTANTIATED**.

Allegation 2. Between on or about 3 September 2005 and 15 February 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, abused his authority by making derogatory comments, using profanity and engaging in unprofessional emotional displays in violation of AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005. **SUBSTANTIATED**.

Facts. On or about 19 November 2005, the 123rd MSS failed a UCI. They received an overall “marginal” rating. (Tab G-3) TSgt Dokie, was the MSS Superintendent at the time of the UCI failure, who was subsequently relieved from that duty. (Tab F-2, p. 6)

Because of the flight’s abysmal marks, the Wing Commander hand-selected CMSgt Mean as the new MSS Superintendent to turn the unit around. (Tab F-5, p. 4) CMSgt Mean had a reputation as the “fix-it” guy because he had previously done so at three other Mission Support Squadrons. (Tabs F-3, pp. 12-13; F-5, pp. 5-6) Other personnel moves occurred, including PCS’ing in SSgt Doger. (Tab F-1, p. 5). Both SSgt Doger and TSgt Dokie believed *they* were there to “fix” the unit. (Tabs F-1, p. 6; F-2, p. 7)

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shouted, “I could throw this (expletive) chair through the window.” (Tabs F-1, p. 38; F-2, p. 28) In early October 2005, when a Staff Sergeant corrected an inaccurate statement Chief Mean had made, the Chief took him into the office and said the next time that the Sergeant treated him like he was “his b*&ch,” that he would do everything in his power to “screw” the Sergeant’s career. (Section III, Tab D-25, pp. 11-13) During one incident, in November 2005, the Chief punted an Airman’s lunch down the length of the hallway in anger. (Tabs F-3, p. 9; F-2, p. 17) In December 2005, as the UCI re-do, or “Staff Assistance Visit,” drew closer, the Chief often yelled at people and threw his cell phone at them. (Tabs F-1, p. 37; F-9, p. 8) Most of these episodes involved the Chief’s use of profanity or were accompanied by derogatory comments to and about subordinates. Chief Mean called fellow Airmen, *including the commander*, “ “dumb a\$%.” (Tabs F-1, pp. 9, 12; F-3, pp. 15-16; F-10, pp. 8, 12; F-27, p. 16) He routinely referred to people as “stupid,” “retarded,” “idiot,” “pieces of crap,” and “(bleeping) moron (or retard).” (Tabs F-2, pp. 12, 36; F-3, pp. 9, 33; F-12, p. 11; F-22, p. 7) He referred to a particular MSgt as “the fat (f-word).” (Tab F-9, p. 11)

The UCI re-do took place in February 2006. In less than 180 days, Chief Mean and flight members transformed the 123rd MSS into “the best” in the MAJCOM. (Section III, Tab E-2) By the time of the SAV, all MSS programs met or exceeded AF and command standards. MAJCOM inspectors lauded Chief Mean as the MAJCOM’s “most effective Superintendent!” (Tab G-2)

Applicable Rules. AFI 90-301, Terms, defines “abuse of authority” as an *arbitrary or capricious* exercise of power by a military member or a federal official or employee that *adversely affects* the rights of any person or that results in personal gain or advantage to the abuser. No regulatory prohibition or isolated UCMJ punitive article is necessary in order to hold commanders or *those given supervisory authority* to a high ethical and moral standard. (Emphasis Added) *SAF/IGQ Policy Memorandum* dated 27 February 2002. <https://www.ig.hq.af.mil/igq/>

The *CDI Guide* provides this test for abuse of authority:

1. Did the responsible management official’s (RMO’s) actions either:
 - c. Adversely affect the rights of any person? (e.g., demotion, referral OPR, etc.)
 - or
 - d. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)
- and

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2. At the time of the action:

a. Did the RMO act within the authority granted under applicable regulations, law or policy?

and

b. Was the RMO's action based on relevant data and factors?

and

c. Was the RMO's action rationally related to the relevant data and factors?

If both Questions 1(a) and (b) are answered "no," then it is not necessary to consider Question 2. If either part of Question 1 ((a) or (b)) is answered "yes", proceed to Question 2. *In answering Question 2, IGs and JAGs should examine the RMO's action very narrowly, giving the RMO's decision substantial deference (great weight) without substituting one's judgment for that of the RMO.* In so doing, if the answer to Question 2, parts (a), (b) and (c) is "yes," the action should not be considered "arbitrary and capricious." If the answer to any part of Question 2 is "no," then the action was "arbitrary and capricious" (a clear error of judgment) and the action is indicative of abuse of authority.

Analysis. The first issue is whether Chief Mean's actions either: adversely affected the rights of any person? (e.g., demotion, referral OPR, etc.) or resulted in personal gain or advantage to the RMO? (e.g., promotion, award, etc.) The preponderance of the evidence indicates "yes," on both accounts. NCO's have the right to be treated with respect, as to subordinates. See, e.g., UCMJ Articles 91 *Insubordinate Conduct Toward NCO*, and 93, *Cruelty and Maltreatment*. As indicated above, Chief Mean's conduct fell far short of this. He often yelled at people, threw cell phones at them and called them profane and otherwise unprofessional names. (Tabs F-2, pp. 12, 36; F-3, pp. 9, 33; F-9, p. 11; F-12, p. 11; F-22, p. 7) Chief Mean himself corroborated the behavior alleged in the allegations. He admitted to using the words, "idiot," "fat a\$%," and "retarded." (Tab F-3, pp. 36-40). He said, "Yeah, OK, so I called people some names...Wah, wah...They were cry babies then and they are now. I don't regret for one minute anything I did." (Tab F-3, p. 42). He also admitted that he doesn't feel the need to hide his emotions and that "old school is the only school." (Section F-4, p. 38)

Other than the right to be free from this type of disrespect and harassment, the Chief's actions had other negative impacts on personnel. For example, both complainants were so distraught by Chief Mean's tactics, that they sought treatment from Life Skills. (Tabs F-1, pp. 8-9; F-2, pp. 9-11) On the other hand, the Chief gained several things from his poor treatment of others. He gained power and control over them by demoralizing them and also was recognized by MAJCOM inspectors as "the best Superintendent," in

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essence, because he had whipped (almost literally) the unit into shape.

In the Chief's defense, he was hand-selected by a general officer to fix a broken organization. He did just that, as evidenced by the "9 G turnaround" the flight experienced. (Tab F-6, p. 7). Local leadership supported Chief Mean's management style. (Tab F-6, p. 4) They repeatedly told people to "get with" the Chief's program.³⁹ (Tab F-2, p. 38)

In addition to leaders senior in grade to the Chief, a number of NCOs and Airman provided positive testimony about him. SSgt Joe Bagodonuts stated that the Chief was a "great and inspirational leader." (Tab F-13, pp. 43, 46) SrA Wilma Kilmore said that things were a lot better at work since the Chief showed up. (Tab F-15, p. 20) The MAJCOM, obviously, felt that the Chief had "fixed the shop." (Tab G-3)

That said, Chief Mean, crossed the line of the decency and professionalism required of any Airman. His emotional outbursts, routine use of profanity, physical attack on a subordinate, and degrading comments violated several UCMJ articles, including, but not limited to: 89 (Disrespect Towards Superior Commissioned Officer), 93 (Maltreatment and Cruelty), 117 (Provoking Speech and Gestures), and 128 (Assault Consummated by Battery). Because he exceeded the authority given to him, he abused his authority.

Conclusion. The preponderance of the evidence shows that between on or about 3 September 2005 and 15 February 2006, CMSgt Wazzie Mean, 123rd MSS Superintendent, abused his authority by making derogatory comments, using profanity and engaging in unprofessional emotional displays in violation of AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005. I conclude that this allegation is **SUBSTANTIATED.**

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³⁹ The issue of management condoning the Chief's unprofessional tactics was referred to the MSG/CC for further consideration.

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Recommendations. *(The below is a sample Recommendations Section, which would be included under Tab E—ONLY if the commander requested recommendations in the IO appointment letter)*

Recommend:

- Appropriate disciplinary action for Chief Mean
- Unit training on the JER.
- Follow-up on senior leadership condoning Chief Mean's unprofessional tactics.
- Close monitoring of any unfavorable personnel actions generated by the Chief against complainants or witnesses as possible reprisal.

(IO Signature Block)

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Not included in this sample ROI—Testimony (Tab F), Evidence (Tab G), Technical Review (Tab H), Legal Review (Tab I). See Attachments 14, 15, 10, and 9 for examples of those.

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(This is a sample Appointing Authority Approval and Action, which would be included under Tab J)

MEMORANDUM FOR RECORD

FROM: ___/CC

SUBJECT: Appointing Authority Approval

I have reviewed the commander-directed investigation completed by investigating officer Major David Schucky, and the subsequent legal review regarding allegations that *(summarize allegations here, e.g., Chief Wazzie Mean abused his authority by using federal personnel for unofficial purposes in violation of the Joint Ethics regulation and by making derogatory comments, using profanity and engaging in unprofessional emotional displays in violation of AFI 90-301, Inspector General Complaints Resolution, 8 February 2005)*. I concur with the findings and conclusions of the investigating officer.

(Commander's Signature Block)

Note: Also include in this tab any final command action, such as Letter of Reprimand, Charge Sheet, memo of counselings etc.)

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ATTACHMENT 18
Case Closure Letter

(Commander's Letterhead)

____/CC
(CC Official Duty Address)

(Complainant's Home Address)

Dear SSgt X,

This is to notify you of the disposition of your allegations concerning abuse of authority by the 123rd MSS Superintendent *(never use names or ranks, just the duty title)*, Any AFB, Pickastate. To fully address your concerns, I chartered a commander-directed investigation (CDI) into the following two allegations:

Allegation 1. Between 1 March 2006 and 30 March 2006, the 123rd MSS Superintendent *(never use names or ranks, just the duty title)*, improperly used federal government personnel for unofficial purposes, by using members of the Mission Support Flight to help him plant shrubbery at his personal residence, during duty hours, in violation of DoDD 5500.7-R, paragraph 2-301 and 3-305.b. **SUBSTANTIATED.**

Allegation 2. Between on or about 3 September 2005 and 15 February 2006, the 123rd MSS Superintendent *(never use names or ranks, just the duty title)* abused his authority by making derogatory comments, using profanity and engaging in unprofessional emotional displays in violation of AFI 90-301, *Inspector General Complaints Resolution*, 8 February 2005. **SUBSTANTIATED.**

These findings were found to be legally sufficient before I personally reviewed and approved them, as appointing authority. Appropriate action has been taken against the individual who displayed the inappropriate behavior. I consider this matter closed.

If you are not satisfied with the final determination concerning your allegations, you may request further review by me, in writing, by no later than _____ *(insert reasonable date, 90 days is sufficient)*. Your request must provide additional or new information that was not otherwise available during the CDI; simply disagreeing with this determination will not be sufficient for further review.

You also have the right to petition the Air Force board for Correction of Military Records (AFBCMR) for correction of any adverse personnel actions (regardless of the findings of this case). Refer to the virtual MPF for assistance in petitioning AFBCMR. If you petition the AFBCMR, you would inform them that records exist pertaining to your request. *(Simulated 4 lines between last paragraph and signature block.)*

Sincerely,

(Commander Signature Block)