

# Workplace Investigations

## Contributing Editors

*Phil Linnard at Slaughter and May*  
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## 12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?

### Belgium

Author: *Nicolas Simon*  
at Van Olmen & Wynant

If the complainant made use of an internal whistleblowing procedure, confidentiality regarding the identity of a reporter is mandatory. Also, in other cases and for other involved persons (witnesses), it is recommended to keep their identity confidential to prevent the risk of intimidation or other negative consequences.

In complaints due to sexual harassment, violence or bullying at work, if the prevention adviser heard or took written statements from persons that were considered useful for the evaluation, these persons may remain anonymous.

The employee must, nevertheless, receive sufficient information to be able to offer a defence concerning the facts of which he or she is accused.

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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.<sup>[1]</sup>

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

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



### Belgium

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It is recommended to limit the communication to the findings and details of the report that are necessary for the employee to fully understand the outcome. This is especially true if the investigation is bound by a duty of confidentiality (eg, under the whistleblowing rules), as the employee should not be allowed access to the full report.

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### Switzerland

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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).<sup>[1]</sup> 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.<sup>[2]</sup>

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<sup>[1]</sup> 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 | hrtdaily.ch> (last visited on 27 June 2022).

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