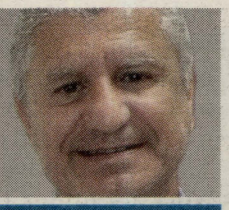
Rules on whistle-blowing



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A local discussion regarding whistle-blowing was recently triggered by the presence here of American whistle-blower Bradley Birkenfeld, who wrote a book on how as a senior banker in Geneva had disclosed secret banking information on US clients to the US government. In the process he became a whistle-blower, went to prison and received millions from the US tax authorities who recovered billions by way of unpaid arrears and fines from tax-evading citizens.

The local discussion was unfortunately hijacked and dominated by the issue of whether whistle-blowers should be rewarded by means of financial incentives. The good thing about financial incentives is that the rules send a message that whistle-blowing is a good thing and should be encouraged. Our current law does not envisage financial rewards but actually sends the signal that whistle-blowing is merely tolerable, that unsolicited disclosures can be a bother and are only protected in certain instances.

What one must keep in mind is that financial incentives in foreign (mainly US) legislation only apply to certain whistle-blowers. Those who disclose government wrongdoing are not rewarded but instead are still generally hounded and punished. I suspect that we shall henceforth have to distinguish more clearly between public and private sector whistle-blowers and between those who are rewarded and those who are punished and end up jobless and isolated.

But my first two rules on whistle-blowing do not concern whether whistle-blowers should be financially incentivised or not. True whistle-blowing is more about risk than reward.

My first rule is: whoever receives a secret disclosure and/or documentation from a whistle-blower becomes immediately responsible for protecting the existence and identity of the discloser. Apart from becoming the privileged holder of potentially dangerous secrets, the person receiving the whistle-blower's disclosure accepts the huge burden of keeping his identity secret. More importantly, from the outset, he has to keep secret the fact that there is a whistle-blower. The "mere" fact that a whistle-blower exists is a dangerous secret and should not be admitted or acknowledged lightly. It is certainly not something to publicise or boast about.

Similarly, newspapers and journalists too are under no obligation to acknowledge that they might have a whistle-blower as their source. Unless clear and strong protocols and mechanisms are in place to protect the identity and existence of a whistle-blower, even from one's own colleagues and superiors, one should not encourage whistle-blowing at all. The receipt of secrets from such a source is not a privilege but a burden that needs to be handled with the utmost care and sensitivity.

It is not rare to find newspapers and others, including possibly misguided public agencies, boasting that information about this or that scandal has arrived to them from an insider whistle-blower. One hopes that whenever this happens, the whistle-blower is not only pre-notified but would have given his explicit consent to the revelation.

At most, the publication should limit itself to stating that the information is coming from a reliable source. The recipient of confidential documents and information should not admit the existence or identity of a whistle-blower, unless this is strictly inevitable or the source authorises it. Revealing the existence of a whistle-blower can give rise to serious risks.

Certainly, the fact should not be disclosed just to add idle information or for sensationalism to arouse more curiosity.

In this area, a strict need-to-know basis rule operates. The circulation of emails mentioning the whistle-blower's name, or even that he exists, should be studiously avoided. There is simply no excuse or place for carelessness or incompetence in this very sensitive area and one does not circulate such information just for the sake of it.

The second rule is that documents passed on by a whistle-blower should be kept secret and hidden to the highest degree possible. Wherever possible, the relevant information should be published in a manner that does not compromise the source or the specific document. Extreme care should be exercised as there is always a chance, no matter how remote, that the documents disclosed might themselves contain clues as to who the whistle-blower might be or that the reported entity could reduce the possible options of who the source might be.

Documents that are very secret and sensitive would have had a very limited internal circulation within an organisation. Their disclosure to interested parties might easily and inadvertently lead to the eventual disclosure of the whistle-blower's identity.

The Maltese whistle-blower Stanley Adams had his cover carelessly blown by EU Commission officials who after much pestering by Roche lawyers and without his knowledge, released copies of highly confidential documents that he had given them. The secret documents were evidence of high-level extensive illegal price-fixing conduct by his Swiss employer.

The incriminating documents enjoyed very limited internal circulation in the Roche structures and Adams's identity was soon blown.

If whistle-blowers are to be encouraged and protected, then it follows that their identity needs to be kept secret. This point recently came to the fore in the UK media which reported how the Barclays Bank chief executive was caught repeatedly trying to uncover the identity of an internal whistle-blower who had disclosed certain wrongdoing inside the bank.

His attempts breached the established procedures and policies about protecting whistle-blowers. His misconduct was investigated internally and he was also reported to the UK financial regulatory authority. The bank issued him a reprimand and withdraw a part of his bonus package as a punishment.

Would such an incident be dealt with in the same way in Malta? I suspect not. Many people in Malta seem careless with other people's secrets and find enjoyment in narrating interesting stories and gossiping with their friends and colleagues. The making of copies and the circulation of emails is often not handled sensitively enough.

Regrettably, people try to get to know things which they should not know or which they do not need to know. No evidence exists that persons working in the media or with public entities, and who might come into contact with whistle-blowers, have been adequately trained on how to deal with such situations in a professional manner and what immediate and ongoing steps they should take to safeguard the confidentiality of a whistle-blower and the documents he may have made available.

So, one should not accept secret documents from whistle-blowers unless one is absolutely certain that the source can be kept secret. The documents should be kept under lock and key. Copies should not be needlessly made and in any case they have to be stored away safely. Moreover, care has to be taken to ensure the documents do not end up in the wrong hands whether internally or externally.

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