

Workplace Investigations

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14. When does privilege attach to investigation materials?

Hong Kong

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Legal professional privilege may attach to investigation materials if they are generated for the sole or dominant purpose of giving or obtaining legal advice (legal advice privilege); or created with the sole or dominant purpose of either obtaining or giving advice about or obtaining evidence to be used in an actual or reasonably contemplated litigation (litigation privilege).^[1] Legal advice privilege applies to confidential communications between lawyers and their clients, whereas litigation privilege may extend to communications between lawyers, clients and third parties. The employer may withhold disclosure of any materials that are subject to either legal advice or litigation privilege.

In the context of a workplace investigation, internal interview records are protected by legal advice privilege if the dominant purpose of creating those records is to seek legal advice on potential disciplinary action against the employee. Such interview records are protected by litigation privilege if they are created to obtain evidence in an actual or reasonably contemplated litigation.

It should be noted that the point in time at which the sole or dominant purpose is judged is when the document is created. In other words, a document is not covered by litigation privilege if it was not created for litigation purposes but was subsequently used to obtain legal advice for litigation.^[2] On a practical point, if the employer would like to minimise disclosure of the investigation by claiming privilege over relevant materials, it may wish to limit the number of documents created and persons to which they are circulated to avoid potential waiver of privilege.

^[1] White Book 2023, 24/5/16, 24/5/18; Litigation privilege applies to adversarial proceedings, but not inquisitorial or administrative proceedings (White Book 2023, 24/5/28).

^[2] White Book 2023, 24/5/18.

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As outlined above, all employees generally have the right to know whether and what personal data is being or has been processed about them (article 8 paragraph 1, Swiss Federal Act on Data Protection; article 328b, Swiss Code of Obligations).

The employer may refuse, restrict or postpone the disclosure or inspection of internal investigation documents if a legal statute so provides, if such action is necessary because of overriding third-party interests (article 9 paragraph 1, Swiss Federal Act on Data Protection) or if the request for information is manifestly unfounded or malicious. Furthermore, a restriction is possible if overriding the self-interests of the responsible company requires such a measure and it also does not disclose the personal data to third parties. The employer or responsible party must justify its decision (article 9 paragraph 5, Swiss Federal Act on Data Protection).^[1]

The scope of the disclosure of information must, therefore, be determined by carefully weighing the interests of all parties involved in the internal investigation.

^[1] Claudia M. Fritsche, *Interne Untersuchungen in der Schweiz*, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 284 et seq.

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22. What must the employee under investigation be told about the outcome of an investigation?

Hong Kong

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The employer is generally not obliged under Hong Kong law to inform the employee under investigation of the outcome of the investigation absent any express obligation under the employment contract, even where the investigation has led to a decision to terminate the employee. However, to avoid any unnecessary claim of unlawful dismissal or dismissal without a valid reason, the employer should inform the employee of the reason for his or her termination, even if the investigation results may not be shared in full with the employee.

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Switzerland

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Workplace investigations often result in an investigation report that is intended to serve as the basis for any measures to be taken by the company's decisionmakers.

The employee's right to information based on article 8, Swiss Federal Act on Data Protection also covers the

investigation report, provided that the report and the data contained therein relate to the employee.^[1] In principle, the employee concerned is entitled to receive a written copy of the entire investigation report free of charge (article 8 paragraph 5, Swiss Federal Act on Data Protection and article 1 et seq, Ordinance to the Federal Act on Data Protection). Redactions may be made where the interests of the company or third parties so require, but they are the exception and must be kept to a minimum.^[2]

^[1] Arbeitsgericht Zürich, Entscheide 2013 No. 16; Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 393 et seq.

^[2] Roger Rudolph, Interne Untersuchungen: Spannungsfelder aus arbeitsrechtlicher Sicht, SJZ 114/2018, p. 394.

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