

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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### 08. Can the employer search employees' possessions or files as part of an investigation?

#### Austria

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In general, it is advisable to back up data, documents, emails and other records promptly to prevent their deletion. Admissibility depends on whether the data originates from personal or professional records and whether they are legally relevant. If internal investigations are carried out based on a specific suspicion of a criminal offence, it is the processing of legally relevant data. In general, the processing of professional emails or documents is permissible. If there is no professional connection, access to private files and documents is only permitted in exceptional cases.

If, for example, using a business email account for private purposes is not allowed, the employer can usually assume that the data processed is only "general" data within the meaning of article 6 GDPR and that such data processing is justified by a balancing of interests. However, if private use is allowed, the data may still be part of a special category within the meaning of article 9 GDPR. In such cases, the justification for its use must be based on one of the grounds explicitly mentioned in article 9(2) GDPR.

The employer must protect the employee's rights under section 16 of the ABGB and must consider the proportionality of the interference. Only the least restrictive means – the method that least interferes with the employee's rights – may be used to obtain the necessary information. The employer's interest in obtaining the information must outweigh the employee's interest in protecting his or her rights. The implementation or initiation of controls by the employer does not automatically constitute an interference with personal rights, as being subject to the employer's rights of control is part of the position as an employee.

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#### Switzerland

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The basic rule is that the employer may not search private data during internal investigations.

If there is a strong suspicion of criminal conduct on the part of the employee and a sufficiently strong justification exists, a search of private data may be justified.<sup>[1]</sup> The factual connection with the employment relationship is given, for example, in the case of a criminal act committed during working hours or using workplace infrastructure.<sup>[2]</sup>

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<sup>[1]</sup> Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168.

<sup>[2]</sup> Claudia Fritsche, *Interne Untersuchungen in der Schweiz: Ein Handbuch für regulierte Finanzinstitute und andere Unternehmen*, Zürich/St. Gallen 2013, p. 168 et seq.

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



### Austria

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When dealing with reports and persons covered by the HSchG, the provisions on identity protection must be followed. In all internal investigations, only authorised persons should receive 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's 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.<sup>[1]</sup>

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

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