

## **Protection of Sources**

### **A Guide Note<sup>1</sup>**

*July 2024*

#### **General Summary**

1. A source is any person who provides information to a journalist through a statement of fact, opinion or idea which is expressed or exchanged through any medium.
2. The protection of sources means that persons assisting journalists in informing the public enjoy a guarantee of non-disclosure of their name/identity. Consequently, a journalist is bound by an obligation not to disclose the name/identity of a source.
3. Disclosure can take place directly or indirectly. A journalist is obliged not to disclose the name/identity of a source, including not to disclose information/data/material that lends itself to identifying the source.
4. The protection of sources is not absolute. There are exceptional instances when the identity of the source is to be disclosed.
5. The protection of sources is legally protected and judicially enforceable in Malta through human rights law, European Union law, and national law.

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<sup>1</sup> The purpose of this Guide Note is to provide journalists and other media actors in Malta with an overview of and general guidance on the obligation to protect sources. This Guide Note is to be used for general guidance only and is not intended as a substitute for specific legal advice. The Guide Note is a concise analysis by the author of relevant information found in case law of the European Court of Human Rights, and documents published by UNESCO and by the Council of Europe. The information is set out as criteria or rules of thumb.

6. In human rights law, the protection of sources is generally lifted when there is an overriding public interest, and the measure of interference is reviewed by a judge or other independent and impartial decision-making body prior to its implementation. In urgent cases, the judicial review may take place after the measure of interference is executed but prior to the access and exploitation of materials obtained through such a measure.
7. The Media and Defamation Act protects journalistic sources by prohibiting any court from requiring an editor, author, publisher or operator of a website to disclose the source of information contained in a newspaper or broadcast or website for which s/he is responsible. The only exceptions are where the court is satisfied that *'such disclosure is necessary in a democratic society in the interests of national security, territorial integrity, public safety, or for the prevention of disorder or crime or for the protection of the interests of justice.'*
8. Other national laws apply a different standard. These include the Prevention of Money Laundering Act, the Criminal Code, and the Security Service Act. When dealing with journalistic investigations that relate to any of the issues indicated in these laws, a journalist must seek specific advice on the extent of the protection of sources.
9. With the coming into force of the EU Media Freedom Act, a standard of protection of sources will also be established across the EU.
10. Journalists are required to consider the protection of source at every stage of their journalistic investigation and to take such actions and measures required to ensure that this protection is not jeopardised including by ensuring that data/information collected is securely held.
11. Journalistic sources may also be whistleblowers in terms of the law, but the latter are specifically regulated by law including on when they can divulge information to journalists.

## Introduction

This Guide Note aims to provide journalists and other media actors with information depicting the general framework within which journalists' sources enjoy the protection of their identity and conversely within which journalists are under an obligation to protect the confidentiality of their sources.

Sources are key to journalism. Though sources may also be whistleblowers, national regulation is very particular on when and how persons may be officially recognised as whistleblowers and given the protection under the relevant legislation.<sup>2</sup> For example, national law establishes conditions which whistleblowers must meet before they can make the information public. It is therefore important to note that this Guide Note is only dealing with persons acting as journalistic sources (and not whistleblowers).

## Who is a Source?

Generally speaking a source is *'any person who provides information to a journalist'*.<sup>3</sup> A source *'volunteers to assist the press in informing the public about matters of public interest.'*<sup>4</sup> The information provided to the journalist may be in the form of a statement of fact, an opinion or an idea expressed and exchanged through any medium.

A source remains a source even if the information provided has not yet been published, will not be published or didn't specifically make it into a publication.

Persons providing information to a journalist who are not aware that they are speaking with a journalist who is collecting information for publication, are not sources. Consequently, a journalist who is undercover and obtains information from persons who are unaware of the journalistic role being undertaken are likely not to enjoy the protection afforded to sources.

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<sup>2</sup> For more information on the legal framework regulating whistleblowing in Malta, refer to the Protection of Whistleblower Act, Chapter 527, Laws of Malta, <https://legislation.mt/eli/cap/527/eng>

<sup>3</sup> Committee of Ministers, *Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information*, 8 March 2000, (701<sup>st</sup> meeting of the Ministers' Deputies) Council of Europe.

<sup>4</sup> *Nordisk Film & TV A/S v. Denmark*, App No 40485/02, (ECtHR 14 November 2002).

At times the intention with which information is given to journalists is taken into consideration when determining whether a person enjoys the protection of sources. For example, where a person informs a journalist that he/she is the person responsible for the commission of a crime, there is the likelihood that a court would not consider this person, the information, data and material provided by him/her to the journalist to be covered by the protection of sources.<sup>5</sup>

### **What Protection Does a Source Enjoy?**

A person assisting journalists in informing the public enjoys a guarantee of non-disclosure of their identity. It is the obligation of journalists to provide such a guarantee. Consequently, a journalist is bound by the obligation of not disclosing the identity of a source.

Disclosure can take place directly or indirectly. Disclosure of information capable of identifying the source would be contrary to the guarantee of non disclosure as much as the direct naming of the source.

*'In practice, this means that journalists have a right not to disclose the identity of their source not only in reply to orders or measures which directly ask for the identity of a source, but also through measures which may ask for or seize documentation or information provided by the source the disclosure of which would also disclose the source's identity. Measures such as court orders, police questioning, searches at the premises of a media house or at the premises of a journalist, the seizure of a journalist's computer or documentation, surveillance and call monitoring of journalists, amount to measures of interference with the right of the journalist not to disclose his/her source.'*<sup>6</sup>

A source remains a source even if the information provided has not yet been published, will not be published or didn't specifically make it into a publication.

### **What is the Extent of the Protection of Journalistic Sources?**

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<sup>5</sup> *Stichting Ostade Blade v. The Netherlands*, App No 8406/06, (ECtHR 5 February 2013).

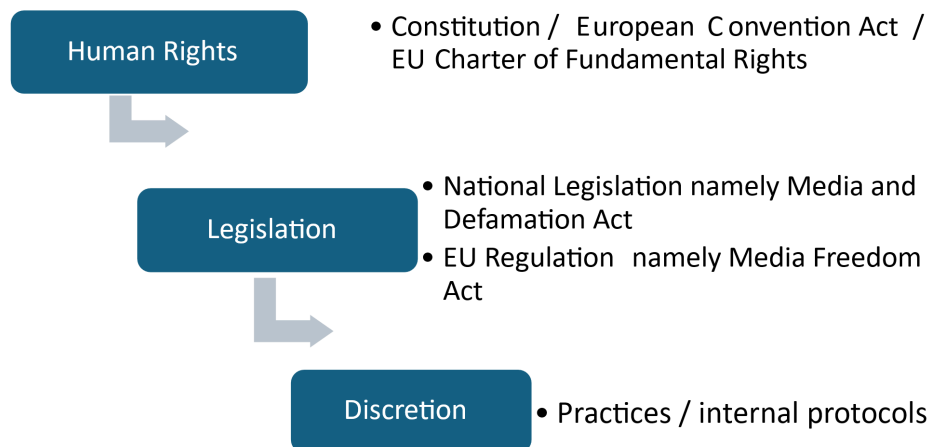
<sup>6</sup> Borg J. & Comodini Cachia T., *Reforming Malta's Media System*, midsea Books (2023), Part 3 Chapter 7

Sources are recognised as ‘one of the cornerstones of freedom of the press’. Without sources the ‘vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.’<sup>7</sup>

Despite this, the protection of sources is not absolute. Consequently, there are exceptional instances when the identity of the source is to be disclosed. This is by way of exception. Where confidentiality of journalistic sources is broken there is the likelihood of exposing that person to risk and of having a chilling effect on the press.

### Legal Protection of Journalistic Sources

The protection of sources is legally recognised in Malta and is judicially enforceable through the following laws and regulations. Each of the following provides a specific extent of protection and there are nuanced differences between the protection each offers.



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<sup>7</sup> *Nordisk Film & TV A/S v. Denmark*, App No 40485/02, (ECtHR 14 November 2002)

The protection of sources is formally protected as an inherent element in the protection of press freedom under article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms<sup>8</sup> (ECHR), and under article 11 of the EU Charter of Fundamental Rights (Charter). The Constitution of Malta does not specifically refer to the protection of sources in article 41 thereof, but one generally expects courts to interpret the protection of freedom of expression found in article 41 of the Constitution in line with the case law of the European Court of Human Rights (ECtHR) and consequently as including the protection of journalistic sources.

According to the ECtHR's case law, the protection of journalistic sources may be lifted provided all of the following criteria are met:

- i. The existence of an overriding public interest;
- ii. All measures of interference with this right must be reviewed by a judge or other independent and impartial decision-making body (the reviewing body);
- iii. The review must be carried out prior to the execution of the measure of interference;
- iv. The reviewing body must:
  - a. be separate from the executive and other interested parties;
  - b. have the power to determine whether there is an overriding public interest;
  - c. have the full picture so that it is possible for it to weigh the potential risks and consider the respective interests in the particular circumstances of the case;
  - d. consider whether a less intrusive measure can suffice to serve the overriding public interests established;
  - e. have the power to refuse the disclosure sought, or to limit it or qualify it in a way that would protect sources.

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<sup>8</sup> See European Convention Act, Chapter 319, Laws of Malta, which incorporates the European Convention into national law.

- v. Where, for example, for reasons of urgency, it is impracticable for the authorities to substantiate their decision to interfere with this right before the reviewing body prior to executing the measure, the independent review must at the very least
  - a. take place prior to the access and exploitation of materials obtained through such measure;
  - b. consider whether an issue of confidentiality of sources arises, whether the measure secured a public interest, and whether that public interest outweighs the public interest of source protection;
  - c. generally occur prior to accessing the information and its handing over for use;
  - d. be capable of preventing unnecessary access to information capable of disclosing the source's identity, by being able to identify and isolate information that carries no such risk.<sup>9</sup>

Since the protection of journalistic sources is embedded in the press freedom protected in article 10 ECHR, the lifting of the protection of sources will also be considered in the light of the criteria established for freedom of expression. These are that the measure of interference must be in accordance with law, for a legitimate interest, and necessary in a democratic society.

These criteria will also be used to interpret the protection of journalistic sources found in article 22 of the Media and Defamation Act. This law prohibits any court or tribunal from requiring an editor, author, publisher or operator of a website to disclose the source of information contained in a newspaper or broadcast or website for which s/he is responsible. The only exceptions are where the court or tribunal are satisfied that *'such disclosure is necessary in a democratic society in the interests of national security, territorial integrity, public safety, or for the prevention of disorder or crime or for the protection of the interests of justice.'*

Other national legislation may be taken to impose an obligation of disclosure. These include the Prevention of Money Laundering Act, the Criminal Code, and the Security Service Act. When dealing with journalistic investigations that may relate to any of the issues indicated in these laws, a journalist must seek specific advice on the extent of the protection of sources.

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<sup>9</sup> Borg J. & Comodini Cachia T., *Reforming Malta's Media System*, midsea Books (2023), Part 3 Chapter 7

The Media and Defamation Act protects authors, co-authors, any person responsible for the editorial or content control of media, the person who owns or controls an enterprise publishing written media, and the operator of a website. The law also appears to only protect information which is in a newspaper, broadcast or website.

The European Media Freedom Act<sup>10</sup> will provide<sup>11</sup> protection from source disclosure by placing a number of obligations on public authorities in Member States, including Malta. According to the Act, public authorities are forbidden from:

- (1) obliging media service providers, editorial staff, and any person who, because of their regular or professional relationship with a media service provider or its editorial staff might have such information, to disclose that information which is related to or capable of identifying journalistic sources or confidential communications;<sup>12</sup>
- (2) causing any of the mentioned persons in point (1) to be detained, sanctioned, intercepted, inspected, or to be subjected to surveillance, search, or seizure, for the purpose of obtaining information related to or capable of identifying sources or confidential information; and
- (3) deploying intrusive surveillance software on any tool used by the persons mentioned in point (1).

These three obligations are not absolute. Public authorities may seek disclosure in terms of point (1) or perform any act mentioned in point (2) if this is:

- a) allowed in EU or national law;
- b) the measure is proportionate, necessary and genuinely meets objectives of general interest, and protects the rights and freedoms of others;
- c) is justified on a case-by-case basis by an overriding reason of public interest;
- d) is previously authorised by an independent impartial decision making authority or in urgent cases reviewed after.

Public authorities may deploy intrusive surveillance software if:

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<sup>10</sup> EU Regulation establishing a common framework for media services in the internal market, otherwise known as the European Media Freedom Act (EMFA)

<sup>11</sup> This is an EU Regulation which came into force on 7 May 2024 and the rules will fully apply as from 8 August 2025. This establishes the minimum standard of protection.

<sup>12</sup> EMFA, Article 4



- e) points a to d are met;
- f) the authorities are investigating any of the mentioned persons for some identified offences which are punishable by more than 3 years imprisonment or other serious crimes punishable by at least 5 years imprisonment;
- g) detention and ordinary surveillance are not adequate and sufficient to obtain the information sought.

### **Queries and Requests**

Queries and requests for assistance may be addressed to Dr Therese Comodini Cachia ([tcomodinicachia@gmail.com](mailto:tcomodinicachia@gmail.com)) who manages the Legal Support Programme for Journalists set up by the Daphne Caruana Galizia Foundation.