

Workplace Investigations

Contributing Editors

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

12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

Netherlands

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Such information can usually be kept confidential in an internal investigation, subject to potential disclosure obligations (see question 25). As indicated in question 10, depending on the nature and subject matter of an investigation, the identity of employees involved and investigative findings shall be shared with an employer on a need-to-know basis only. Specific requirements apply to the protection of the identity of whistleblowers since the Whistleblower Directive was implemented into Dutch law.

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Portugal

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An employee served a notice of accusation is entitled to assess all information that was gathered within the scope of the investigation and disciplinary procedure (notably the identity of the complainant, witnesses heard, other sources of information, etc), otherwise his right of defence may be jeopardised.

Where a preliminary investigation does not lead to an accusation against the employee, no disclosure has to be made by the employer.

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Switzerland

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As mentioned under Question 10, the employer's duty of care (article 328, Swiss Code of Obligations) also entails the employer's duty to respect and protect the personality (including confidentiality and privacy) and integrity of employees (article 328 paragraph 1, Swiss Code of Obligations) and to take appropriate measures to protect them.

However, in combination with the right to be heard and the right to be informed regarding an investigation, the accused also has the right that incriminating evidence is presented to them throughout the investigation and that they can comment on it. For instance, this right includes disclosure of the persons accusing them and their concrete statements. Anonymisation or redaction of such statements is permissible if the interests of the persons incriminating the accused or the interests of the employer override the accused' interests to be presented with the relevant documents or statements (see question 11; see also article 9 paragraphs 1 and 4, Swiss Federal Act on Data Protection). However, a careful assessment of interests is required, and these must be limited to what is necessary. In principle, a person accusing another person must take responsibility for their information and accept criticism from the person implicated by the information provided.^[1]

[1] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 390.

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