

PUBLIC INFORMATION

PUBLIC RECORDS—PUBLIC DEFENDER—TRIAL TRANSCRIPTS—TRANSCRIPTS IN HANDS OF PUBLIC DEFENDER ARE PUBLIC RECORDS—CLIENTS OF PUBLIC DEFENDER DO NOT HAVE PERSONAL PROPERTY RIGHT TO TRANSCRIPTS—PUBLIC INFORMATION ACT GRANTS RIGHT TO INSPECT TRANSCRIPTS AND, FOR A FEE, TO A COPY.

January 25, 1983

Alfred J. O'Ferrall, III, Esq.
Deputy Public Defender

You have requested our opinion on whether, under Maryland law, a client of the Public Defender has a "property right" to his or her trial transcript in the custody of the Public Defender. You advise that this request derives from actions now pending in the United States District Court for the District of Maryland, in which one issue is whether such a property right, if found to exist, would be enforceable under federal law.

For the reasons given below, we have concluded that, under the laws of this State, a trial transcript in the custody of the Public Defender is not the private property of a defendant or, indeed, anyone else. It is, rather, a public record within the meaning of, and subject to, the Maryland Public Information Act, Article 76A, of the Maryland Code*. The defendant whose trial the transcript reports has a right, under the Public Information Act, to be furnished with a copy of the transcript in the custody of the Public Defender for a "reasonable fee", although the Public Defender may waive the fee if the waiver is in the public interest.¹

* *Editor's Note:* The records provisions of the Public Information Act have since been recodified, without substantive change, as Title 10, Subtitle 6, Part III, of the new State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets.]

¹ This Opinion is limited to the rights of a defendant to acquire a copy of a transcript from the Public Defender for purposes of collateral litigation, the Public Defender's office having obtained the transcript in connection with its representation of the defendant. We do not address the right of an indigent defendant to have a trial transcript prepared at State expense for purposes of appealing his or her conviction. See Maryland Rules 883 and 1083. Nor do we deal with the property rights of a defendant who has already acquired a copy of the transcript.

I

Public Record Character of Trial Transcripts

Under Maryland law, court records are generally open to public inspection: "Unless otherwise provided by law or order of court, any person may, without charge, inspect, examine, and make memoranda or notes from an index or paper filed with the clerk of a court." §2-203 of the Courts Article. "Court files, unless sealed by order of the court, are properly viewable by any person." *Beckett v. State*, 31 Md. App. 85, 89 (1976).

A trial transcript is, of course, an important element of "court files". Indeed, a "transcript represents the only official record of the proceeding." *Harrod v. State*, 39 Md. App. 230, 236, *cert. denied*, 283 Md. 733 (1978) (emphasis added). See Maryland Rule 826b (transcript to be included in record on appeal to Court of Appeals); Maryland Rule 1026a2 (transcript to be included in record on appeal to Court of Special Appeals). *Cf.* Maryland District Rule 4a (sound recording "shall be part of the official record of each proceeding"). We have found no case law or other support for the proposition that a trial transcript is in any way the private property of the defendant in the trial or of anyone else.

Apart from these specific indicia of its public record character, a trial transcript also falls squarely within the definition of "public records" in the Maryland Public Information Act. This definition is as follows:

"Public records' when not otherwise specified shall include any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map, drawing, or other written document, regardless of physical form or characteristics, and including all copies thereof, that have been made by any branch of the State government, including the legislative, judicial, and executive branches, by any branch of a political subdivision, and by any agency or instrumentality of the State or a political subdivision, or received by them in connection with the transaction of public business." Article 76A, §1(b) [SG §10-611(f)].

We think it indisputable that a trial transcript is a "public record[]" under this definition. It is both a "written

... made by" the judicial branch of State government and, when in the possession of the Public Defender, a document "received by [an executive branch agency] in connection with the transaction of public business". Therefore, access to a trial transcript is governed by the Public Information Act.

II

Access to Transcripts

The Public Information Act imposes various duties on the "official custodian" and the "custodian" of a public record. In the instance of a trial transcript, these duties fall on both the court clerks and the Public Defender.

An "official custodian" is the State officer or employee "who is responsible for the maintenance, care, and keeping of public records, regardless of whether such records are in his actual personal custody and control". Article 76A, §1(f) [SG §10-611(d)]. Certainly, the clerk of the court in charge of a trial record is the official custodian of a trial transcript that forms a part of that record. See §2-201(a)(i) of the Courts Article of the Maryland Code. We believe that the Public Defender is also the official custodian of a trial transcript obtained by the Public Defender's office in the course of its legal representation of an indigent defendant. See Article 27A, §§4, 5(a), and 5(c) of the Maryland Code.

A "custodian" is "any authorized person having personal custody and control of the public records in question". Article 76A, §1(g) [SG §10-611(c)]. For a given transcript held by the Public Defender's office, an Assistant Public Defender would typically be the custodian.

The primary duty of the custodian of public records is to "allow any person the right of inspection of such records", unless any of several specified reasons for denying access may be asserted. Article 76A, §3 [SG §10-612 *et seq.*]. Assuming that no such basis exists for denying access to a trial transcript, the custodian in the Public Defender's office would be required to permit his or her client—or any other person—to inspect the transcript.

Moreover, the Public Defender is also required to provide copies, upon request, of such a transcript: "In all cases in which a person has the right to inspect any public records such person shall have the right to be furnished copies, printouts, or photographs for a reasonable fee to be set by the official custodian." Article 76A, §4(a) [SG §§10-620 and 10-621]. Ordinarily, when a person is confined, this procedure is the only feasible means of access.

III

Fee Waivers

As indicated in Part II above, copies of a public record are usually provided only upon payment of "a reasonable fee to be set by the official custodian". Article 76A, §4(a) [SG §10-621(a)]. However, the Public Information Act also provides that fees may be waived in some circumstances:

"The official custodian may waive any cost or fee charged under this subtitle if a waiver is requested and the official custodian determines that a waiver would be in the public interest. The official custodian shall consider, among other relevant factors, the ability of the requester to pay the cost or fee." Article 76A, §4(e) [SG §10-621(d)].

This provision leaves the waiver decision to the discretion of the official custodian. While he or she is required to consider the requester's ability to pay the fee, that factor alone is not determinative of the waiver decision; as the statute indicates, the ability to pay is only one "among other relevant factors".

We cannot state in the abstract what other factors the Public Defender, as an official custodian of trial transcripts, ought to consider in making a "public interest" determination. That is a matter for his or her reasonable discretion.² We do suggest

² We need not reach the question of whether this exercise of discretion is judicially reviewable. Cf. *Lybarger v. Cardwell*, 577 F.2d 764 (1st Cir. 1978) (reviewing and upholding agency denial of fee waiver request under federal

that decisions about both fees and fee waivers be coordinated with the clerks of the appropriate courts, who are also official custodians of the transcripts.

IV

Conclusion

In summary, it is our opinion that trial transcripts in the custody of the Public Defender are public records under Maryland law. They are not the private property of the trial defendant or anyone else. The defendant, in common with all other persons, has a right under the Maryland Public Information Act to be furnished with a copy of the transcript upon payment of a "reasonable fee", although the Public Defender may waive the fee if the waiver would be in the public interest.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Assistant Counsel,*
Opinions and Advice

STEPHEN N. ROSENBAUM,
Assistant Attorney General

AVERY AISENSTARK

Chief Counsel
Opinions and Advice

Editor's Note: Since the issuance of this Opinion, the Court of Appeals, on certified question from the United States District Court for the District of Maryland, has ruled on the issue addressed by this Opinion. The Court held that "a client represented by . . . the Office of the Public Defender . . . does not have a property right under the laws of this State to the transcript of his or her trial which is in the custody of the . . . Public Defender." *Levene v. Antone*, 301 Md. 610, 625 (1984).

Freedom of Information Act; *Endrey v. CIA*, 478 F.Supp. 1175 (D.D.C. 1979) (reviewing and overturning as "arbitrary and capricious" agency denial of fee waiver request under Federal Freedom of Information Act). *See generally* Annot., 50 A.L.R. Fed. 552 (1980).

PUBLIC INFORMATION—EXEMPTIONS—CONFIDENTIAL RECORDS—"LETTERS OF REFERENCE"—EXEMPTION FOR LETTERS OF REFERENCE APPLIES TO BOTH SOLICITED AND UNSOLICITED LETTERS.

August 9, 1983

Mr. Arthur S. Drea, Jr.

Chairman

Governor's Information Practices Commission

You have requested our opinion as to the meaning of the term "letters of reference" in the Maryland Public Information Act, Article 76A of the Maryland Code.* Specifically, you inquire whether a provision of the Public Information Act, which requires a custodian to deny requests for inspection of "letters of reference", applies to unsolicited letters from members of the public to a government official concerning the qualifications of persons who have applied for a public office.

For the reasons given below, we have concluded that the provision exempting "letters of reference" from public disclosure applies to all letters—solicited or unsolicited—that concern a person's fitness for public office or employment.

I

Background

The specific context of your inquiry concerns the selection of members of the Washington Suburban Sanitary Commission ("WSSC"), a bi-county agency. Detailed procedures for the selection of WSSC members are set out in statute. Under Article 67, §1-103 of the Maryland Code, appointments are made from a list of applicants. This list is "open to the public for inspection from the time the list is first begun until an ap-

* *Editor's Note:* The records provisions of the Public Information Act have since been recodified, without substantive change, as Title 10, Subtitle 6, Part III, of the new State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets.]