


# University of Tennessee System Title IX Roundtable

JUNE 17, 2024  
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## Today we will cover


- ▶ Overview of new Title IX regulations
- ▶ Mandatory training for Title IX implementers
- ▶ Intake-related decisions
- ▶ Conducting effective investigations
- ▶ Writing investigation reports



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## Where we are today


- ▶ Operating under the August 2020 regulations for sexual harassment
- ▶ 2024 regulations were issued in April 2024
- ▶ 2024 regulations go into effect August 1, 2024
- ▶ 202 regulations still apply to conduct occurring before August 1, 2024



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## Expansion: Sex Discrimination


- ▶ Includes but is not limited to:
  - ▶ Sex-Based Harassment
- ▶ Sexual discrimination includes discrimination on the basis of:
  - ▶ Sex Stereotypes
  - ▶ Sex Characteristics
  - ▶ Sexual Orientation
  - ▶ Gender Identity
  - ▶ Pregnancy (or related conditions)
- ▶ Also: clarification of Retaliation



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## Sex-Based Harassment


- ▶ Quid Pro Quo
  - ▶ Broadened to include acts of an employee, agent, or other person authorized by the institution to provide an aid, benefit, or service of the institution
- ▶ Hostile Environment Harassment
  - ▶ Broadened definition to conduct that is severe OR pervasive
  - ▶ Provides factors to assess for hostile environment
- ▶ Clery Crimes
  - ▶ Sexual assault, dating/domestic violence, and stalking



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## Pregnancy and Related Conditions

- ▶ Must provide reasonable modifications based on individualized needs (but don't have to fundamentally alter programs)
- ▶ Right of reinstatement to academic status
- ▶ Explicit requirement for lactation space other than a bathroom
- ▶ Important: Pregnancy reporting and requirement of providing information



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## Notification and Information Requirements

- ▶ Regulations provide some discretion, and obligations differ based on category of employees
- ▶ UT requires all non-confidential employees to report possible sex discrimination to the Title IX Coordinator.
- ▶ Confidential employees must provide TIXC information to the person disclosing



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## Other expansions worth noting

- ▶ Response obligations: to conduct that occurred outside the institution's program or activity or outside the U.S., if it contributes to a sex-based hostile environment
- ▶ Investigation obligations: definition of complaint and who can file
- ▶ Duties of TIXC
- ▶ Opportunities to appeal
- ▶ Availability of informal resolution



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## Grievance procedures: Two sets

- ▶ Complaints of sex discrimination (§106.45)
- ▶ Complaints of sex-based harassment involving a student party (§106.46)



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## Procedures for complaints of sex discrimination (§106.45)

- ▶ More relaxed evidence review
- ▶ Doesn't require institution to permit advisors
- ▶ No hearing requirement
- ▶ Decisionmaker (who may be the same person who conducted investigation) must be allowed to question parties and witnesses where credibility in issue
- ▶ Preponderance of the evidence, unless ...
- ▶ No requirement of investigation report, but written notice of determination must include rationale for determination



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## Procedures for complaints of sex-based harassment--student party (§106.46)

- ▶ 2024 regulations provide more relaxed evidence review and options for adjudication
- ▶ UT will continue to utilize an investigative process, hearings with provided advisors, and cross-examination largely consistent with current process.



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## Training for all employees


- ▶ Institution's obligation to address sex discrimination
- ▶ The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment
- ▶ Their duty to report to the TIXC or give TIXC contact info
- ▶ All applicable notification and information requirements related to pregnancy and related conditions



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### Training for Title IX implementers


- ▶ (Training for all employees, plus)
- ▶ Institution's obligations to respond to sex discrimination (including mandatory reporting)
- ▶ Institution's grievance procedures under 106.45 and, if applicable 106.46
- ▶ How to serve impartially, including not pre-judging the facts, conflicts of interest, and bias
- ▶ The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance



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### Training for facilitators of informal resolution


- ▶ (Training for all employees, plus)
- ▶ The rules and practices associated with the institution's informal resolution process
- ▶ How to serve impartially, including by avoiding conflicts of interest and bias



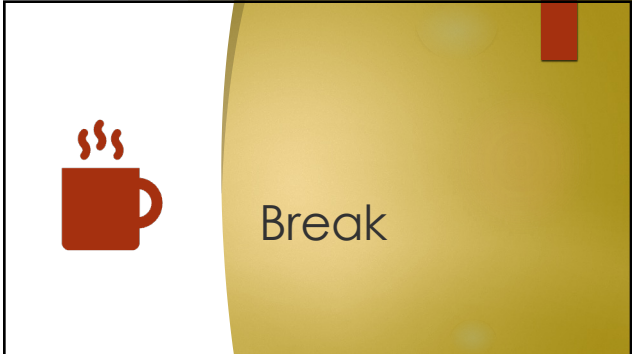
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### Training for Title IX Coordinator and designees

- ▶ (Training for all employees, training for all Title IX implementers, training for facilitators of informal resolution, plus)
- ▶ Their specific responsibilities to coordinate efforts to comply with Title IX, all duties of the TIXC spelled out in the regulations
- ▶ The recordkeeping requirements of the regulations



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## Intake-Related Decisions

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### Required initial response to report


- ▶ Notify complainant/reporter of procedures in §106.45, §106.46, and informal resolution options
- ▶ Offer and coordinate supportive measures
  - ▶ Must not unreasonably burden either party
  - ▶ Must be designed to protect the safety of the parties or the educational environment or to provide support during grievance process or informal resolution
  - ▶ Must not be imposed for punitive or disciplinary reasons
  - ▶ Must give party opportunity to seek modification or reversal of decision to provide, deny, modify, or terminate supportive measures applicable to them
  - ▶ Must provide opportunity for parties to seek modification or termination of a supportive measure if circumstances change materially
- ▶ If complaint is made, must initiate grievance procedures under §106.45 or §106.46 or informal resolution as appropriate



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### Intake/informational meetings

- ▶ What is the purpose of the intake meeting?
- ▶ How much information to collect and what to document
- ▶ Use of informational checklist/document
- ▶ Follow-up email



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### Non-participating complainant: Regulatory factors to consider

- ▶ Complainant's request not to proceed with complaint
- ▶ Complainant's reasonable safety concerns regarding initiation of complaint
- ▶ Risk that additional acts of sex discrimination would occur if complaint is not initiated
- ▶ Severity of alleged sex discrimination
- ▶ Age and relationship of the parties, including whether respondent is an employee
- ▶ Scope of the alleged sex discrimination
- ▶ Availability of evidence to assist a decisionmaker in their determination
- ▶ Whether institution could end the alleged sex discrimination and prevent its recurrence without initiating grievance procedures

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### Bias


- ▶ Regulations require that all Title IX implementers be unbiased
- ▶ Bias is not an action; it occurs in a person's head
- ▶ What is implicit bias?
- ▶ Different kinds of bias




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### What does it mean to be unbiased?

- ▶ Don't have a bias for or against complainants or respondents generally
- ▶ Don't have a bias for or against an individual complainant or respondent
- ▶ Treat parties equally/equitably during interviews
- ▶ Seek to interview witnesses identified by both parties
- ▶ Don't prejudge the evidence



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Lunch


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## Conducting Effective Investigations

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### Investigation process at UT for sex-based harassment involving a student party


- ▶ Notice
- ▶ Collection of evidence
- ▶ Share evidence directly related to allegations with parties
  - ▶ Parties have 10 days to review and provide written feedback
- ▶ Consider the parties' written responses
- ▶ Create investigative report that summarizes relevant evidence
  - ▶ Parties have 10 days to review and provide written feedback prior to hearing



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### Preparing to start the investigation


- ▶ Review complaint
- ▶ Review notice letters
- ▶ Review all initial information
- ▶ Review relevant policy definitions and think about the kind of questions you'll need to ask
- ▶ What facts does the decision maker need to make a determination?



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### Example: Incapacitation


- ▶ "Incapacitation" means that a person lacks the ability to actively agree to sexual activity because the person is asleep, unconscious, under the influence of an anesthetizing or intoxicating substance such that the person does not have control over their body, is otherwise unaware that sexual activity is occurring, or their mental, physical, or developmental abilities renders them incapable of making a rational informed judgment.
- ▶ A person violates this Policy when they engage in sexual activity with another person who is Incapacitated under circumstances in which a reasonable person would have known the other person to be Incapacitated.
- ▶ Signs of Incapacitation may include, without limitation: sleep; total or intermittent unconsciousness; lack of control over physical movements (e.g., inability to dress/undress without assistance; inability to walk without assistance); lack of awareness of circumstances or surroundings; emotional volatility; combativeness; vomiting; incontinence; unresponsiveness; and inability to communicate coherently.



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### Questions you'll need to ask re: incapacitation

- ▶ What objective signs of impairment did Complainant display?
- ▶ Did Respondent observe these signs or reasonably should they have?
- ▶ What information is there about Complainant's mental, physical, or developmental abilities?
- ▶ Did Complainant have control over their body?
- ▶ And think about: how and who will we ask these questions?




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### Interviews: What is our goal?

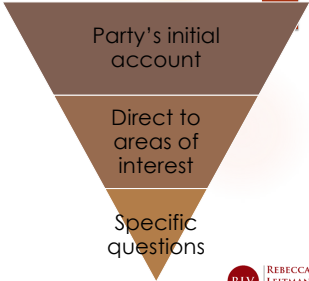

#### Learning from different techniques

- ▶ Child forensic interview
- ▶ Trauma-informed interview
- ▶ Forensic experiential trauma interview



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### Conducting thorough interviews

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### Transitioning to follow-up questions

- ▶ Tell me all about walking to Cal's dorm.
- ▶ Help me understand what was going on while you and Skylar were walking to your dorm.
- ▶ What were your thoughts and feelings when you first arrived at Cal's room?
- ▶ You said you felt trapped. I want to make sure I understand what you mean by feeling trapped.
- ▶ I don't want to make any assumptions, so can you explain what you mean when you said that you and Skylar had been "talking" in the two weeks prior to this encounter?
- ▶ I am going to ask about what happened once you were on the bed. It's important that I gather as much information as possible about that part of the encounter because the decision-maker will need that information in evaluating the issues in this matter.
- ▶ I am going to shift gears now to the morning following your interaction with Skylar.
- ▶ What were you hearing while Cal was removing your clothes?
- ▶ How did you know Skylar wanted to engage in kissing?



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### What does the typical complainant interview sound like? It could start like this:


- ▶ Skylar, I understand you have raised concerns about an interaction you had with Cal on November 4, 2021.
- ▶ How do you know Cal?
- ▶ Starting where makes sense for you, please tell me about your experience with Cal. I'm sure I'll have some follow up questions for you, but I'd first like to hear about your experience in your own words.



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### Then it could sound like this:

- ▶ Thank you for sharing your experience. As I mentioned, I do have some follow up questions there I'd like to learn more.
- ▶ You mentioned attending a party at Kelly's house before going to Respondent's dorm room.
  - ▶ Can you tell me all about the party?
  - ▶ I'd like to hear all about that party, like what you did, who you may have interacted with, what prompted you to leave, etc.
  - ▶ Who did you go to the party with?
  - ▶ What is Kelly's last name?
- ▶ You mentioned sending a text message to Respondent an hour after you left their apartment. Do you still have that? Are you willing to share it?



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### Typical respondent interview starts like a complainant's, and then could sound like this:


- ▶ Thank you for sharing your account of your interaction with Skylar.
- ▶ I want to make sure you've had a chance to hear some of the specifics of Skylar's allegations and that you have a chance to directly respond. What is your response to hearing that?
- ▶ Skylar said after the encounter, you called them and apologized for a "bad decision." What is your response to hearing that?
- ▶ I want to make sure you've had a chance to hear some of the specifics of Skylar's allegations and that you have a chance to directly respond.
- ▶ Skylar said after the encounter, you called them and apologized for "bad decision." What is your response to hearing that?



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### Witnesses

- ▶ Advise witnesses of neutrality, lack of confidentiality, and retaliation
- ▶ Ask about relationship to parties (at beginning) and conversations about interview (at end)
- ▶ Give the witness very little specific information about the allegations
- ▶ Last question before closing meeting should be open-ended invitation for them to add anything




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### Make sure you've collected enough information for decision-maker to make their determination




Relevance




Reliability




Credibility



Weight/  
probative  
value






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### Relevant v. Impermissible


<p><b>Relevant</b></p> <ul style="list-style-type: none"> <li>▶ Related to the allegations of sex discrimination under investigation</li> <li>▶ Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred</li> <li>▶ Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred</li> </ul>	<p><b>Impermissible</b></p> <ul style="list-style-type: none"> <li>▶ Privileged information, unless waived</li> <li>▶ Records maintained by physician, psychologist, or other similar/connected treating professional, unless written consent</li> <li>▶ Evidence re: complainant's sexual interests or prior sexual conduct, unless:                     <ul style="list-style-type: none"> <li>▶ Offered to provide identity</li> <li>▶ Is about specific incidents of prior sexual conduct with respondent and offered to prove consent</li> </ul> </li> </ul>
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### How does a decision-maker assess credibility?

- ▶ Motive or bias to give inaccurate account
- ▶ Inherent plausibility/logic of account
- ▶ Corroboration
- ▶ Demeanor
- ▶ Relationship to the parties
- ▶ Interest, if any, in the outcome of the case-- Anything to gain or lose from the case
- ▶ Inconsistency within account? Reasonable/minor or significant?




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### Other evidence common in campus investigations

- ▶ Texts/emails
- ▶ Social media posts
- ▶ Police reports
- ▶ Photos
- ▶ Medical records
- ▶ Phone records
- ▶ Surveillance videos
- ▶ Key card swipe records



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# Break

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## Writing investigation reports

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### Investigation report

- ▶ Must accurately summarize the relevant evidence
- ▶ No required structure in the regulations



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### What does it mean to summarize:

Transcripts of recorded interviews

Written summaries of unrecorded interviews

Police reports

Text messages

Medical records

Surveillance videos


Key card swipe records



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### Drafting the interview summary


- ▶ Chronological narrative v. order of the interview conversation
- ▶ "Direct quotes"
- ▶ Topic sentences
- ▶ Show how the information came out
- ▶ "I don't know" and "I don't remember"
- ▶ Send draft of summary (of unrecorded interview) to person for review for accuracy
- ▶ Address feedback on the summary of the interview appropriately



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### Addressing parties' responses to evidence review in investigation report


- ▶ Document additional investigative steps and include any additional evidence collected
- ▶ Summarize party's position/arguments in section addressing parties' response to evidence review



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### Investigation report structure: suggested sections


- ▶ Background
- ▶ Allegations from complaint
- ▶ Relevant policy provisions
- ▶ Procedural steps
- ▶ Table of evidence collected
- ▶ Summary of party interviews
- ▶ Summary of witness interviews
- ▶ Response to evidence review
- ▶ Appendices/Exhibits
  - ▶ If applicable, include exhibit of irrelevant evidence



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### Investigation report structure—Background

On November 2, 2021, undergraduate student Skylar Smith ("Complainant") filed a Formal Complaint against undergraduate student Taylor Jones ("Respondent") alleging violations of the University's Title IX and Sexual Misconduct Policy ("Policy"). Following the Title IX Coordinator's initial assessment and outreach to both parties, on November 14, 2021, the University commenced a formal investigation into the Formal Complaint pursuant to the University's Title IX and Sexual Misconduct Grievance Procedures ("Procedures"). This Investigation Report details the University's investigation into those allegations and summarizes the relevant evidence collected.



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### Investigation report structure—Allegations from Formal Complaint

In their Formal Complaint, Complainant alleged as follows:

[Either include exact language from Formal Complaint, if appropriate].

Or, paraphrase, such as:

On or about October 7, 2021, when the parties were in Respondent's dorm room in Academia Hall, Respondent repeatedly touched and grabbed Complainant's buttocks even after Complainant told Respondent to stop touching their buttocks, while Complainant was highly intoxicated and unable to consent.



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## Investigation report structure— Relevant Policy provisions

The allegations in the Formal Complaint implicate the Policy's definitions of Sexual Assault: Fondling; Consent; and Incapacitation.

The Policy defines Sexual Assault: Fondling as

The Policy defines Consent as

The Policy defines Incapacitation as




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## Investigation report structure— Procedural Steps




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DATE	ACTION
7/31/2021	Formal Complaint filed
8/9/2021	Notice letter issued to Complainant and Respondent via email
8/13/2021	Email outreach for interview to Complainant
8/19/2021-8/20/2021	Email outreach for interview to Respondent
8/23/2021	Second interview of Complainant
8/27/2021	Email outreach for interview to Witness 1; sent draft of interview summary to Complainant for review
8/31/2021	Email outreach for interview to Witness 2
9/1/2021	Interview of Witness 1
9/2/2021	Interview of Respondent; sent draft of interview summary to Witness 1 to review
9/3/2021	Second email outreach for interview to Witness 2
9/5/2021	Email from Respondent identifying Witness 5 as witness
9/7/2021	Interview of Witness 2
9/8/2021	Interview of Witness 3, Witness 4
10/4/2021	Draft Investigation Report and Directly-Related Evidence shared with the parties
10/14/2021	Complainant submitted response to Draft Investigation Report and Directly-Related Evidence
10/15/2021	Final Investigation Report and Relevant Evidence submitted to Title IX Coordinator




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## Investigation report structure— Table of evidence collected



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Item Number	Description of Item	Provided by
Attachment 1	Notice of Investigation letters and exhibits sent to parties on May 5, 2023	Title IX Coordinator
Attachment 2	Initial incident reports from April 4 and April 5, 2023	Title IX Coordinator
Attachment 3a	Complainant 1 transcript of first interview	Complainant 1
Attachment 3b	Complainant 1 transcript of second interview	Complainant 1
Attachment 4	Photos showing interior of Complainant 1's office	Complainant 1
Attachment 5a	Complainant 2 transcript of first interview	Complainant 2
Attachment 5b	Complainant 2 transcript of second interview	Complainant 2
Attachment 6	Text screenshots between Complainant 2 and Respondent dated March 30 through May 2, 2023	Complainant 2
Attachment 7a	Respondent transcript of first interview—parts 1 and 2	Respondent
Attachment 7b	Respondent transcript of second interview	Respondent
Attachment 8	Text screenshots between Respondent and Complainant 2 dated May 1 and May 2, 2023	Respondent
Attachment 9	Respondent's cell phone and text billing records from April 2023 billing cycle	Respondent
Attachment 10	Witness 1 transcript of interview—parts 1 and 2	Witness 1
Attachment 11	Witness 1's notes from March 30 through April 4, 2023	Witness 1
Attachment 12	Email from Title IX Coordinator dated June 13, 2023 including photos of nursing department hallway and offices	Title IX Coordinator
Attachment 13	Video of nursing department hallway including view from Witness 1's desk/office recorded on June 13, 2023	Title IX Coordinator
Attachment 14	Witness 2 transcript of interview	Witness 2
Attachment 15	Text screenshot between Witness 2 and Complainant 1 dated April 6, 2023	Witness 2




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## Investigation report structure— Summary of party interviews

The investigator interviewed both parties via Zoom. Complainant's advisor, Sal Price, was present for their interview. Respondent chose not to have an advisor present for their interview. Prior to the parties' interviews, the investigator advised each party of the following: investigator neutrality, that information shared with the investigator was not confidential and would be shared with the other party and included in the investigation report, and the of University's prohibition on retaliation. The information summarized in the sections below is presented from the perspective of the party interviewed.

Both parties were provided the opportunity to review a draft of their interview summary and provide feedback. Parties' feedback on their interview summaries is noted either within the text or in footnotes, as appropriate.



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## Investigation report structure— Summary of witness interviews

The investigator interviewed all witnesses via Zoom. Prior to each witness interview, the investigator advised each witness of the following: investigator neutrality, that information shared with the investigator was not confidential and would be shared with the parties and included in the investigation report, and of the University's prohibition on retaliation. The information summarized in the sections below is presented from the perspective of the witness interviewed.

All witnesses were provided the opportunity to review a draft of their interview summary and provide feedback. Witnesses' feedback on their interview summaries is noted either within the text or in footnotes, as appropriate.



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## Investigation report structure— Response to evidence review

On January 24, 2022, both parties provided responses to the evidence review. In their response (Exhibit H), Complainant identified two additional witnesses (Witness 4 and Witness 5) and provided argument regarding the summary of Respondent's interview.

In their response (Exhibit I), Respondent submitted additional text messages exchanged between the parties on the day following the incident (Exhibit J) and provided argument regarding the summary of Complainant's interview and Witness 2's interview.



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## Final thoughts on investigation reports

- ▶ Whole point is to be useful to decision-maker
- ▶ Think about who else is reading the report and how they will use the report
- ▶ Record = Investigation Report and Evidence
- ▶ Logistics of sharing record



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