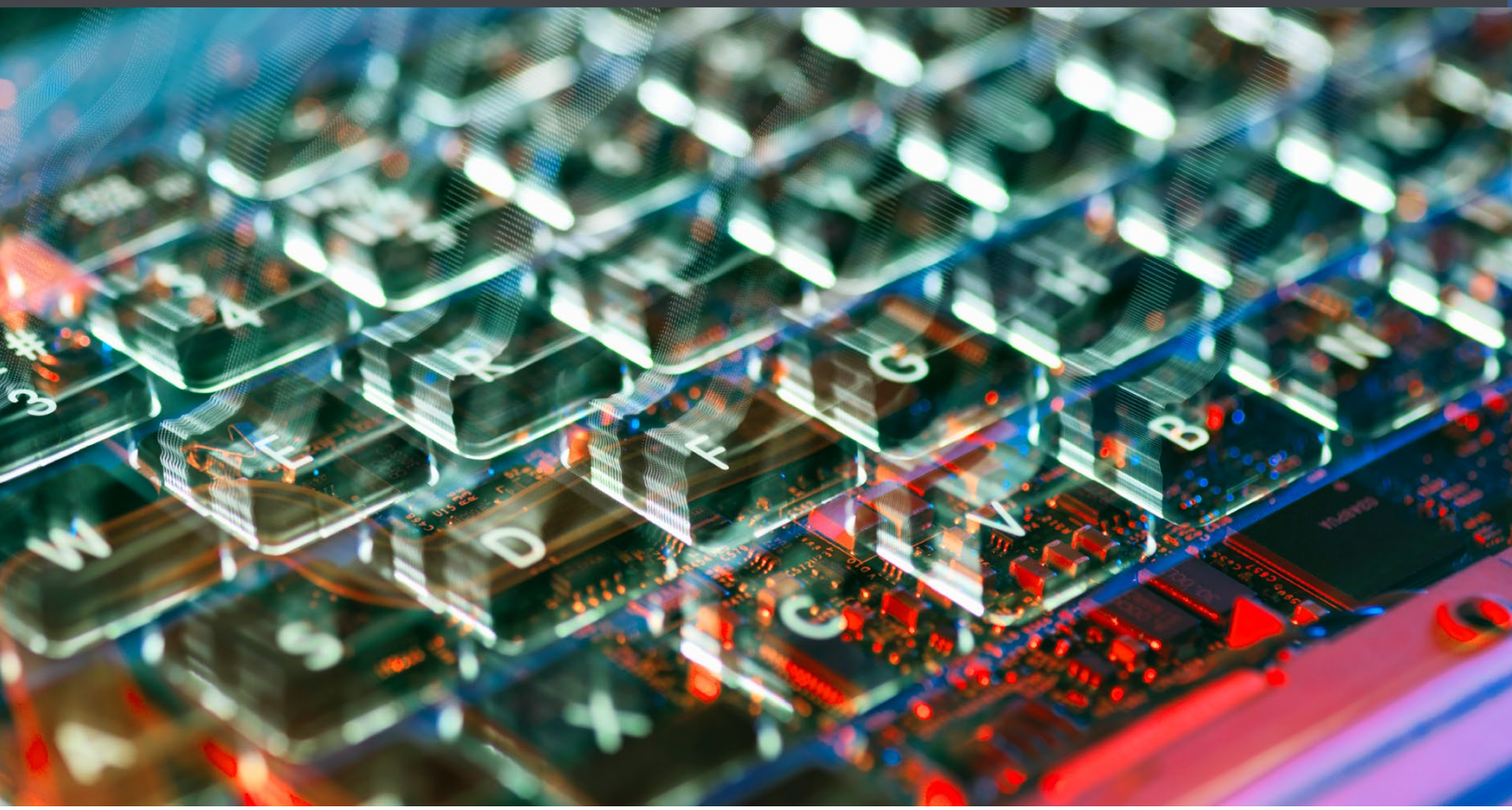
Protecting Privilege in Internal Investigations



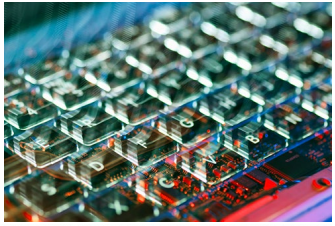
JASON DAY

PARTNER
+1.303.291.2362
JDay@perkinscoie.com

T. MARKUS FUNK

PARTNER
+1.303.291.2371
MFunk@perkinscoie.com

PERKINSCOIE | Bloomberg Law



Protecting Privilege in Internal Investigations

Authored by T. Markus Funk and Jason Day, Perkins Coie LLP

Rarely does a week pass in white collar and investigation or SEC-regulatory outside counsel life that an auditor or government enforcement attorney does not request some interim or final read-out. These requests for information can encompass investigative process and factual findings, lists of search terms, interview outlines, or similar investigative materials.

However, this information, if provided, presents a very real risk of privilege waiver. This article encourages pushback against the "nobody else ever fights us on this" contention often heard from government enforcers and outside auditors wanting to "better understand" a client's internal investigation making these requests.

Understanding the Ask

Outside lawyers often conduct internal investigations and provide counsel to companies through their internal audit committees, special committees, boards of directors, and management. The areas of privileged and confidential legal advice can include reacting to findings of wrong-doing, Securities and Exchange Commission disclosure obligations, fiduciary duties, and strategic transactions. It is in this context that third parties will request search term lists, or "key document" collections generated during such investigations. Outside auditors, following a final read-out, might even ask for an all-things-considered assessment of wrong-doing (*ala* "so, did your client violate any criminal proscriptions?").

An internal investigator's refusal to provide this information is frequently met with disbelief. But the investigator's job is to both figure out what happened, and to make sure that the investigator's findings receive the maximum level of privilege protection. After all, even when an internal investigation finds no material wrongdoing, there is a real and articulable concern that the client might end up dealing with another legal follow-on action. This could be a wrongful termination suit after parting from employees in the context of discipline and remediation, legal action against competitor companies or other individuals, negotiating with whistleblowers, addressing shareholder suits, or responding to enforcement or regulatory actions.

Making a misstep by sharing privileged materials can have devastating legal and reputational consequences to client and counsel alike. When an outside auditor or government enforcer asks for arguably protected materials, it is critical to think around the corners and anticipate problems, even if that results in an occasional look of incredulity from lawyers across the table.

Pressure to Turn Over Sensitive Information

Some privilege waiver concerns have rarely received much attention. Privilege waiver, however, moved to the front burner in part because of the Biden administration's decision to move the focus back from Main Street to Wall Street. Whether talking about incoming Public Company Accounting Oversight Board (PCAOB) personnel, new SEC commissioners, or leadership changes at the Department of Justice (DOJ), the one constant is that ramped-up enforcement appears to be back with a vengeance.

This is also a bellwether for how vigorously the enforcers will start pushing for access to search term lists, key document lists, investigative work plans, memoranda of interview, and interview outlines.

Turning over such materials will not always trigger a blanket subject matter waiver or even waiver of work-product protection for the actual documents disclosed. That said, waiver arguments are notoriously challenging to predict. An avoidable misstep will, with the benefit of hindsight, deposit significant legal and reputational risk on the doorstep of the company and its counsel. It pays to think twice about what is turned over and to push back against risky requests, even amid contentions that everyone else is doing it.

Quest for Investigative Search Terms

The problem is real. Between enforcers and the outside auditors, in virtually every internal investigation there will be a request to review a copy of the search term list. In almost every case, lawyers who acceded to such a request do so at their clients' peril.

To understand why counsel's tailored and carefully thought-out search term list can reveal an attorney's strategy and thinking, consider this list: (John /2 Doe) w/50 (brib! or FCPA or corrupt!) /50 government! w/2 offic! w/50 (Prague or "Czech Republic" and da(2020)). Even this short Boolean string provides more than a subtle clue that the attorney who drafted it believes there might be evidence that John Doe, in or around 2020, engaged in bribery of a foreign official in the Czech Republic. Using the parlance of Federal Rule of Civil Procedure 26, can there be a real dispute that this search term list reveals the attorney's "mental impressions, conclusions, opinions, [and] legal theories"?

Today's standard-issue employee using emails, posting on social media accounts, conducting online searches, or communicating on collaboration apps, creates a staggering 600 megabytes of data per day. This is the equivalent of up to 300,000 pages of paper. The attempt to cut through the clutter and use carefully crafted search terms to narrow down the evidence to a list of relevant documents or emails is, therefore, part of today's internal investigation.

Law on Work Product and Attorney-Client Privilege

Federal Rule of Evidence 502(g) states:

> (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The work-product privilege is more comprehensive than attorney-client privilege. Whereas the attorney-client privilege includes only communications between an attorney and the client, work product includes materials prepared or collected by persons other than the attorney or someone working for them with an eye towards the realistic possibility of impending litigation.

Classic opinion work product thus includes documents like investigative work plans and memoranda of interview, not mere lists of words and phrases connected by Boolean search operators. As noted, these search term lists, not unlike interview outlines, can reveal a great deal about the attorney's legal theories and factual suspicions. Because these records typically would not exist but for the fact that the company anticipates potential legal action, attorneys should consider pressing the position that work-product protection should apply.

Let us at this point also get ahead of an argument occasionally advanced by those skeptical of this perspective. Opinions rejecting arguments that search terms amount to opinion work product, like FormFactor Inc. v. Micro-Probe Inc., were birthed in the context of civil cases. In those cases, the search terms at issue were prepared to identify documents and information responsive to opposing counsel's specific discovery requests. In that context, then, production of search terms in civil litigation may legitimately assist opposing counsel in judging whether the other side has fulfilled its mandatory discovery obligations.

Internal investigations are fundamentally different from civil litigation. Rarely can an internal investigation be deemed legally mandatory, such that counsel or the company would be duty-bound to prove the sufficiency of its investigative efforts. And in the context of investigations, the facts do not emerge as a result of the opposing side's discovery requests. Rather, counsel makes continuous judgment calls on what information may be important.

Further, lurking immediately beneath the surface of the investigative process we find an implicitly adversarial relationship between the investigating attorney and the individuals whose data is being reviewed. This is never more so than when those

investigative targets are employees who are believed to be guilty of wrongdoing. In this context, investigative data review efforts are best described as an active, prelitigation attempt to discover the nature and scope of potential wrongdoing.

Consider, by analogy, those few cases addressing requests for disclosure of metadata, which is information attached to a text-based file showing, for example, the drafting history of the document. Courts for good reason have ruled that metadata "almost by definition, shows the mental processes of the drafter of a document by revealing the drafter's drafting decisions and steps." United States v. Wirth, Crim. No. 11-256 ADM/JJK, 2012 BL 87068, at *4 (D. Minn. Apr. 3, 2012). Even if a court were to reject characterizing investigative search term lists as opinion work product, a useful fallback position is to note that some courts have found that, when search terms are used as a "mechanism for determining the scope of [discovery obligations]," the terms may be protected as fact work product. United States v. Cadden, Crim. No. 14-10363-RGS, 2015 BL 320421, at *3 (D. Mass. Sept. 30, 2015).

Who Are the Company's Actual Adversaries?

Investigative attorneys are often engaged, at least in part, for the very purpose of establishing legal privilege over an internal investigation. In other words, they are paid to be paranoid about privilege waivers and their impact on our clients' legal fortunes.

Can there be a real argument that the investigative materials frequently requested by outside auditors invoking Section 10A of the Securities and Exchange Act of 1934 are not also extremely attractive to potential hostile downstream litigants, including employees terminated as a result of the investigative findings, governmental authorities, or shareholders? It's worrying that legal protection might be considered waived if the protected materials could be shared with an adversary. See S.E.C. v. Roberts, 254 F.R.D. 371, 381 (N.D. Cal. 2008).

Government Enforcers

When government enforcers work with outside counsel and their publicly traded client in an FCPA investigation disclosed to the SEC and DOJ and the company's outside auditors to conduct a 10A review, are they adversaries for the purposes of the attorney work-product doctrine? The answer for government enforcers like the DOJ and SEC is pretty often "yes," even if the company is now working with government parties. See generally Wadler v. Bio-Rad Laboratories, et al., 212 F. Supp. 3d 829 (2016) (ruling in the context of an FCPA internal investigation that, pursuant to the well-settled "general waiver" principle, privileged communications cannot be shared selectively); United States v. Hatfield, No. 06-CR-0550 (JS), at *3-4 (E.D.N.Y. Jan. 8, 2010) (holding that independent auditors were adverse to the company's CEO where auditors had "concerns regarding … management" and "a responsibility to publicly reveal the truth").

Outside Auditors

The trickier question comes in the context of outside auditors. Aren't they there to help the company and aren't their interests consequently aligned? Although not in the majority, courts have concluded that independent auditors in fact have an inherently adversarial relationship with the companies they audit. Compare Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 116 (S.D.N.Y. 2002).

As a consequence, companies have a solid basis for fearing a downstream assertion that they waived work product protection over the subject of the information disclosed to their outside auditors. These cases, and the more generally unsettled state of the law on this key issue, create a non-trivial risk that turning over their search terms today could create privilege waiver arguments tomorrow.

This fight has been fought—most frequently with success. Although privilege waiver arguments are inherently fact-dependent, being prepared to identify and fight even unwitting efforts by third parties to put privilege in jeopardy is a skillset that should be part of every careful and experienced outside counsel's toolkit.

Doing it the Right Way—Minimizing the Risk of Successful Future Privilege Waiver Claims

Here are actions outside counsel and their clients should consider to maximize privilege over investigative search term lists and minimize the risk of future privilege-waiver claims:

Properly document that search term lists and other investigative materials were created "in anticipation of litigation."

For investigation-related materials to fall under the protection of the work-product doctrine, they must have been prepared in anticipation of litigation. It is important, therefore, that diligent counsel think about, and contemporaneously memorialize, the best argument for why litigation is "anticipated." Simply adding a header or footer stating that the list comprises attorney work product is, without more information, unlikely to persuade a court down the line. See In re Domestic Airline Travel Antitrust Litig., Misc. No. 15-1404 (CKK), 2020 BL 243881, at *6 (D.D.C. Feb. 25, 2020) ("Here, many claims of attorney-client privilege involve a situation where a communication was sent to or from an attorney and/or the document was marked as confidential/privileged or attorney-client privileged. As the law makes clear, however, such designations are not dispositive").

Develop your argument that search terms are opinion work product.

By now we hope you are persuaded that search terms represent an attorney's Rule 26(b)(3)(B) mental impressions, conclusions, and opinions. Counsel, therefore, should resist requests to turn them over. Though almost always initially skeptical, it will not take much persuading to convince an experienced attorney that you are right in drawing this line. But for those who remain recalcitrant, we suggest that you put the burden on them by sharing your (or, if we may, our) analysis of the opinion they have developed supporting the assertion that the privilege waiver argument is not legitimate. The dearth of current case law on this specific issue will make sustaining that burden of persuasion challenging.

Consider appropriate steps short of turning over the full search term list and similar materials.

Outside auditors and enforcement attorneys are motivated to ask for investigative search term lists to help them determine whether the investigating attorney may have "missed" anything important. As with other questions concerning the investigatory "process," there is nothing unreasonable about that. To help ensure these third parties that your approach to the electronic data review process is/was appropriately complete, consider, alternatively, providing verbal summaries of the subject areas covered by the search terms, or offering the third parties an opportunity to provide their own lists, against which you can compare your terms to verify whether anything needs to be added. While perhaps not ideal, such an approach considerably mitigates the risk of a subsequent privilege-waiver argument.

If you must disclose to your outside auditor (or possible joint venture or acquiring partner), do so pursuant to a confidentiality agreement spelling out the non-adversarial relationship between the parties.

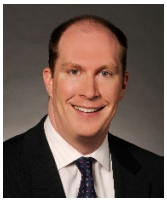
Let's consider the scenario under which the client decides to take on the calculated risk of disclosing its investigative search terms to its outside auditor or to parties interested in understanding the full scope of the investigation prior to entering into a joint venture agreement or purchasing the company. In those cases, the company should only do so subject to a confidentiality agreement that spells out why there is, in fact, a common interest between the parties (rather than an adversarial relationship).

Manage your client and expectations.

Many public companies may be used to semi-reflexively handing over to their auditors whatever information they request. As noted, the outside auditors are likely to respond to a denial for information with "an everyone gives it to us" or "we absolutely need it to sign off" on an upcoming SEC report.

You will need to manage expectations with the company's SEC reporting team, which may feel tremendous pressure to comply with auditor requests and with in-house counsel (who may be feeling the heat from the financial reporting team, auditors, and even the CFO or Audit Committee). You'll need to understand the "deadlines" for the next upcoming SEC report and work to complete the above-referenced verbal summary with the outside auditors in advance of that date to allow the auditors to consider whatever information can be shared without losing privilege. It's also beyond crucial that you keep your client's key constituencies updated on the discussion with the auditors to avoid surprises or delays in a company's SEC filing timeline. Nothing is worse than the CFO hearing directly that the outside auditor may need to hold up their audit, consent, or 10-Q sign off because the auditor is awaiting information on an internal investigation. (Of course, it also pays for outside counsel to have a personal relationship with their client's audit partners so that you can have direct and frank conversations.)

About the Authors



Jason Day is the firmwide chair of the Corporate practice and a member of the firm's Executive Committee. Jason serves as a trusted advisor to public companies on their most sensitive securities and corporate governance matters. He regularly counsels public company boards of directors and management on SEC disclosure obligations, fiduciary duties, internal investigations, proxy advisory firm standards and stockholder activism matters.

Markus Funk, who from 2016 - 2021 served as the firmwide chair of the White Collar & Investigations practice, is a decorated former federal prosecutor in Chicago, and a former section chief with the U.S. State Department-Balkans. He earned a PhD (DPhil) in law from Oxford University, where he started his career as a lecturer in law. In 2021, Chambers ranked him "Band 1" for Litigation: White-Collar Crime & Government Investigations - Colorado and also included him in the rankings for FCPA - USA - Nationwide (a first for a lawyer based in Colorado/the Rocky Mountain Region).