

Chapter 06 Investigations

6.1 Introduction

An investigation is a systematic search for and documentation of the facts relevant to an event from which a decision to take appropriate action can be made. It is the most significant phase of the enforcement process since subsequent action that may affect both individual rights and public safety will depend on its thoroughness and adequacy. In order for investigators to conduct thorough investigations from the initial complaint through to the case report, it is imperative that they have a thorough understanding of their delegation of authority and a sound knowledge of their inspection and investigative powers. Inspectors must also know what constitutes relevant evidence if Civil Aviation Authority of Nepal is to bring an action against an alleged offender because the only means available to prove that the violation has taken place on the basis of obtained evidence.

6.2 Priorities for Investigation

Priority shall be given to violations received from any Government request. For all other violations the Director, Flight Safety Standard Department (FSSD) shall assign an investigation priority level based on safety impact.

6.3 Cockpit Voice Recorder (CVR) / Flight Data Recorder (FDR)

CVR/FDR recordings shall not be used by Civil Aviation Authority of Nepal in any enforcement matters. Their use is limited to aircraft accident investigations to assist in determining the cause of accidents and incidents. Should courts of law subpoena CVR/FDR tapes, counsel for the Department will handle the matter.

6.4 No Investigation Conducted (NIC)

Sometimes, it is evident from the original complaint or the Initial Violation Process that the case does not warrant a comprehensive investigation because of: lack of evidence; referral to a foreign or Nepalese agency; statutory limitation; low safety item; insufficient resources; etc. Nevertheless, the relevant information should be recorded for the type of action taken.

6.5 Defences - Necessity, Due Diligence, Officially Induced Error

If early in an investigation, facts are uncovered which point to the likelihood that an alleged offender could successfully argue the actions taken were justified, the investigator may opt to terminate the investigation with a recommendation for no further action. In certain cases where wrongful conduct can be proven or is admitted, the alleged offender may still be able to raise a defence based on necessity, due diligence or officially induced error. These defences are available in both judicial and administrative proceedings.

6.5.1 The Defence of Necessity

The defence of necessity has its origins in common law and remains available to alleged offender. In deciding whether the defence has been established, the Director, Flight Safety Standard Department (FSSD) should carefully examine the facts to determine whether all of the following conditions apply:

- (1) the situation was so urgent and the dangers from inaction were so imminent that it was unreasonable to delay any action;
- (2) compliance with the law was demonstrably impossible as the violation was inevitable or unavoidable in that there was no opportunity for an alternative course of action that did not involve a contravention of the regulations; and
- (3) the hazards to flight safety caused by the contravention were less serious than the hazard posed by complying with the law (e.g. breaking the law is less serious than any accident that might result from complying with it in the particular circumstances).

In addition, the Director, Flight Safety Standard Department (FSSD) must be satisfied on reasonable grounds that the urgent situation was not brought about by the alleged offender through negligence or a breach of the regulations. In other words, where the alleged offender created the danger, the alleged offender cannot avoid liability for a contravention committed to escape from that danger.

Where the defence of necessity is proven, the alleged offender cannot be found to have contravened the law because the contravention was necessary to avoid an immediate greater danger (in particular, death or injury).

6.5.2 The Defence of Due Diligence

CAAN documents and manuals provides for the "defence of due diligence" in an alleged contravention of the CARs. In order to establish this defence, the alleged offender must show that due diligence was exercised (all reasonable steps were taken) to avoid committing the contravention. Where due diligence is proven, the alleged offender cannot be found in contravention of the law because all reasonable steps to avoid the contravention were taken. What constitutes due diligence will therefore vary from case to case depending on the facts.

6.5.3 Officially Induced Error

The defence of officially induced error is available where an alleged offender has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. It must be proved, on a balance of probabilities, that the alleged offender relied on the erroneous legal opinion or advice of the official and that this reliance was reasonable. The reasonableness will depend on several factors, including the efforts made by the alleged offender to ascertain the proper law, the complexity or obscurity of the law, the position of the official and the clarity, definitiveness and reasonableness of the advice given. The defence may at times overlap with the defence of due diligence, but it is separate and distinct.

6.5.4 Application of Defences

Any one of the previously mentioned defences can be raised by the alleged offender during the investigation or at any time before a decision to impose a sanction has

been made. If the Director, Flight Safety Standard Department (FSSD) is satisfied that a defence has been established and therefore no offence has been committed, then the case must be closed. When a defence of due diligence or necessity has not been proven, a mitigating circumstance may still exist that may be taken into consideration. If an informal meeting is requested by the document holder, the procedures as laid out in **Civil Aviation Regulations, 2002** shall be followed. If the alleged offender insists the defences are valid, the situation becomes a matter for the DGCA/Government or the court to decide.

6.6 Comprehensive Investigations

If the initial violation process indicates that a contravention took place and further evidence is necessary to establish the facts, a comprehensive investigation must be commenced. The purpose of the comprehensive investigation is to obtain all the evidence necessary to establish the truth. The investigator's objective is not only to obtain sufficient evidence to prove an alleged offence occurred, but also to ensure that all the facts of the incident are disclosed so that natural justice will be served. The procedure for conducting a comprehensive investigation follows:

- (1) identify all provisions that were possibly contravened;
- (2) analyze the regulations allegedly contravened (see Chapter 5);
- (3) determine the evidence necessary to prove each element of a violation;
- (4) plan and initiate the steps necessary to obtain such evidence; e.g. interviews, resource personnel, expert witnesses, log books, records, search warrant, etc.;
- (5) obtain information from the alleged offender. The alleged offender must be contacted in person, by telephone or by mail and be advised that:
 - (a) an investigation is in progress; and,
 - (b) there is an opportunity for the document holder to offer voluntary information.

NOTE 1: It is mandatory to advise the alleged offender that an investigation is in progress. The case file must be annotated to record the notification. An alleged offender may be able to provide evidence valuable to the investigation. Under no circumstances should the Notice of Assessment of Monetary Penalty or the Notice of Suspension be the alleged offender's first indication of an enforcement investigation.

NOTE 2: A **warning** shall be given advising the alleged offender that this information may be used as evidence.

- (6) co-ordinate the investigation to prevent overlap or conflict with other personnel;
- (7) establish the cause of the violation. e.g. weather, navigation hazard, equipment, deliberate, inadvertent;
- (8) record the relevant information, including a narrative of the facts and circumstances of the event which lead to the alleged violation; and

- (9) prepare a personnel or company enforcement case file incorporating the results of the foregoing activities and including the Initial Violation Process Form, a legible activity log and a case report.

6.7 Case Closure - No Further Action (NFA)

A case should terminate with no further action if:

- (a) the alleged offender's identity cannot be ascertained;
- (b) the evidence does not provide reasonable grounds to believe the violation took place;
- (c) an uncorrectable technical or other flaw in the case precludes further action;
- (d) an exemption had been granted which negated the contraventions; or
- (e) a defence of necessity, due diligence or officially induced error is established.

Enforcement correspondence relating to a case in which no further action was taken is recorded but the case shall not be considered a contravention.

Aviation Enforcement Procedure Manual

Figure 6-1

COMPARISON OF INTERVIEWS OF WITNESSES AND ALLEGED OFFENDERS	
Witness	Alleged Offender
AIM ...to gather information and test its validity in order to determine the particulars of the matter under investigation.	...to gather information and test its validity in order to determine whether the subject was responsible for or involved in the matter under investigation.
WHO ...witnesses who are willing to provide the investigator with any information they possess about the matter under investigation.	...persons suspected of offences as well as others who may have information but are reluctant to offer it.
WHEN ...interviews should take place as soon as possible after the event has occurred so that statements by witnesses are not affected by memory loss, influence of talking to others, etc. Immediate gathering of information enables the investigator to prepare for interviewing alleged offenders.	...interviews of alleged offenders should take place ideally after the investigator has gathered enough information to make a judgement on how truthful the subject is. An alleged offender interview is more fruitful after witnesses have been interviewed and physical evidence has been located and evaluated.
LOCATION ...at a place convenient and familiar to the subject or in a neutral setting. The subject's home, place of business or any place where privacy is assured is preferred.	...the interview room at the office is best since it enables the inspector to manage the security of the subject and to control other factors which might tend to be distracting.
TECHNIQUE ...a low-pressure, informal atmosphere is preferred to allow the subject to relate his information in narrative style. Specific questions should be used to gather more detail and to jog the witness' memory.	...basically the same method as with witness interviews, but the atmosphere is more formal and the investigator works toward a more specific purpose.