

# WORKPLACE INVESTIGATIONS: ARE THE REPORTS PUBLIC RECORDS?

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An employee of the water department comes to her supervisor, alleging a co-worker has bullied her through improper e-mails and Facebook postings. A newspaper contacts city council, seeking comment on reports that police officers used excessive force on minority arrestees. A parent calls a school superintendent, accusing a principal of inappropriate discipline, or a coach of improper locker room behavior. These scenarios are every public body's worst nightmare. And unfortunately, they happen nearly every day.

Faced with such allegations, the affected public body must respond. The public has the right to expect that allegations of misconduct by public employees will be investigated, and if wrongdoing is found, appropriate action taken. On the other hand, the accused public employee also has a right to expect an impartial review and that his reputation not be sullied if the allegations are false.

Responding to allegations of employee misconduct, then, requires a delicate balance of competing interests, often in a highly sensitive, emotionally-charged setting. Frequently the investigation is fraught with legal implications involving employee/employer rights, contract interpretation, defamation issues, public records and open meetings concerns, and even possible tort and criminal liabilities. Of course the allegations usually demand an immediate, efficient and thorough investigation. But the resulting investigation report, itself, can create another set of problems.

Interested parties and the media, aware an investigation is ongoing will inevitably request a copy of the report. Is it a public record, which must be produced? Doing so may create real dilemmas. False or embarrassing allegations may become public. Identities of witnesses may be exposed. And, most important, if the report is prepared by an attorney, privileged communications by the attorney and client may be revealed.

Until recently, the issue of whether written reports of investigation of workplace misconduct must be produced in response to a public records request was murky. However, a recent Ohio Supreme Court ruling has clarified the subject, at least when the report is prepared by an attorney.

In *State ex. rel. The Toledo Blade Company v. Toledo Lucas County Port Authority*, 2009-Ohio-1767 the held that investigation report concerning alleged workplace misconduct prepared by an attorney for a public body was exempted from public records production because it was protected by the attorney-client privilege. The Court specifically rejected the view that there is a distinction between fact-finding and lawyering, and refused to adopt the principle that the attorney-client privilege does not apply when the attorney is engaged to engage in a factual investigation. Rather, the critical factor is simply that the report was related to the rendition of legal services. This ruling is a win for public bodies who must carefully balance the public's right to know with the legitimate need to assure that sensitive personnel investigations be conducted confidentially.

This issue and the recent Court ruling have provoked some questions, like these:

*Q. Does this ruling mean that an investigation report prepared by a supervisor and submitted to a governing board is exempt from production when a public records request is made?*

A. No. The ruling is grounded on the existence of the attorney client privilege. Unless the document is prepared by an attorney retained by the public to provide legal advice, the ruling will not apply.

Q. Does the report have to contain legal conclusions and recommendations about the outcome, instead of factual findings, for the report to be exempt?

A. No. The critical issue is not whether the lawyer was retained to conduct a factual investigation instead of a legal report, but whether the investigation was related to provision of legal services.

Q. Can the report be kept confidential if prepared by a law director or prosecutor instead of a private lawyer?

A. Yes, so long as the law director or prosecutor is the authorized legal counsel for the public body involved.

The lesson to be learned from this ruling is that using lawyers to conduct investigations of workplace misconduct is the most effective way to avoid future public records and privacy issues associated with the investigation itself. Believe it or not, lawyers can be your friends, and this issue is one reason why that is so.

For further information, please contact your IMIP Risk Management representative.

