

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

14. When does privilege attach to investigation materials?



Brazil

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Privilege attaches to investigation materials when attorneys conduct interviews and take notes, and when they write reports and recommendations.

However, if other persons participate in an interview or write a report, and they are not attorneys, they can be required to testify about what they witnessed while participating in the interview or to discuss or disclose their investigation report.

For this reason, when starting an investigation, and depending on the matters to be investigated, it is important to determine whether it is convenient to allocate lawyers to certain roles to increase the company's control of corporate confidentiality resulting from third-party involvement in the investigation.

Attorneys should also clearly state to participants of the investigation that they are attorneys representing the company and that their work papers fall under attorney-client privilege and will not be shared with them.

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Switzerland

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of

the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute*, p. 284 et seq.

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23. Should the investigation report be shared in full, or just the findings?



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There is no legal requirement or recommendation for the company to share the full or partial report or findings. It is also not a recommended measure. Therefore, unless the internal rules determine that the company must do it, any answer to queries should be limited to the fact that the investigation was concluded, and the company took the appropriate action.

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.[2]

[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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