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KLOKKENLUIDERS



**INTEGRITY IN PRACTICE**  
**Internal Investigation**



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### **Dutch Whistleblowers Authority**

The Dutch Whistleblowers Authority contributes to ethical organisations and workplace relationships. By advising employees who have stepped forward to blow the whistle on wrongdoing. By investigating wrongdoing. By investigating the treatment of whistleblowers, who - by law - may not experience any disadvantageous treatment as a result of stepping forward. And by encouraging government agencies, semi-public institutions and companies to monitor, promote and safeguard their integrity.

### **Internal investigations in practice**

Whistleblowers typically report suspected wrongdoing within their own organisation, making use of the statutory internal whistleblowing procedure. Reports may give rise to an internal investigation into the suspected wrongdoing. When conducted properly, internal investigations strengthen an organisation's integrity, boost confidence in the internal reporting procedure and reduce the need for employees to resort to reporting matters externally.

### **Practical guide**

This publication provides practical guidelines for internal investigations into suspected wrongdoing. It examines a general investigation protocol and the roles of the various agents involved, as well as covering the phase between the report and the preliminary investigation, the internal fact-finding investigation, the conclusion of the investigation and any follow-up steps.

### **Who is this publication for?**

This publication is intended for everyone in a public or private organisation who may in some way become involved in internal reports, such as integrity professionals, compliance officers, confidential advisers, managers, HRM officers, auditors and integrity investigators. However, it is primarily up the employer (the organisation's management) to develop an investigation protocol that suits their organisation, in consultation with these actors and with due consideration of their roles. This publication is therefore primarily addressed to the employer and seeks to assist them in shaping the investigation protocol. Please note that this publication is based on Dutch laws and legislation, which may be different in other countries. For more information, please see our other publications in the series on 'Integrity in Practice': The Reporting policy, The Confidential Adviser, and Working on Culture.

# 1

## Preparation

### Preparing for an internal investigation

- Investigation protocol
- Division and separation of duties
- What can be reported

### Introduction

Reports of suspected wrongdoing raise practical questions. For example: who should be the first to receive the report, when should an internal investigation take place and what are the rights and obligations of all those involved in such an investigation? It is in organisations' best interests to ensure they are well prepared, and an internal investigation protocol is absolutely indispensable.

### 1.1

### Investigation protocol

An investigation protocol lays down how the organisation handles reports, e.g. how it assesses reports and how it conducts its internal fact-finding investigations, if necessary. It also describes the rights and obligations of the organisation, the reporting person and the person suspected of wrongdoing: the person concerned.

Each and every integrity policy must feature an investigation protocol, as it provides clarity and formalises all internal agreements with all persons concerned. In addition, organisations with an investigation protocol will be in a stronger position in any court cases that may follow as a result of the report. With a formal policy, organisations will handle whistleblowing reports and incidents in a more professional manner. Because investigations may lead to an invasion of privacy, it is advisable to involve a privacy officer or data protection officer in drawing up the investigation protocol.



**Reports of possible wrongdoing are part and parcel of honest organisations. The fact that employees are brave enough to step forward is a positive sign. It is important for management to realise that not having any reports is not necessarily a good thing. In fact, the opposite is more often the case. Reward employees for their faith and confidence and ensure that you are well prepared for reports.**

It is important that an investigation protocol is tailored to fit in well with the other components of your broader integrity policy, such as a code of conduct, reporting policy and internal training programmes. There may also be cross-links with other policies, such as the complaint or security incident procedures. Harmonise these various policies and ensure that they are coherent. This is also a task for the integrity coordinator (or compliance officer).



The consent of the works council (WC) is required for the adoption of a investigation protocol. The works council must also consent to the reporting procedure and receive annual information on its operation. This is an action point for the organisation's management.

## 1.2

### Division and separation of duties

Reports and internal investigations typically concern various types of professionals, such as the confidential adviser, fact-finding investigators, HR experts/legal advisers, the organisation's management and the integrity coordinator, to name a few. Sound division and separation of duties are critical in order to ensure employees' confidence that they will be treated carefully and fairly. Separation of duties helps prevent the appearance of bias and conflicts of interest. Below is a list of the key roles:

- Confidential advisers, also known as trusted persons, are tasked with confidentially advising reporting persons. As such, they cannot be asked to coordinate or conduct an independent investigation, or to advise on measures to be taken against 'offenders'. After all, the primary purpose of a confidential adviser is to assist and support whistleblowers. For more information about this role, please consult the publication 'Integrity in Practice: The Confidential Adviser.
- An organisation can opt to source fact-finding investigators from within or outside the organisation, but they must, in any case, be able to do their job without interference from their employer. Fact-finding investigators will not express their opinion on the established facts and will not give advice on any measures to be taken.
- HR experts and legal advisers will advise the employer on possible (employment-related) measures to be taken on the basis of the established facts.
- The management of the organisation has final responsibility. It shall decide in advance whether an internal investigation is necessary and which measures should be taken on the basis of the facts established. The management is also responsible for the integrity policy as a whole.
- The integrity coordinator (in this document, this role is synonymous to a compliance officer) coordinates, directs and oversees the overall integrity policy, ensuring that it is complete and coherent. Like the confidential adviser, an integrity coordinator will not typically investigate matters themselves, though this may vary from one sector and company to another, nor will they determine which measures are to be taken. However, the integrity coordinator may advise management on whether or not to initiate an investigation and take measures. As such, they may be tasked with monitoring the progress and deadlines of the reporting and investigation process. They must also have insight into the development of the nature and extent of integrity violations and reports thereof in the organisation. It is crucial that the integrity coordinator has an independent position with access to senior management. It is preferable to lay down in writing that the coordinator shall have direct access to internal supervisory bodies, such as the supervisory board, in the event of reports concerning senior management. If necessary, management can (also) appoint an external integrity coordinator.

## Integrity Coordinator Profile

### The integrity coordinator:

- has thorough knowledge of integrity management;
- has an eye for the processes involved in integrity management;
- can operate independently of management;
- knows how to mobilise management support;
- can give critical advice;
- has authority and impact within the organisation;
- is seen as honest and unbiased;
- has sufficient authorisations and access to data;
- can handle confidential data well;
- has strong analytical skills and empathy;
- can communicate well with all layers of the organisation;
- has the authority to engage (internal or external) experts;
- has an eye for the vulnerable position of reporting persons;
- has knowledge of methods of investigation.



- In practice, internal investigations will take up a large share of the integrity coordinator's time and efforts, though they are only one of their tasks. To ensure that integrity coordinator has ample time and space left for their duties with regard to integrity management as a whole, the decision may be made to exempt the integrity coordinator from conducting investigations themselves. Besides, conducting internal investigations does not always go hand in hand with the coordinator's preventive tasks. In addition, conducting an investigation requires experience and expertise. This can be problematic, especially for integrity coordinators who work in smaller organisations and who do not find themselves working on an investigation as often. It is up to an organisation's management to take a position on this in consultation with the integrity coordinator and other persons involved. Naturally, matters are different for large organisations with a dedicated integrity or compliance department.
- In the case of a report of suspected wrongdoing, the reporting person has a right to confidential treatment. The greater the number of officers involved, the more difficult it will be to safeguard this confidentiality.
- The positions of integrity coordinator, confidential adviser and fact-finding investigator are highly specialised. It is the responsibility of the organisation's management to ensure that these persons are prepared for their role and to provide the necessary training or external expertise. Trade associations can play an important supporting role in this.

**1.3****Wrongdoing, integrity violations, complaints: what can be reported?**

According to the Dutch Whistleblowers Authority Act, employees must be able to resort to reporting mechanisms (or whistleblowing policies) to report wrongdoing in a work-related context that may have an impact on society. This includes major cases of wrongdoing that may involve multiple colleagues and managers, or large parts of the organisation, or that may be detrimental to customers or third parties.

In addition to wrongdoing, there may be violations of integrity, such as the misuse of company assets or violation of the company's code of conduct. It is advisable that employees can also resort to the reporting procedure to report this type of violations. Finally, it is important that employees also have access to a mechanism to report undesirable behaviour, such as bullying, discrimination or sexual harassment. For reports about undesirable behaviour, employees can often turn to a complaints policy based on Working Conditions legislation. The Dutch Whistleblowers Authority Act is the starting point for all reports concerning wrongdoing, whereas a company's own code of conduct and standard employment law usually apply to violations of integrity.



When a report is made, it can be difficult to determine whether it constitutes wrongdoing, an integrity violation or undesirable behaviour. It is therefore important to appoint confidential advisers who have expertise in all these areas, as this will enable them to support and assist employees as best they can. For more information about this role, please consult the publication 'Integrity in Practice: The Confidential Advisor'.

## 2

## Reports and reporting person protection

### Report and reporting person

- Reports and the reporting hotline
- Protecting the reporting person
- Communication with the reporting person
- Confidentiality and anonymity

### 2.1

## Reports and the reporting hotline

Internal investigations are usually triggered by a report made by an employee. Employees can choose to report to various people. Although they will tend to go to their manager first, employees can also opt to involve a confidential adviser. The latter can advise and assist reporting persons and serve as an intermediary, so that they can protect the reporting person's identity, if desired. Employees can also report to an internal hotline or other anonymous reporting system.

Regardless of who receives a report first, it is important that reports be forwarded to the correct address as soon as possible. This may be a designated report hotline or specially appointed officer, for instance, or the competent authority (the management of the organisation).



**Make sure that managers are well trained and know what to do to recognise, receive and properly forward a report to a hotline or integrity coordinator.**

It is best for an organisation to have several 'reporting routes', as this lets employees pick the option they feel most comfortable with. In the internal reporting procedure, describe clearly which options employees have. All employers with more than 50 employees are obliged to have such an internal reporting procedure. For more information, please consult the Whistleblowers Authority's publication on 'The Reporting Policy'.

Reporting wrongdoing, a violation or undesirable behaviour is often very stressful for employees, and they may have several reasons for hesitating, such as:

- fear of retaliation;
- the expectation that nothing will come of the report.
- lack of faith in the organisation;
- the possible consequences for colleagues.



These hesitations can be reduced. Make sure that there is a culture of acceptance regarding reporting suspected wrongdoing within the organisation. Emphasise that reports contribute to the organisation's integrity, especially if potential problems are identified at an early stage. Encourage employees to report and reward those who dare to take this step. On top of that, make sure that reports are handled carefully in such a way as to inspire confidence, as this will help employees overcome their hesitations and will increase their willingness to report.

### **Receipt of the report**

**Make sure that reporting persons receive a confirmation of their report in writing within one or two days. Briefly describe the nature of their report and indicate when they can expect to hear more.**

**It is also important to schedule a one-on-one interview with the reporting person as quickly as possible, as this will strengthen trust, improve the organisation's information position and reduce the risk of a false report.**

**Use the receipt of the report and the first appointment with the reporting person to point out that they have recourse to assistance by a confidential adviser. Identify the risks to which the reporting person is exposed and determine whether the organisation should immediately take protective measures.**

## **2.2**

### **Protecting the reporting person**

Persons reporting suspected wrongdoing may not be put at a disadvantage because of their report. That is the law. Disadvantageous consequences may consist of measures such as dismissal, non-renewal of a temporary contract or sudden negative assessments and reviews, but may also take the form of harassment, bullying and exclusion, for instance. It is undesirable - and even illegal - for persons to experience retaliation because they have reported potential wrongdoing. The management of the organisation is obliged to protect reporting persons from this.

However, reporting persons are not protected against measures that are not related to the report, and whistleblowing does not protect a reporting person from the consequences of (possible) breaches on their own part. Ensure that the organisation acts fairly in such cases, keeping the vulnerable, stressful position of the reporting person in mind.

It is advisable to regularly check up on the reporting person: Are they experiencing disadvantageous treatment, may they experience such treatment in the future, and what can be done to prevent this?

It is also wise to involve the confidential adviser and to ensure that the reporting person feels free to discuss any disadvantageous treatment they are experiencing as a result of the report. Company management takes all information shared by the confidential adviser seriously. It is important to continue monitoring the situation of the reporting person after the investigation as well.

### Disadvantageous treatment

If the reporting person still experiences retaliation, quickly take the necessary measures to protect them. The best course of action will depend on the circumstances. The Dutch Whistleblowers Authority can also advise reporting persons and even launch an investigation into their disadvantageous treatment.

## 2.3

### Communication with the reporting person

It is important to stay in touch with the reporting person throughout the investigation, as this tells them that the organisation is dealing with the report and is taking it seriously. It also increases the reporting person's confidence that the matter will be handled properly. Besides, this is a quick way to detect and put a stop to any disadvantageous treatment at an early stage.



Inform the reporting person of important moments in advance, e.g. before an announcement is made to the entire organisation, or before it becomes clear that an investigation will be launched.

It is not, however, desirable to give the reporting person full insight into the investigation, as this may compromise the confidentiality and thoroughness of the investigation, whilst jeopardising other persons' rights. Persons reporting suspected wrongdoing do have the right to involve an external authority, especially if their own employer fails to deal with an internal report properly. Make sure to provide the reporting person with sufficient information so that they can determine whether or not to take this step.

## 2.4

### Confidentiality and anonymity

Reporting persons are entitled to confidential treatment of their report, which means that their identity must not be more widely known than is strictly necessary for the proper handling of the report. In practice, this means that management, the confidential adviser, the fact-finding investigators, legal experts and HRM are usually up to date. In all cases, keep the circle of people 'in the know' as small as possible. The reporting person should also be aware of this and act accordingly, as they will be best protected if their identity is not widely known.

Confidentiality is in everyone's interest during an investigation. The person concerned also has a right to privacy during the investigation and rumours can be incredibly damaging. Arrange with the reporting person that they contribute to and cooperate with the confidential treatment of the report and record this in writing if necessary, as this also reduces the risk that the reporting person will experience disadvantageous treatment.



**Employers are not permitted to conclude a Non-Disclosure Agreement with their employees that prevent reporting persons from reporting suspected wrongdoing to external authorities.**

Not all reporting persons wish to make a report under their own name, but it must be noted that anonymous reports are more difficult to investigate, especially if no further contact with the reporting person is possible. On top of that, it is not possible to protect anonymous reporting persons.

If the reporting person involved a confidential adviser and requested them to keep their identity confidential, all further communication will go through the confidential adviser. When an anonymous report is received via an online reporting system, the obvious choice is to continue communicating via that system. When purchasing a reporting system, make sure that it has this feature. Incidentally, the more confidence employees have in the reporting procedure, the more likely they will be to make their identity known.

# 3

## Initial assessment and preliminary investigation

### Upon receipt of a report

- **Initial assessment**
  - Report assessment criteria
  - Preliminary investigation
- **Launching a fact-finding investigation**
  - Securing data
  - Precautionary measures
  - Communication

### 3.1

## Initial assessment

All reports must be taken seriously, but this does not mean that all reports will automatically be investigated. After the report has been received, there are several possibilities. The report may lead directly to a fact-finding investigation, to further preliminary investigation to determine whether fact-finding is necessary, or to the decision that no (preliminary) investigation is necessary. Management will assess what to do with the report and will be advised in this by the integrity coordinator. In this process, the following assessment criteria can be used to support a decision:

#### a) Type of suspected wrongdoing

- Can it be reported through the reporting procedure?
- What is the nature of the suspected wrongdoing?
- May it constitute a criminal offence?
- Are there any external authorities or inspectorates that could play a role?

#### b) Admissibility

- Is the organisation responsible for the suspected wrongdoing?
- Is the organisation authorised to investigate the suspected wrongdoing?
- Are there more suitable procedures for the reported problem, such as an appeal procedure or a complaints procedure?

#### c) Seriousness of the matter

The seriousness of the case can be determined on the basis of:

- the act itself;
- the context in which the act took place;
- the (position of the) person concerned;
- potential danger, social or political sensitivity.

#### d) Verifiability

- Are there sufficient leads for an investigation?
- Is there sufficient information available?
- Is there any additional information available?
- Is there access to good investigators/investigation resources?

**e) Position of the reporting person**

- How much insight did the reporting person actually have into the suspected wrongdoing?
- How much knowledge does the reporting person have?
- Can the reporting person provide more information?
- How reliable is the report?

**f) Position of the person concerned**

- Who is the person suspected of wrongdoing?
- Was this person capable of committing the suspected wrongdoing? E.g. because of their workplace, their presence at work during a certain period of time, the type of work they do, the nature of their position or personal circumstances?

**g) Credibility/Likelihood**

- How does the information in the report relate to the facts and circumstances known to the organisation?
- Is it possible that the suspected wrongdoing occurred?
- Can the suspected wrongdoing be ruled out with certainty?



Assessments with regard to likelihood are often based on subjective views and what would be more desirable for the organisation. Nevertheless, even unlikely scenarios may turn out to be true. It is important that all reports are taken seriously and judged on their own merit.

Reports can shed light on risky or harmful practices in the organisation. In such cases, take measures as soon as possible to prevent or limit the resulting damage.

**Preliminary investigation**

In some cases, the report will not provide sufficient information to make a well-founded decision as to whether or not to launch a fact-finding investigation. When this happens, the organisation will have to conduct a limited, brief preliminary investigation. The purpose of this preliminary investigation is to ascertain the seriousness of the report and the scope of the problem.

Keep in mind that a preliminary investigation may alert certain individuals, who may decide to destroy evidence or harmonise their statements as a result. Make sure that the preliminary examination takes place quickly and does not take longer than four weeks. Always record the outcome of the preliminary investigation in writing.

### **Knowingly reporting or disclosing incorrect information**

The deliberate reporting or disclosure of incorrect information leads to a new situation, triggering a new integrity investigation into the false report, including a rehabilitation process and a counselling process for the person falsely accused of wrongdoing. The organisation may even support the person concerned should they decide to press charges for libel or defamation or file a claim for damages.

### **Decision to refrain from a fact-finding investigation**

In some cases, an organisation may decide to refrain from launching a fact-finding investigation after the preliminary investigation. In these cases, ensure that the decision-making process is carefully documented. Inform the reporting person of the organisation's decision, preferably in a personal conversation. Explain why the company opted against launching a fact-finding investigation and offer the reporting person the opportunity to present additional information within a certain amount of time.

Also inform the person concerned within a reasonable period of time that a preliminary investigation has been carried out into them, and that the preliminary investigation shows that there are no grounds for further fact-finding. Keep in mind that this always has consequences, as it may disrupt relationships in the organisation. Follow and guide this process closely.

Even without launching a fact-finding investigation, company management may take certain measures in response to the report to eliminate a risk or vulnerability, for instance. If possible, inform the reporting person, as this will reinforce their belief that reporting suspicions is useful and increase their willingness to report.

## **3.2**

### **Launching a fact-finding investigation**

If the decision is made to launch a fact-finding investigation, the necessary steps will have to be taken. Careful attention must always be paid to securing the relevant data, and it may also be necessary to take precautionary measures and to notify an authority or inspectorate. Thought should also be given on communications with management, the reporting person, the person concerned, colleagues, the organisation and, possibly, society.

#### **Securing data**

One of the first steps of the investigation is to secure all the necessary data. Which data are needed to investigate the report? What are the chances that persons will destroy data as soon as they begin to suspect that an investigation has been launched? Are the accounting systems, ERP systems, E-mail servers, files and file structures backed up? Is it possible to store today's backup, yesterday's backup or a backup made a few weeks ago, depending on the report? Always stay mindful of privacy aspects. It is highly advisable to involve a data protection officer in the investigation. Investigators may also have to focus on the physical workplace or e-mail, phone and messaging communications. Agreements will have to be made in advance with the Works Council regarding which resources to deploy. As a result, the person concerned may be requested to return their company car, laptop and phone, as well as

stating their login credentials. The person concerned will then know that they are the subject of an investigation.

### **Precautionary measures**

In the event of suspected wrongdoing, the question immediately arises as to whether the person concerned will be able to continue to work in their current position, as the suspected wrongdoing may continue, the person concerned may continue to commit breaches, damages may increase, or the presence of the person concerned may disrupt the investigation by influencing witnesses or destroying evidence. Taking a precautionary measure, such as a temporary transfer or suspension, may be wise. This also applies to situations in which the reporting person can be regarded as a person concerned.

In some cases, it may be necessary for the person concerned to continue doing their job, such as when an additional investigation is required and the employee in question needs to be observed. In that case, the employee will not yet be aware of the suspicion and of the investigation against them.

The specific situation and circumstances determine when to take a precautionary measure. If it is not immediately necessary, it may still prove wise at a later stage. The situation may change over the course of the investigation or new discoveries may be made that warrant a precautionary measure. It is therefore best to continue monitoring the need to impose a precautionary measure.

### **Communication**

Communication about fact-finding investigations requires care. In the first place, only inform people on a need-to-know basis, keeping the loop as small as possible. Describe which persons will be involved in an investigation protocol.

Consider carefully whether (and if so, which) managers and supervisors are informed about the fact-finding investigation. It may be necessary for the sake of the investigation that immediate supervisors are not aware of the situation. It is also possible to inform managers in a very succinct fashion: "We are investigating an issue in your department. In the interest of the investigation, we are unable to provide any further information at this time"



**Train managers and supervisors in their role in reporting and fact-finding. Explain that it is sometimes necessary to refrain from informing them or only provide limited information. This will limit resentment during actual investigations.**

Inform the reporting person (in writing) of the decision to investigate the facts in response to their report. Explain the investigation protocol and what is expected of the reporting during the investigation, if applicable, such as cooperating in interviews or providing additional information. It is wise to inform reporting persons sufficiently, but sharing all information may harm the investigation (and the person concerned). Make sure that the investigation is not compromised. Properly record all communications with the reporting person, so that it is clear what the organisation has done at what time.

## **Informing the person concerned**

The person concerned must be informed in writing as soon as possible that an investigation has been opened into them. This should preferably be done prior to the start of the investigation, though it may be necessary to do so at a later stage for the sake of the investigation. In this written notification, include at least the following:

- A description of the suspicions towards the person concerned.
- The possibility of hearing the person concerned and any witnesses.
- That the person concerned can be assisted during the interviews by a counsellor (e.g. a lawyer, or an internal or external adviser)
- That it is expected that the person concerned will cooperate and fully and truthfully.
- That the person concerned can name persons and/or provide documents to assist the fact-finding investigation.
- That the investigation will follow the investigation protocol.
- That when new facts and circumstances come to light that may a bearing on the suspected wrongdoing, the scope of the investigation may be expanded.
- The rights and obligations of the person concerned.
- The contact details of the investigators.
- An invitation for an interview, in which the notification will be explained in further detail.
- That an precautionary measure has been imposed (if applicable).  
In this case, refer to a separate letter that explains this measure in more detail.

Chances are that, at some point, rumours will arise about the investigation. When this happens, inform the organisation, or part of it, in general terms. It is also likely that posts will appear on social media or that traditional media will cover the matter. Be well prepared for any attention from the press, preferably before any report is made. You can draw up a crisis communication protocol, for instance, and practice it regularly. In general, it is advisable to be as transparent as possible, whilst keeping the identity of the reporting person confidential and respecting the privacy of the person concerned.

## **Criminal charges and/or report to an authority**

In some cases, the organisation may be obliged to press charges after the report, even as early as during the initial assessment phase. It is also possible that the organisation will have to press charges during the investigation. An internal fact-finding investigation and criminal investigation by the police are not mutually exclusive and may take place either consecutively or at the same time. In any case, the employer remains responsible for all matters related to employment.

Check whether any other authorities need to be involved as well, such as the FIOD Financial Investigation Service, the Dutch Data Protection Authority, or an inspectorate or external supervisory body. In some cases, organisations are not obliged to inform such authorities, but it is nevertheless wise to do so voluntarily.





Do not forget to check whether any other parties need to be informed, such as supervisory bodies or insurance companies.

## 4

## Execution of the fact-finding investigation

### The fact-finding investigation

- Selection of fact-finding investigators
- Assignment (investigation objective and research questions)
- Key principles
- Investigation methods
- Fair hearing
- Privacy

### 4.1

### Selection of fact-finding investigators

The goal of a fact-finding investigation is to find the truth, and as such it should be carried out by independent fact-finding investigators. They will determine, independently from the employer, which facts can and cannot be established. The fact-finding investigators may be employed by the employer (internal investigators) or by a third party (external investigators).

When selecting a team of fact-finding investigators, the following questions are of particular importance:

- What is the nature of the suspected wrongdoing?
- What knowledge and expertise is needed to investigate it?
- How can it be ensured that the fact-finding investigators are sufficiently independent?

The advantage of using an internal fact-finding team is that these people tend to have a better understanding of the organisation and its industry. Specific investigative knowledge can often be found in the Compliance, Legal, Security or Internal Audit departments.

There must be sufficient distance between the investigators and the suspected wrongdoing to ensure an independent investigation. A direct superior of the reporting person or person concerned may not under any circumstances be responsible for conducting the fact-finding investigation. Ensure that the investigators have the necessary knowledge and experience, and, if possible, have the investigation carried out by at least two people.

In some cases, an organisation will not have enough knowledge, expertise (of certain forensic techniques and technologies, for instance) or capacity at its disposal. To increase trust in the fact-finding investigation, it can also be better to involve external parties, e.g. because criminal prosecution may follow, because there is not enough distance between the available internal fact-finding investigators and the reporting person/person concerned, or because senior management may be involved. In such cases, it is better to involve an external party. Optionally, they can be involved for a specific part of the investigation only, or serve as an addition to the internal investigation team.

Even when opting for an external party, the organisation remains responsible for the investigation, so it is important to select an expert, professional party. Aspects to consider include: Does the party have a professional code of conduct? Does the party have its own protocol and what is that protocol? Does the party have sufficient insight into the organisation and the industry? Are they familiar with jargon and industry-specific terminology? Have they received positive reviews? It is preferable to avoid commissioning in-house lawyers or external auditors to do the investigation, as this will harm confidence in the independence of the investigators.



**Record the relationship between the principal and the external investigators in a GDPR-compliant Processing Agreement. When working with internal investigators, it is equally important to make agreements about data processing, as this will contribute to confidentiality, privacy protection and file quality (archiving, retention periods). The Data Protection Officer can advise on this matter.**

The research protocol should also state who has the authority to engage third parties and act as a contact person. Preferably, this should be the integrity coordinator. Naturally, the person concerned, employees who report directly to them, or employees who directly manage them, may not commission the investigation.

## 4.2

### Assignment

The fact-finding investigation starts with an investigation assignment for internal and/or external investigators. Formally speaking, the employer should issue this assignment, specifying at least the following:

- The reason and purpose of the investigation.
- A clearly defined scope. Insofar as the principal has an investigation protocol, this will have to serve as a framework for the investigation.
- The research question or research questions
- The investigation method(s)
- The necessary capacity and expertise
- The estimated duration of the investigation
- Arrangements about the situation in which investigators anticipate they will fail to meet a deadline
- An estimate of the costs and/or hours (especially when third parties are involved)

### The research questions

The research question is a key element of any investigation. It is best to develop a list of research questions based on the what, who, where, when and how:

- What happened?
- Who was involved?
- Where did it happen?
- When did it happen?
- Why did it happen, for what purpose?
- How did it happen?

On top of that, it is wise to investigate which measures the organisation has already taken to prevent such situations from arising. Did these measures fail to have the intended effect? It is possible that the preventative measures will have to be modified or supplemented in order to avoid similar problems in the future.

Provide a clearly defined research assignment, so that it is clear what falls within and what falls outside the scope the investigation. Investigations can always be expanded in the event of new or unexpected findings. When this happens, formally adjust the assignment and check the following:

- Should we secure any other data?
- Should we inform management?
- Should we inform the authorities or a supervisory body?
- Should we contact the reporting person or the person concerned (again)?
- Should we reformulate or make changes to the assignment, the research question, the method, the planning or the team?

Determine which activities the investigators can carry out and in what way. Make agreements about how and when the team will share their results and how any documents will be archived. Never relinquish control of the investigation. Arrange to receive regular feedback, so that the investigation can be fine-tuned if necessary.

## 4.3

### Key principles

It is very important that the investigation be carried out in a professional manner. Investigators must be true experts: they must know how to conduct an investigation and which methods to use.

The investigation must be thorough, independent and focused on finding the truth. When faced with processing a lot of information, the investigators will have to make the right selection. A thorough investigation will highlight the circumstances under which the suspected wrongdoing took place, even if those circumstances do not reflect well on the client. As such, the investigation will consider both incriminating and exculpatory information.

Investigations must also be carried out consistently and without bias. Investigations of similar reports must be carried out similarly, regardless of the persons involved. In all cases, all persons involved must receive a fair hearing. Accused persons have the right to defend themselves and express their views on the findings.

The fact-finding investigation must be proportionate: the scope of the investigation must be appropriate to the nature and seriousness of the suspected wrongdoing. Moreover, the lightest means of investigation must always be used to achieve the desired objective (subsidiarity).

#### **How long should a fact-finding investigation take?**

**The duration of fact-finding investigations can vary widely. In 2018, the average completion time of an internal fact-finding investigation was approximately 40 days. Some investigations take several days,<sup>1</sup> whereas others can take multiple months or longer. This depends entirely on, among other things, the nature of the investigation, the available capacity and access to witnesses and information.**

**In general, it is best to complete investigations as quickly as possible, without detracting from its thoroughness. Completing investigations as quickly as possible boosts confidence in the reporting procedure, as employees will see the effects of their report and feel heard. Rapid completion also reduces the chance of similar incidents occurring in the future.**

#### **4.4**

### **Investigation methods**

When selecting investigative methods, proportionality and subsidiarity are two key criteria, to ensure that the investigation does not become any heavier or more far-reaching than is strictly necessary. The investigation protocol should contain a list of all methods, stating the circumstances under which their use is permitted. The investigation protocol must be approved by the Works Council and be known within the organisation.



**The investigation report must indicate each method used, stating its justified interest. This ensures proportionality and subsidiarity.**

<sup>1</sup> See: NAVEX Global, *2019 Ethics & Compliance Hotline Benchmark Report*, 2019.

## Open-source investigation

The least onerous investigative method is a desk-based open-source investigation, which includes checking public information held by the Land Registry or Chamber of Commerce, for instance, or examining certain entries, claims or invoices in the organisation's accounts.

## Interviews

Another frequently used method is interviewing the person concerned, as well as possible witnesses in expert. In general, the aim of every investigation is to establish the facts. In the process, the investigators must always continue to question the reliability of the information they have obtained, and this applies especially to information obtained from interviews. Interviewees often have their own ideas about what happened.

### Tips for interviews

Investigations often involve interviews. It takes skill to hold a good interview. Some tips:

- **Think carefully about who to interview. Do not interview more people than necessary, but make sure to interview enough.**
- **Protect confidentiality, including practical aspects. Interview people outside company premises and find a sound, confidential way to invite interviewees.**
- **Interview employees first, managers second. This is particularly important when management may be involved in the wrongdoing.**
- **Inform people of their rights and obligations at the start of the interview.**
- **Record the interview and write down the questions and answers. Then go through the text with the interviewee and have them sign it, indicating that they agree with or have seen the document.**

## Physical workplace

If there is a suspicion that an employee's workplace contains information that is relevant to the investigation, investigators can search an employee's workplace. This includes service rooms, cabinets, desks and company vehicles. This type of investigation must be performed by at least two investigators and they must state all their findings in a report.

## Digital workplace

Investigating a person's digital workplace involves investigating their e-mail history, internet communications and phone. With this type of investigation, it is important to create an image (exact digital copy) of the employee's account as quickly as possible to serve as a basis for the investigation. It is very important that the investigators know exactly who to go to for approval in advance.

## Surveillance and cameras

There are two forms of surveillance. Static surveillance involves using a (hidden) camera in the workplace, such as a cash register camera, which could record someone taking money from the cash register. It is also possible to use footage made by existing security cameras.

Dynamic surveillance involves physically following the person concerned and, optionally, taking photo or video footage. Dynamic surveillance can also take place outside working hours. This is a particularly serious investigative method, especially if it takes place outside working hours, and the seriousness of the suspected wrongdoing must justify using this method.



**The investigation protocol must state that static and dynamic surveillance must be approved by the highest-ranking member of management.**

## 4.5

### Fair hearing

The purpose of a fact-finding investigation is to uncover all relevant facts and circumstances, so it is particularly important to hear both sides of an argument. This offers investigators the opportunity to check and, if necessary, amend their findings.

It is also very important for the reporting person and the person concerned that both sides of the argument are heard. This increases the quality of the investigation, but also helps them form an opinion about the investigation. Are there grounds for contesting the conclusions of the fact-finding investigation or for reporting the suspicion to a third party?

One way to ensure that all arguments are heard is to give the person concerned and the reporting person access to the fact report before it is finalised. This can best be done by inviting them and giving them sufficient opportunity to read it, i.e. in a quiet room, with sufficient time and, if desired, in the presence of a counsellor or a confidential adviser. Afterwards, any comments and remarks can be recorded in writing and incorporated in the report.

It is not wise to send or share a hard copy of the fact report, because it will still be a draft and will probably still be modified. Preferably, there should never be multiple versions of the investigative report in circulation, especially as they contain confidential information about the person concerned, the reporting person and the organisation.

There is no obligation to give the reporting person or person concerned access to the full investigation report or the underlying investigation file, as doing so may violate the privacy of other parties involved. At the same time, it is important to ensure that the reporting person is confident that their report has been seriously investigated and that all relevant evidence was included in the report.

## 4.6

### Privacy

Employees are entitled to a certain degree of privacy. However, the investigative methods discussed here constitute an (increasingly severe) invasion of employee privacy. Therefore, the use of these methods is only permitted if it is generally known to employees that they may be investigated in such a way, e.g. by means of guidelines, a protocol or a code of conduct. The Works Councils Act (Section 27) gives the works council the right to consent to the implementation of the control policy. In other words: make sure that the WC consents to the investigation protocol.

The Dutch Data Protection Authority has also imposed conditions on the use of certain investigative methods. In general employers must always seek to minimise any invasion of privacy, and each method used must be justified.

Camera surveillance is subject to a number of specific, additional conditions. First of all, sound recordings are prohibited. Before using 'standard' security cameras, the employer must perform a privacy test, which involves weighing the interests and rights of employees and visitors against their own interests. Prior to installing the cameras, the employer must obtain the consent of the works council. Employees and visitors must also be able to know that they are being recorded (disclosure requirement).

For large-scale or systematic camera surveillance to detect possible wrongdoing and for the use of a hidden camera (covert camera surveillance, even when incidental), the employer must carry out a data protection impact assessment (DPIA).

The employer may not retain camera footage longer than necessary, with the Dutch Data Protection Authority stipulating a guideline of no more than 4 weeks for this purpose. The DDPA allows employers to retain footage of an incident that is relevant for a fact-finding investigation into suspected wrongdoing until the incident has been dealt with.



**If necessary, please involve the Privacy Officer or the Data Protection Officer and consult the website of the Dutch Data Protection Authority for more information.**



# 5

## Completion and conclusion of the investigation

### Conclusion of the investigation and measures

- Investigation report
- Taking measures
- Informing the reporting person and person concerned
- Internal and external communication
- Long-term tips

### 5.1

## Investigation report

The fact-finding investigators will provide the employer with an investigation report, containing the information the employer needs to form an opinion about the suspected wrongdoing. All relevant facts and circumstances must be taken into account, both incriminating and exculpatory. The reporting person, the person concerned and the organisation are entitled to this. In addition, this increases the value of the report in any subsequent proceedings.

In any case, an investigation report will contain

- the assignment (and any subsequent extensions);
- the description and justification of the investigation methods used;
- the fact report (list of all facts and circumstances relevant to the suspected wrongdoing);
- a summary of relevant legislation and regulations;
- underlying documents (such as interview reports and evidence);
- the findings of the investigation.

After the investigators submit their report and their findings, it is up to the organisation to pass judgement. This is the employer's responsibility. Usually, their judgement will be prepared by a HRM officer or legal adviser, especially when disciplinary measures are involved. The integrity coordinator may also be involved.



**The investigators describe the established facts (descriptive). In so doing, they may not express an opinion on any consequences arising from the facts under investigation. Giving a (normative) judgement is the task of the employer.**

If wrongdoing is established, the employer will have to put an end to this wrongdoing, penalise the persons responsible and take measures to prevent such an incident from occurring again.

### Retention of the investigation report

After completion of the investigation, it must still be kept confidential. The investigation report, along with any attachments, must be kept in a separate confidential file. The investigation report must not be added to the personnel file of the reporting person or person concerned.

Define retention periods in the investigation protocol. In general, organisations have a retention period of between 5 and 10 years. Keep in mind the limitation period associated with criminal offences.

For public organisations, investigation reports fall within the scope of the Freedom of Information Act (Wet Openbaarheid Bestuur, WOB). On the basis of Section 10 of the WOB, the decision may be made not to make these files public or to make them public only in part. If disclosure is mandatory, make sure that all personal data have been anonymised and cannot be traced back from the context. This is in the best interest of both the reporting person and the person concerned.

## 5.2

### Disciplinary measures

Based on the fact report, the employer may decide that disciplinary measures are warranted. When taking such measures, the severity of a measure shall depend on several considerations, as well as on mitigating circumstances, if any. For example: Can the person concerned be blamed for the wrongdoing, was the person concerned influenced or even encouraged by the organisation or the people around them, is the organisation's integrity policy sufficiently clear? If the person concerned was unaware that they were doing something wrong, it may be enough to organise a training programme and give them a formal reprimand.

In other cases, the person concerned may have knowingly violated laws or legislation. In serious cases, immediate dismissal and criminal charges may follow. There is a wide range of different options between a reprimand and dismissal, such as demotion, a transfer, repayment of bonuses, a (temporary) restriction of career opportunities and a (temporary) salary freeze.



The investigation report may give grounds to press charges to report the wrongdoing to another authority (e.g. an inspectorate or supervisory body).

## 5.3

### Preventive measures

The fact-finding investigation may also give reason to introduce preventive measures. In fact, it is important to consider preventive measures after every fact-finding investigation. You could decide to perform a cause-effect analysis, for instance. How can this be prevented in the future? Can we reduce the risks? What improvements are possible and what would they cost?



Analyse reports and how they have been handled on a yearly basis, so that the organisation can learn from reports. It offers the integrity coordinator the opportunity to respond to new developments or risks, so that they can keep the organisation's integrity policy up to date.

Measures may involve changes to the organisation's structure, policy or procedures. As a result of the report, the decision may be taken to refrain from certain assignments or tasks, or to change the way employees should go about doing certain jobs. If possible, management may need additional training, or replacements may be needed. The incident may give rise to a dialogue within the organisation, or to the organisation of dilemma sessions. In some cases, it may even trigger a culture change. For more tips and information, please consult our publication on 'Working on Culture' on the website of the Dutch Whistleblowers Authority.

5.4

### **Informing the reporting person and person concerned**

Inform the persons concerned of the outcome of the investigation and any subsequent measures. Should disciplinary action be necessary, always take care to exercise due diligence. If the investigation shows that the person concerned is not to blame, arrange for active rehabilitation in consultation with the person concerned.

It is also important to inform the reporting person of the results of the investigation and about any subsequent measures that have been taken. After all, a person reporting suspected wrongdoing can decide to report the issue again to an external body, if they suspect that the matter has not been resolved properly. Provide sufficient information so that the reporting person can decide whether or not to take this step.

5.5

### **Internal and external communication**

In order to open up the topic of undesirable behaviour for discussion, it is very important to communicate openly and transparently about suspected or proven wrongdoing. On top of that, it is also important if an organisation is to learn from incidents. In addition, it shows (and underlines) the importance the organisation attaches to integrity. This applies to both internal and external communication. The trick here is always to find the right balance between the desired openness and the privacy of those involved: restricted where it has to be, open where possible.

It goes without saying that an organisation's employees are entitled to information. Let them know that an investigation has taken place and tell them what the outcome was. In principle, employees should always be informed of completed investigations, not only if they were told about the investigation at an earlier stage or if there are rumours. Be as open as possible in communications, without breaching confidentiality, as this sends the clear message that reports are taken seriously and acted on.



**When taking disciplinary measures, it is best to discuss them with employees. This will reduce any anxiety, tension and ambiguity and can help eliminate false rumours.**

When communicating about suspected or proven wrongdoing, it is important to have a clear, predefined communication strategy, which states - among others, who should communicate with whom at what time and who is responsible for content. In addition, the strategy should contain agreements on external communication, as media can play a big role. Tell employees who have contact with external parties which information they can share with others, such as answers to expected questions or remarks (a FAQ) or a core message.

## 5.6

### Long-term tips

It is good to continue paying attention to how your organisation deals with reports even when there is no fact-finding investigation going on. This will show employees that the organisation will not shy away from enforcing the rules, that it is eager to learn from incidents and that it appreciates all employees who dare to come forward to report. This can be done by regularly providing information on anonymised cases with the rest of the organisation, as this tells employees that they work for a fair organisation that rewards good performance and punishes misconduct. This will increase employees' sense of security and confidence in the organisation and its integrity.

All investigations into suspected wrongdoing are isolated and stand alone. Nevertheless, the integrity coordinator also has the task of overseeing all reports and looking for patterns. If a certain department or unit is mentioned in reports more frequently, this may be a good reason to launch an in-depth investigation.



**Coordinators should submit anonymised reports to management, the supervisory board and the works council at least annually. If necessary, proactively make these reports, or parts of them, available to the public, e.g. in the organisation's annual report, to increase the organisation's transparency.**



## Checklist

A summary of key points:

### Drawing up the investigation protocol

- When drawing up an investigation protocol, remember that the works council must consent to it
- Investigations should be seen as a link in the organisation's overall integrity policy
- Ensure a good division of roles between the various actors involved in the investigation, in particular the confidential adviser, fact-finding investigator, HR expert/legal adviser, the employer and the integrity coordinator
- Make clear agreements about the role of the integrity coordinator in the investigation

### Reports

- There are various types of reports, such as:
  - wrongdoing that affects society (subject to the Dutch Whistleblowers Authority Act);
  - integrity violations (subject to the organisation's code of conduct and employment law);
  - undesirable behaviour (subject to the complaints procedure and Working Conditions legislation)
- Appoint a knowledgeable confidential adviser who is familiar with all these fields.

### Reporting routes

- It is preferable to give employees access to various reporting routes, such as:
  - manager and confidential adviser;
  - internal hotline or automated reporting system
- Make sure employees know which options/routes there are
- Make sure that reports are quickly forwarded to the correct address

### Upon receipt of a report

- Immediately send a written acknowledgement of receipt of the report
- Quickly have a personal conversation with the reporter and point out the role of the confidential adviser
- Be alert to (the risk of) harming the reporting person inform them of the existence of the Dutch Whistleblowers Authority
- Stay in touch with the reporting person and inform them about important steps

### Confidentiality and anonymity

- Keep the number of people in the loop regarding the report as small as possible
- The reporting person shall also respect the confidential nature of the report
- The employer may not have the reporting person sign a non-disclosure agreement
- Employees can make anonymous report via the confidential adviser

## **Initial assessment and preliminary investigation**

- Check the seven criteria for reports
- In some cases, a preliminary investigation will be necessary in order to make a better assessment of the report
- Attention: a preliminary investigation may alert the person(s) concerned
- Anyone deliberately reporting/disclosing incorrect information can be punished

## **The fact-finding investigation**

- The WC must have consented to investigation targets and methods (e.g. company telephone, company car, e-mail, camera surveillance)
- Secure data, but take privacy aspects into account and involve the Data Protection Officer
- In some cases, the organisation will have to take precautionary measures, such as suspension
- When the manager, reporting person and person concerned can be informed of the investigation depends on the situation.

## **Fact-finding investigation assignment**

- Investigations can be carried out by internal or external fact-finding investigators: expertise is paramount
- An investigation must always be based on a specific assignment, with agreements on content (key question) and process (approach)
- Thoroughness, independence, proportionality and subsidiarity are important requirements for investigations
- It is important to hear both sides of the argument in order to test/adjust the preliminary findings of the investigation; provide access to (part of) the fact report

## **Outcome of the investigation**

- The employer, assisted by the HR department, will assess the investigation outcome in terms of possible consequences and measures
- The employer must take into account any mitigating circumstances
- The person concerned and the reporting person will be informed of the results of the investigation and the measures to be taken
- Wherever possible, the issue is communicated to internal and external parties and preventive lessons are learned

## Colophon

This brochure was written by the Dutch Whistleblowers Authority. This brochure was written with the help of: Jitse Talsma, Alain Hoekstra and Marijntje Zweegers, as well as Geert Vermeulen. We would also like to thank Joyce Tang and Richard Hald for reading and sharing their comments on an earlier version of this text. We would like to keep the brochure up to date by incorporating your reactions and experiences. For more information, please visit [www.huisvoorklokkenluiders.nl](http://www.huisvoorklokkenluiders.nl).

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