

“PUBLIC FUNDS EQUAL PUBLIC BENEFITS”

Complaints (Text Only)

Learning Objectives

- Determine the Elements of a Complaint (When is a complaint a complaint)
- Describe the Complaints Process

INTRODUCTION

The heart of Title VI, informs us that:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”.

In addition, several related authorities protect groups based on age, sex, disability, etc. with respect to Title VI.

However, there are instances in which individuals or groups of individuals may experience discrimination or injustice. In such cases where these individuals feel that their Civil Rights under Title VI have been violated, there is a formal process whereby complainants may submit their concerns directly to either the Federal Highway Administration (**FHWA**), a State Transportation Agency (STA), or the U.S. Department of Transportation (USDOT) for processing, review, and investigation (if necessary).

THE ELEMENTS OF A COMPLAINT: WHEN IS A COMPLAINT A COMPLAINT?

What Is a Complaint and Who Can File a Complaint?

Discrimination involves any act or inaction, whether intentional or unintentional in any program or activity of a Federal-aid recipient, sub-recipient, or contractor, which results in disparate (unfavorable) treatment, disparate impact, or perpetuating the effects of prior discrimination based on race, color, sex, national origin, age, disability, or in the case of disability, failing to make a reasonable accommodation.

Because the purpose of Title VI is “to ensure that public funds are not spent in a way which encourages, subsidizes, or results in racial discrimination,” intentional discrimination is expressly prohibited, by law. Furthermore, most Federal agencies have adopted regulations that prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the *effect* of subjecting individuals to discrimination based on race, color, national origin, etc. Additionally, the Supreme Court has held that such regulations may validly prohibit practices having an unfavorable (or disparate) impact on protected groups, even if the actions or practices are not *intentionally* discriminatory.

A Complaint is an allegation of wrongdoing for which **attention, resolution, redress** or any other corrective action may be sought. A complaint may be formal or informal, written or unwritten. The FHWA, however, prefers that formal complaints be written by or on behalf of the complainant, and signed by him or her. A Complaint usually results due to a violation of a certain law, provision, statute, regulation, policy, Executive Order, etc.

In a complaint of discrimination under Title VI, the complainant has the responsibility of establishing a *prima facie* case of discrimination. A *prima facie* case means that the complainant has provided information which contains all of the parts necessary for a complaint of discrimination. This requires evidence that shows the following:

- that the complainant is a member of a protected group;
- that the complainant was harmed by some decision;
- that similarly situated persons of a different group were not or would not have been harmed under similar circumstances.

Ideally, a complaint of Title VI discrimination must contain these three elements to be considered complete --- become a *complaint* --- or meet the test of a *prima facie* case of discrimination. In a large number of cases, all of the elements cited above may not be present. In such situations, it is the responsibility of the investigator to obtain any of the missing information from the complainant.

Title VI claims may be proven by two primary legal theories: **intentional discrimination/disparate treatment** and disparate impact/effects. Under the first theory, the recipient, in violation of the statute, engages in intentional discrimination based on race, color, national origin, etc. The analysis of intentional discrimination under Title VI is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment.

Under the second theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that **disparately (or unfavorably) impacts** members of a protected group by disproportionately excluding or adversely affecting them, whereby such practice lacks a "substantial legitimate justification." Titles VI disparate impact claims are analyzed using principles similar to those used to analyze Title VII disparate impact claims; these claims do not require proof of discriminatory intent.

It should be noted that a complainant may raise allegations based on more than one legal theory, especially if it involves allegations that an applicant or potential participant did not meet entry or participation requirements for a federally assisted program. Complainants may also bring **retaliation** claims under Title VI or under a Title VI regulation that prohibits retaliation.

Filing Specifications and Procedures

Any person or specific class or persons who believes he or she has been subjected to discrimination or retaliation prohibited by any of the following may file a complaint:

- Title VI of the Civil Rights Act of 1964 (more commonly referred to as Title VI)
- Related statute, Section 504 of the Rehabilitation Act of 1973 (or Section 504)
- Related statute, Title II of the Americans with Disabilities Act of 1990 (or the ADA)

A complaint must be filed within 180 days of the last date of the alleged discrimination, unless the time for filing is extended by the D.O.T. per 49 CFR part 21.11 and 27.123. The filing date of the complaint will be noted as the earlier of either the postmark of the complaint or the date the complaint is received by any office authorized to receive complaints.

As mentioned earlier, complaints submitted must either be a written or electronic statement concerning an allegation of discrimination that contains a request for the receiving office to take action. **Complaints** should be in writing and signed. It may be filed by mail, fax, in person, or via e-mail. Complaints may also be received in **alternate formats** from persons with disabilities, upon request.

The following are examples of items that should not be considered a complaint, unless the item contains a signed cover letter specifically asking that the agency take action concerning the allegations:

- An anonymous complaint
- Inquiries seeking advice or information
- Courtesy copies of court pleadings
- Courtesy copies of complaints addressed to other local, State, or Federal agencies
- Newspaper articles
- Courtesy copies of internal grievances

Furthermore, the HCR has sole authority for **dismissing** Title VI, Section 504, or ADA complaints deemed unacceptable for further consideration.

THE COMPLAINTS PROCESS: WHAT HAPPENS WHEN A COMPLAINT IS FILED?

Now that a clear determination has been established regarding discrimination, the elements of a complaint and who can file a complaint, the next portion of this module will focus on what happens when a complaint is filed.

Receipt and Review of a Complaint

When a complaint is filed with the Headquarters Office of Civil Rights (or HCR) by the FHWA, an STA, or the U.S. DOT, the complaint is acknowledged by the HCR Director of Investigations and Adjudications. Depending on the type of **complaint** (e.g. Title VI, Section 504, ADA), the agency or entity against whom the complaint is filed, and who the complaint is filed with, determines how the complaint will be investigated.

Upon initial receipt, complaints should always be date stamped by the receiving office to assist in determining jurisdiction and timeliness and reviewed within 10 calendar days of receipt to determine whether or not it contains all necessary information required for acceptance. **Complete**, accepted complaints require that the complainant be provided a **letter of acceptance** along with a *Complainant Consent/Release* form and *Notice About Investigatory Uses of Personal Information* form.

Title VI complaints processed by HCR should be investigated within 180 days from the initial receipt of the complaint. When received directly by the STA, the complaints processing period is bound by the time frames outlined in 23 CFR 200.9(b)(3). Finally, Section 504 or ADA complaints investigated by the Division Office or STA should be investigated within 90 days from receipt of the complaint from HCR.

Investigative Process

An **investigation** should be confined to the issues and facts relevant to the allegations in the complaint, unless evidence shows the need to **extend** the issues.

When the initial complaint receipt process has been completed, the case activity to follow will include:

- The development of an **Investigative Plan** (or IP)
- Maintenance of an **investigative log**
- Preparation of a **Request for Information** (or RFI) and **Cover Letter**
- Conduct of **interviews of involved parties** (e.g. complainant(s), respondent(s), and witness(es))
- Conduct **on-site visit(s)**, if necessary
- Analysis of case-related **evidence**
- Conduct an **exit interview**
- Composition of a full, written **Investigative Report** (or IR)

Investigative Plan

Preparing an **IP** is the first step taken after a complaint has been accepted and assigned for review and investigation. The IP is a working document intended to define the issues and lay out the blueprint to complete the investigation. The IP is also an internal document for use by the investigator to keep the investigation on track and focused on the issues and likely sources of evidence or corroboration.

Investigative Log

An investigative log should be maintained which documents all activity related to the complaint.

Request for Information and Cover Letter

The RFI goes “hand-in-hand” with the preparation of the IP, as it is the official document submitted to the respondent (or the accused) to request evidence in relation to the case being investigated. The RFI requires a **cover letter** and is taken directly from the evidence section of the IP.

The respondent must provide requested RFI information within **30 calendar days** from the date of the agency’s request to submit the required information, as **failure or refusal** to do so is a violation of the Department of Transportation’s Title VI regulations and could result in further sanctions against the accused agency.

Interviews

Interviews should be conducted with the **complainant, respondent,** and appropriate **witnesses** during the investigative process. Each of these persons has the right to a representative of his/her choice present during the interviews. Since the main objective during the interview is to obtain information from individuals who can provide information that will either support or refute the allegations, it is highly recommended of the interviewer that a list of major questions be prepared to address the issues involved in the complaint.

Since the primary objective of the interview is to gain information which will either support or refute the allegations in question, it is essential that an investigator understand not only the process, but what is **expected** of him or her, prior to conducting any interviews associated with a case. It should also be noted that a written record of both telephone and in-person interviews must be created and kept in the investigative file.

On-Site Visits

After the investigator has received and reviewed the documents contained in the RFI from the Respondent, a determination should be made whether an **on-site visit** is needed. A thorough investigation can often be conducted without an on-site visit to the Respondent’s facility. However, after analyzing the respondent’s response to the RFI, the investigator may decide that a visit to the Respondent’s facility is **necessary**. If the visit is deemed necessary, an **on-site notification letter** should be sent to the respondent advising it of the planned visit. At this point of the review process, the respondent should already be aware of the existence of the complaint, the FHWA’s jurisdiction and, the basis of the complaint.

Properly collected and analyzed evidence is essential to determining compliance. Upon completion of the on-site visit, but before returning to the home office, the investigator should review the information and cross-check it with the IP and RFI to ensure that all needed information has been collected. Missing information should be gathered in an exit conference while on-site, which provides an opportunity for the investigator to clarify any questions that may have arisen and request any additional information.

Analyzing Evidence

The standard of proof applied in making a determination of noncompliance should be one of "**preponderance of the evidence.**" Preponderance of evidence in general terms means to be superior in number or weight. Preponderance as used in evidence law, means having the greater weight of the evidence required in a civil law suit needed to convince the jury or convince the judge (without a jury) to decide in one's favor.

Evidence standing alone does not prove a violation. It must be related to the policies and procedures of the respondent and issues under investigation. Therefore the evidence gathered must not only be relevant, it must be analyzed in a specific manner for effective use in Title VI, Section 504 and ADA investigations.

There are six **types of evidence** that can be gathered during the investigation of a formal complaint. These include:

- **Direct:** Evidence of the actual, subjective intent of the person(s) charged with discrimination
- **Circumstantial:** Facts from which one may *infer* intent or discriminatory motive
- **Comparative:** Evidence, which identifies the difference(s) in treatment accorded similarly-situated individuals or groups based on their identification with or membership in a protected class
- **Statistical:** Evidence that generalizes about the experience of a class rather than focusing on the experience of an individual member of that class
- **Documentary:** Evidence provided in written form (i.e. applications, business records, memoranda, letters, etc.)
- **Testimonial:** Oral evidence (i.e. statements collected from interviews)

By addressing asserted or anticipated defenses "up front" when planning an investigation and identifying the evidence to be obtained, investigators save themselves and the respondent(s) a considerable amount of time and the possible aggravation of additional requests for data and interviews.

Evidence presented for review and analysis during any investigation must meet three **quality** criteria:

- It must be **material**, or issue-related. When material, the evidence should relate to one or more of the issues raised in an allegation.
- Evidence must be **relevant** with a tendency to either prove or disprove a claim or issue raised in an allegation.
- Finally, evidence must be **reliable**, accepted as dependable and/or trustworthy.

Additionally, the **quantity** of evidence submitted during an investigation is also important to the outcome of the case. While planning for an investigation, a preliminary determination must be made concerning the amount of evidence needed to resolve the allegation(s) raised.

This decision will be reexamined periodically throughout the investigation and resolution process, based upon the information being gathered.

Remember, evidence standing alone does not prove a violation. Rather, it must be related to the policies and procedures of the respondent and issues under investigation. Therefore, investigators are expected to do the following to ensure the value of collected and analyzed data in any investigation:

- Note when the document was received and from whom.
- Keep the original copy of the document **clean** and free from marks, tears, etc.;
- Keep the documents filed in a safe place so that they will not get lost or inadvertently removed by co-workers.
- Document the **circumstances** under which the evidence was collected.

Exit Interview

The exit interview is conducted separately for the complainant and the respondent. The exit interview provides an opportunity for the investigator, as well as the respondent and the complainant, to clarify any questions that may have arisen and to provide any additional information. The investigator should explain that this exit interview may not be an end to the investigation. The investigator should also explain the process HCR will follow, if a **violation** is found.

Investigative Report

The investigator should prepare an Investigative Report (or IR) setting forth all the relevant facts obtained during the investigation. The IR should include a finding for each issue and recommendations where necessary.

References should be used throughout the IR to direct the reader to the appropriate supporting documentation in the investigative case file. For large case files, it is suggested that the IR include an index of documents and a key referencing by tab the evidence in the file relied upon in making any determination.

A copy of the IR should never be given to the respondent or complainant.

Completed Case Files

The Investigative Case File is a **structured compilation** of all documents and information, within your agency's possession, pertaining to the case. An Investigative Case File should be established for each complaint which your agency accepts for investigation.

Complaints that are administratively closed for lack of jurisdiction, because they are untimely filed, for failure to exhaust local remedies, or for failure to state a claim over which your office has jurisdiction do not require an Investigative Case File.

The purpose of the Investigative Case File is to establish a methodology for the systematic compilation and structured storage of all documents, records, and information associated with the case. This is done in such a manner that the Case File (a) provides the basis and supporting documentation for the Investigators' Draft Report, and (b) allows a reader of that report to easily verify the facts upon which it is based.

All case files which are to leave the possession of the FHWA are to be redacted in accordance with the Privacy Act and Freedom of Information Act. Investigative files of closed cases shall be maintained for 4 years, then either archived or destroyed. Any requests made to STAs for copies of investigative case files should be directed to HCR.

In summary, it is the goal of Title VI that no individual should suffer discrimination, retaliation, or disparate treatment due to specific personally identifiable characteristics such as race, color, national origin, sex, etc.. Furthermore, because "public funds equal public benefits," the FHWA takes each complaint seriously. Unfortunately, there may be instances where discrimination takes place. However, it is the FHWA's hope that by strictly enforcing Title VI, the law, and continuing to educate agencies and STAs about Title VI, the program, residents of the U.S. will experience a decrease in discrimination and continue to see an increase equal opportunity and justice for all.