

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?

Germany

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at Hengeler Mueller

There is no general obligation on the part of the employer to disclose to the employee concerned the identity of the complainant, witnesses or other sources of information during the workplace investigation.

However, as described in question 11, the employee must be sufficiently informed of the allegations before a termination based on suspicion of wrongdoing is issued. This may also require disclosing the complainant's or witnesses' identity or other sources of information. In addition, the employer would have the burden of proof in the context of a legal dispute (eg, termination protection proceedings or proceedings about the legality of certain investigation measures) and may have to name witnesses and disclose sources of information.

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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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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?



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At the end of the workplace investigation, the results are presented to the company's management bodies so that they can make a decision. This may be a mere summary of the facts, or it may contain a legal assessment and recommendation for action.

There is no general obligation to report compliance violations to the police or public prosecutor's office. For some violations, there are statutory disclosure requirements. For example, data protection violations must be reported to the responsible supervisory authority (article 33 and 34, DSGVO), violations in connection with money laundering must be reported to the Central Office for Financial Transaction Investigations (section 43, Anti-Money Laundering Act), unlawful claiming of subventions must be disclosed to the subsidy-providing authority (section 3, Subventions Act), and incorrect information in the tax declaration must be reported to the tax authority (section 153, Tax Code). Additionally, in listed companies, criminal acts may constitute insider information in individual cases, and this must be disclosed within the framework of ad hoc publicity following market abuse regulations.

Also, there may be cases where reporting to the authorities should be considered for corporate policy and tactical reasons (eg, to avoid or mitigate negative consequences for the business).

Pursuant to section 17 paragraph 2, HinSchG, feedback will need to be provided to the whistleblower within three months of confirmation of receipt of the report or, if the receipt has not been confirmed to the whistleblower, within three months and seven days after receipt of the report. This includes the communication of planned and already taken follow-up measures as well as their reasons. Feedback to the whistleblower may only be provided to the extent that it does not affect the workplace investigation and does not prejudice the rights of the persons who are the subject of the report or who are named in the report.

For the question of whether internal investigations reports and material need to be shared with or can be seized by the public prosecutor, please see question 14.

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Switzerland

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The employer is generally not required to disclose the final report, or the data obtained in connection with the investigation. In particular, the employer is not obliged to file a criminal complaint with the police or the public prosecutor's office.

Exceptions may arise, for example, from data protection law (see question 22) or a duty to release records may arise in a subsequent state proceeding.

Data voluntarily submitted in a proceeding in connection with the internal investigation shall be considered private opinion or party assertion.^[1] If the company refuses to hand over the documents upon request, coercive measures may be used under certain circumstances.^[2]

^[1] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 123.

^[2] Oliver Thormann, Sicht der Strafverfolger – Chancen und Risiken, in: Flavio Romerio/Claudio Bazzani (Hrsg.), *Interne und regulatorische Untersuchungen*, Zürich/Basel/Genf 2016, p. 102 et seq.

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