

# The Washington Post

## Swiss banker turned whistleblower ended up with a prison sentence

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Former Swiss banker Bradley Birkenfeld had secrets he was burning to tell, secrets so profound they could change lives and fortunes, beginning with his own.

They could make him rich, and they could send him to prison. They could expose thousands of Americans who had hidden money from the Internal Revenue Service, and they could implicate one of the world's most powerful financial institutions in a far-reaching fraud against the U.S. government. They could topple Switzerland from its vaunted position as secret banker to the world.

The question was how to tell them.

How could the Massachusetts native strike a blow against the malefactors and claim a potentially astronomical reward without destroying himself in the process?

Three years ago, communicating with his Washington lawyers from Swiss hotels and pay phones to avoid discovery, Birkenfeld began a delicate and dangerous dance with the U.S. government. He wanted to stake a claim under a new federal whistleblower law that offers informants up to 30 percent of the tax revenue they help the IRS recoup. Before spilling his secrets to federal investigators, he also wanted immunity from prosecution for his participation in the cross-border scheme.

Birkenfeld's story turned into a cautionary tale for would-be informants and a test of the U.S. government's attitude toward them. Should people who come forward with inside knowledge of a crime be rewarded, punished -- or both? Can the government simultaneously woo such whistleblowers with financial enticements and threaten them with incarceration?

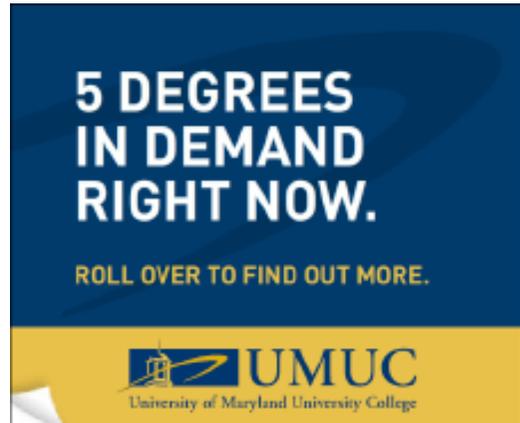
By now, results of the famous case have reverberated around the world. UBS, Switzerland's largest bank, admitted to helping Americans dodge taxes, and it agreed to pay the U.S. government \$780 million. In a departure from its own legal standards,

the Swiss government divulged client secrets. Alarmed by the whole affair, many depositors pulled their money out of UBS, and thousands of tax-dodging Americans have come clean with the IRS.

Not as well known is a distinctly Washington drama: how Birkenfeld, 45, came in from the cold but ended up in a federal prison camp.

With the new whistleblower law, Congress had hung an open-for-business sign on the IRS, part

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of a strategy to collect some of the billions of dollars of taxes that go unpaid each year. However, to secure immunity, Birkenfeld had to deal with the Justice Department. In effect, he had to put his head in the lion's jaws.

In March 2007, Washington lawyer David H. Dickieson of the firm Schertler & Onorato asked Justice for a meeting. The agenda: a mystery client.

"This is a 'once in a career' case for the lucky government attorneys willing to follow up on the hard leads that our client is prepared to provide," Dickieson wrote in an e-mail to prosecutor Karen E. Kelly. "We look forward to working on the same side as you and the government in this matter."

"Just what I need, a 'once in a career case'!!" Kelly answered.

At the outset, Justice wasn't making any promises.

"You should know that based upon the information that you have disclosed to date, we consider your client merely a tipster, not a whistleblower," Kelly wrote.

On April 19, 2007 -- Patriots' Day -- Birkenfeld's lawyers sent Justice a confidential summary of the information he was willing to deliver. The document, which contained no names, heightened the intrigue. Birkenfeld was referred to as "Salesman." UBS was "the Vault," a large international financial institution whose salesmen fanned out from Europe to help wealthy Americans open undeclared accounts. Hinting at the quality of Birkenfeld's information, including written records, the document described "Slick" the oil trader, whose accounts allegedly held more than \$100 million.

If the prosecutors followed Salesman's road map, "the entire European tax haven could be revealed," the summary said.

"We believe that the new IRS Whistleblower Reward program was designed by Congress precisely to encourage persons like Salesman to come forward despite personal risk," the document said.

The Justice lawyers weren't exactly bowled over -- at least not as far as they were letting on.

"Frankly, at this point we do not know whether your client has any information that is of interest to the Department of Justice," Kelly wrote on June 11.

Kelly also put Birkenfeld's lawyers on notice: The Justice Department was not part of the IRS whistleblower program, "and you should act accordingly."

\* \* \*

Birkenfeld made a leap of faith. Avoiding a direct flight in the hope of obscuring his destination, he traveled to Washington and walked into a series of meetings at Justice.

The ground rules, spelled out in a standard agreement called a proffer, explained that the government could still prosecute Birkenfeld, and that at least indirectly it could use his own evidence to build a case against him.

Birkenfeld unloaded information, backed by internal UBS documents. According to Birkenfeld

and his current lawyers, he provided cellphone numbers, e-mail addresses and the names of American hotels used by UBS salesmen. He recommended that the government trace their contacts with U.S. clients. He named the cultural events that the Swiss bankers attended in the United States to network with prospective clients, such as Art Basel in Miami, and suggested that the government arrest the bankers when they attempted to enter the country.

In a tantalizing glimpse of a Swiss bank's innermost secrets, he handed over a copy of an index card he said was extracted from a UBS safe. It listed the name, account numbers and password of the Middle Eastern oil trader previously referred to as "Slick," along with his posh New York address.

Birkenfeld said he offered up the oil trader because, though he had no proof, he suspected the trader had terrorist connections.

The reaction to his tactical advice was not what he had hoped. Prosecutor Kevin M. Downing "looked at me and said, 'Oh, you watch too much TV. That's Hollywood,'" Birkenfeld recounted in an interview. Birkenfeld said he felt he was treated with "hostility and aggression."

\* \* \*

The Justice lawyers across the table from Birkenfeld were among the government's top guns in tax enforcement. The very day Kelly was trading messages with Birkenfeld's lawyer about a "once in a career case," she was in the news for her role in what the Justice Department called its largest ever personal income tax evasion case.

The news was mixed. On one hand, Washington telecom entrepreneur Walter Anderson was sentenced to nine years in prison for not paying \$200 million in taxes -- and Kelly would receive a department award for her work on the case. On the other hand, a federal judge said the prosecutors botched the plea agreement, preventing the court from ordering an estimated \$140 million in restitution. (An appeals court ruled that the drafting error did not stand in the way of restitution.)

Meanwhile, Downing had been leading the landmark prosecution of former employees of the big accounting firm KPMG on charges of promoting fraudulent tax shelters. In that case, a court dismissed charges against 13 of the defendants after finding that the government "violated the Constitution it is sworn to defend" by in effect denying them access to counsel. The court said the prosecution's overzealousness was consistent with policies established at Justice headquarters.

For Birkenfeld's camp, the meetings in Washington gave way to exasperation. By August, a sense of urgency set in: It appeared that someone had tipped UBS that he was blowing the whistle. It would now be harder to catch bankers in the United States, and panicked clients might empty their accounts. If the government couldn't collect, neither could Birkenfeld.

In e-mails to prosecutors, Birkenfeld's lawyer described him as "spooked" and "irked." His whistleblowing threatened powerful people, and there was reason to believe he was in danger, Dickieson wrote.

Dealings between Birkenfeld's camp and the Justice Department soon reached an impasse amid mutual finger-pointing. The Justice lawyers asserted that Birkenfeld "terminated his proffer offer," and they made clear that they declined to grant him immunity.

Dickieson alleged that Justice lawyers had taken shifting positions on immunity -- at one point saying they would grant it when Birkenfeld's information was verified, and at another point suggesting he had no need for it.

In a sense, Birkenfeld and the Justice Department were locked in a Catch-22. It would be risky for him to tell prosecutors every last detail without immunity, and it would be risky for Justice to grant immunity without knowing all.

Birkenfeld took his story elsewhere: to the Securities and Exchange Commission, civil investigators at the IRS and the Senate's Permanent Subcommittee on Investigations. In a November message to Kelly and Downing, Dickieson suggested that Birkenfeld was happier talking to authorities who were less contentious. Birkenfeld "has decided that he will continue to provide information to the government on his own terms," Dickieson wrote.

As late as April 2008, Dickieson reiterated Birkenfeld's offer to help Justice in return for immunity. "Let us know what the DOJ is willing to do."

In May 2008, Birkenfeld got his answer. Arriving back in the United States for a high school reunion and for meetings with Senate and SEC officials, he was arrested. Now he was cooperating fully with Justice -- not on his own terms, but under threat of incarceration.

Birkenfeld pleaded guilty to helping a single client evade taxes.

At Birkenfeld's sentencing last year, Downing said the banker's assistance had been indispensable. "I will say that without Mr. Birkenfeld walking into the door of the Department of Justice in the summer of 2007, I doubt as of today that this massive fraud scheme would have been discovered by the United States government," Downing said.

But Downing faulted him for "failing to disclose his involvement with the fraud and the U.S. clients that he aided." If Birkenfeld had been more forthcoming about one of his own clients before the government reached a financial settlement with that client, the California real estate billionaire would have been sent to prison, Downing said.

"We cannot have people, U.S. citizens, engage in that kinds of fraud scheme, come back here, and put half the leg in the door," Downing told the court, according to a transcript.

Birkenfeld argued that if he divulged client names without a subpoena, he could have been jailed in Switzerland.

Dean Zerbe, a member of Birkenfeld's new legal team, rejected the notion that Birkenfeld did not disclose his own involvement, saying his client told prosecutors "everything that was going on at the circus."

" 'Dude, I was the third clown coming out of the clown car. How can you tell me I wasn't in the circus?' "

Given the value of Birkenfeld's information, the prosecutors should have been offering him a soft pillow, a cup of tea and a cookie, Zerbe said.

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Birkenfeld's 40-month prison sentence makes it all the more imperative that the IRS grant him a

large reward and that President Obama grant him clemency, said Stephen M. Kohn, another new lawyer for Birkenfeld.

"You have to take steps to induce other Bradley Birkenfelds to step forward," Kohn said. Kohn is also executive director of the National Whistleblowers Center, an advocacy group, which has been working to rally support for Birkenfeld.

In an interview from prison, Birkenfeld said going to the Justice Department was a mistake, and that his incarceration was an injustice. He accused the government of letting UBS off lightly, and he expressed outrage that, after detaining a senior bank official -- one of Birkenfeld's superiors -- the government allowed the banker to leave the United States.

"The transgressions are endless here with respect to the incompetence and corruption of the Department of Justice," Birkenfeld said.

Asked to comment, Karen Kelly, the federal prosecutor, deferred to Downing. He declined to comment. In the end, it appears that Birkenfeld could well have delivered on the promise of a once-in-a-career case. For his role in the pursuit of UBS, Downing shared a Justice Department award.

In a news release last year announcing Birkenfeld's sentencing, the Justice Department accused him of a litany of wrongdoing and said he was "paying the price." The Justice announcement did not mention that he stepped forward voluntarily to blow the whistle on UBS.

The head of the IRS Whistleblower Office, Stephen A. Whitlock, declined to discuss the Birkenfeld matter, citing confidentiality law. Speaking generally, he said that the whistleblower program "is not an immunity program."

"And if the person who is bringing us the information has some criminal exposure themselves," Whitlock said, "then they need to think about that."

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