

Workplace Investigations

Contributing Editors

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

France

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The identity of the complainant must be kept confidential and cannot be disclosed. There are two exceptions: if the complainant consents to the disclosure; or if the employer is asked for this information by the judicial authorities.

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Hong Kong

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Subject to any internal policies and terms of the employment contract, an employer would have discretion as to whether the identity of the complainant, witnesses or sources of information for the investigation should be kept confidential. In general, the employer should consider how the confidential treatment or its absence would affect the conduct and outcome of the investigation. The disclosure of the identity of the complainant in some cases may be necessary for the employee under investigation to respond in a meaningful way. On the other hand, both the complainant and witnesses may be more forthcoming in providing information if he or she is assured that his or her identity will not be made known to the person under investigation (especially if the latter is senior management personnel). A balance should be struck between the interests of the complainant or witnesses in maintaining confidentiality and the need for the employee under investigation to make a proper response to the allegations made. In any case, the employer should follow its whistleblowing policy if there is one (as discussed in question 9), and take into account practical and statutory considerations relating to confidentiality (as discussed in question 10).

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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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