This message will not self destruct: Investigations and disclosure of sensitive communications

Investigations often take place where there is an allegation of wrongdoing. They are a crucial process, enabling organisations to establish facts, identify problems, and determine how best to proceed.

Carrying out a thorough and fair investigation can enhance an organisation's credibility, send a powerful message that wrongdoing will be taken seriously, and lead to the introduction of new and improved arrangements to help prevent incidents from occurring again. As part of any serious investigative process, it is important to consider at an early stage what evidence may have to be handed over, when and to whom, and to put in place arrangements with key stakeholders to help minimise the risk of a problem occurring further down the line.

When potentially sensitive or embarrassing records do have to be handed over to an enquiry or as part of some other formal process, some will offer extraordinary explanations as to why they can't produce their evidence; whether it's because the phone containing the messages in question just happened to fall into the North Sea from the side of a boat while on a family holiday, or because the messages simply can't be retrieved because it's something to do with the app going down and then coming up again, the explanations can be as wide ranging as they are surprising.

Recent enquiries and investigations, from the Post Office to Formula 1, are timely reminders that investigations carry a risk that compromising or embarrassing communications may end up being circulated far more widely than their authors intended. This may be for a number of reasons, including where a party is under an obligation to disclose documents as part of litigation or where someone who is unhappy or considers themselves to be a whistle-blower leaks the material or otherwise chooses to go public as a way of piling on the pressure.

Understanding at the outset of an investigation what might have to be handed over at a later stage can help an organisation navigate its way through this minefield and help avoid embarrassing slip ups.

Certified B Corporation

So what might need to be disclosed?

There are many ways through which information created during an internal investigation may have to be disclosed to a third party. Most commonly, an organisation may be legally or morally required to disclose relevant information to:

- **Other parties in legal proceedings**
  Subject to some exceptions, parties to litigation are usually obliged by court order to disclose all documents on which they rely, but also all documents which adversely affect their own case or support another party's case. These disclosures can not only make or break the case, but importantly, any document referred to in open court effectively becomes a public document which anyone can then apply to the court for a copy of.
- **Regulators**
  To the extent that the investigation covers an issue which is of regulatory concern. Charities for example, may need to provide investigation reports to the Charity Commission.
- **The police or other similar authority**
  As evidence in criminal proceedings.
- **The general public**
  By public authorities, to anyone who makes a Freedom of Information Act request (subject to a number of other exemptions under that Act).
- **Colleagues and other third parties**
  As part of disciplinary proceedings in an employment context.
- **Individuals**
  In the case of personal data held about a particular individual, requested by that individual, pursuant to a Data Subject Access Request (DSAR) made under data protection legislation. As a free standing right a DSAR can be and often is also made during an investigation or other legal process.

Exceptions

There may be applicable exemptions which mean otherwise damaging or unhelpful material may not have to be disclosed, for example under FOIA or the GDPR.

In addition, those carrying out investigations may in some circumstances at least have a degree of protection against some forms of disclosure, where those communications are covered by legal professional privilege.

Lawyers will know that legal professional privilege is a fundamental right which essentially means that any material covered by it, other than in very specific and limited circumstances, does not have to be disclosed to a third party; it is the client's right and not for the lawyer to decide. However, most of the rules relating to privilege are tightly defined, and without careful consideration at the outset of an investigation, it can be easy for privilege to be lost.

There are two main types of legal professional privilege in English law:

(i) Legal advice privilege

Legal advice privilege protects confidential communications between a lawyer and a client, sent for the dominant purpose of giving or receiving legal advice.

Importantly, the term "client" does not mean every person employed by an organisation seeking legal advice. Instead, following the judgment in the Court of Appeal decision in Three Rivers No 5 the "client" for privilege purposes should be interpreted as a narrow group of individuals who are responsible for and authorised to seek and receive legal advice on behalf of the organisation. Significantly, this does not automatically extend to those who are authorised to provide information to lawyers.

Because the privilege only attaches to communications relating to "legal advice", it means that even where lawyers are involved, if they have been appointed to carry out the investigation itself on an organisation's behalf, where they are carrying out a purely investigative role rather than providing legal advice, those communications will not usually be privileged, unless for example, "litigation privilege" applies. Put another way, sensitive discussions with lawyers may end up being aired more publicly than expected.

(ii) Litigation privilege

Litigation privilege kicks in at the point at which litigation is in "reasonable contemplation". It protects from the disclosure of confidential communications between client or lawyer on the one hand, and third parties on the other, and documents created by or on behalf of the client or their lawyer, which are for the dominant purpose of use in litigation. It is not necessary for a lawyer themselves to be party to the communication, or to have prepared the document.

The communication or document must have litigation as its dominant purpose, i.e. it must have been created for the litigation. Even during proceedings, parties may internally create documents which are relevant to the issues in litigation, but for a variety of other reasons. These kinds of documents would also be disclosable.

The recent Court of Appeal case Al-Sadeq v Dechert LLP [2024] has confirmed that litigation privilege applies even to non-parties to litigation, provided that at the time the document or communication was created there was reasonable contemplation of adversarial litigation, and the dominant purpose test is satisfied.

When considering privilege, it is also crucial for organisations to be aware that even where privilege initially exists, it can be lost through the mistaken disclosure of a document. For example, this could happen where an email is sent to too many recipients, or to the wrong recipient, such that the information ceases to be confidential. Privilege is therefore something which must be actively and consciously maintained.

Practical advice

Determining what may need to be handed over, when and to whom and whether an exception to doing so applies can be a challenging process which will need to be kept under review. However, there are some simple steps that organisations should consider at the outset:

- Think about the possible bases on which documents might have to be provided and what might happen to them once they have been provided. Would it be a voluntary process or pursuant to a court order, a DSAR or some other legal process?
- Consider whether to involve lawyers (either in house or external) as soon as the need to begin an investigation is identified.
- Ensure that communications with lawyers are kept within a small group on a 'need to know' basis, and not distributed, in copy or in summary, more widely unless absolutely necessary.
- Be certain that anyone involved in the investigation understands the importance of maintaining confidentiality and privilege, and mark material as "confidential and privileged".
- If there is any potential for litigation or regulatory involvement, ensure that routine document destruction procedures are suspended, and that existing documents are protected.
- Bear in mind that every document or communication generated in the course of the investigation, particularly informal messages sent by email, individually or as a group, or via WhatsApp or other messaging services, could eventually be disclosed.

The many stories in the press in recent months serve to confirm the importance of being prepared at the outset of an investigation for all the twists and turns that may be thrown up; Rebekah Vardy's assistant would presumably deny that she was "helped out" by the unfortunate loss of her phone...!

Get in touch

Robert Oakley
Partner
T: 020 7551 7792
E: r.oakley@bateswells.co.uk

Lucinda Ellen
Associate
T: 020 7551 7710
E: l.ellen@bateswells.co.uk

Certified B Corporation