

# Workplace Investigations

## Contributing Editors

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## 07. What data protection or other regulations apply when gathering physical evidence?

### Switzerland

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The Swiss Federal Act on Data Protection applies to the gathering of evidence, in particular such collection must be lawful, transparent, reasonable and in good faith, and data security must be preserved.<sup>[1]</sup>

It can be derived from the duty to [disclose and hand over benefits received and work produced](#) (article 321b, Swiss Code of Obligations) as they belong to the employer.<sup>[2]</sup> The employer is, therefore, generally entitled to collect and process data connected with the end product of any work completely by an employee and associated with their business. However, it is prohibited by the Swiss Criminal Code to open a sealed document or consignment to gain knowledge of its contents without being authorised to do so (article 179 et seq, Swiss Criminal Code). Anyone who disseminates or makes use of information of which he or she has obtained knowledge by opening a sealed document or mailing not intended for him or her may become criminally liable (article 179 paragraph 1, Swiss Criminal Code).

It is advisable to state in internal regulations that the workplace might be searched as part of an internal investigation and in compliance with all applicable data protection rules if this is necessary as part of the investigation.

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<sup>[1]</sup> Simona Wantz/Sara Licci, Arbeitsvertragliche Rechte und Pflichten bei internen Untersuchungen, in: Jusletter 18 February 2019, N 52.

<sup>[2]</sup> Claudia Fritsche, Interne Untersuchungen in der Schweiz, Ein Handbuch für Unternehmen mit besonderem Fokus auf Finanzinstitute, p. 148.

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### Thailand

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The basic premise is that all evidence is admissible unless it violates the law of admissibility and production of evidence, which may vary depending on the jurisdiction. In a criminal court, for example, evidence gathered in violation of the fruit of the poisonous tree doctrine would be typically inadmissible, yet in a civil court, this doctrine would not be an exclusionary rule.

The Personal Data Protection Act, BE 2562 (2019) (PDPA), which is the main data protection law in Thailand, applies when collecting, using, and disclosing pieces of evidence containing the personal data of employees. If the investigation requires sensitive information of the employee under investigation, for example, race, ethnic origin, political opinion, religious or philosophical beliefs, sexual behavior, criminal records, health data, disability, genetic data and biometric data, consent from the employee should be obtained.

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



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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).[1] 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.[2]

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[1] 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 | hrtoday.ch> (last visited on 27 June 2022).

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It depends on with whom the investigation report should be shared. If there is a court case or criminal case to be further investigated by police, the investigation report should be shared in full as this would be used as documentary evidence to make a case stronger. On the contrary, if the investigation report is requested by the employee under investigation, employers are entitled to use their discretion as to what information to share.

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