

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.

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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); *Eudey 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.]

pointment is made by the County Executive". Article 67, §1-103(a)(1)(ii).¹

As you point out, "[s]ince the applicant list may be examined by the public, members of the public frequently send letters to the county executive expressing views regarding the qualifications of particular applicants. These letters are neither solicited by the county executive nor by the applicants themselves." You question the status of these letters under the "letters of reference" exemption in the Maryland Public Information Act ("PIA").²

II

Analysis

Under Article 76A, §3(c)(iv) [SG §10-616(d)], "[t]he custodian shall deny the right of inspection of the following records or any portion thereof, unless otherwise provided by law: . . . [l]etters of reference". The PIA contains no definition of "letters of reference", and the term has not been construed by any Maryland court.³

In construing statutes, the "cardinal rule", of course, is to "carry out the real legislative intent". In determining that intent, the Court considers the language of an enactment in its

¹ Comparable procedures previously appeared in §§6-1-1 of the Montgomery County Code, now repealed.

² The County Attorney for Montgomery County has concluded that all "written expressions regarding applicant qualifications must be considered letters of reference". Memorandum from Paul A. McCuckian, County Attorney, to Neal Potter, President of the Montgomery County Council (August 6, 1979). However, Montgomery County Council Member Esther P. Gelman believes that unsolicited letters of comment from the public regarding WSSC applicants are not "letters of reference".

³ Three other states, Colorado, New Mexico, and Wyoming, have public information statutes that include a specific exemption for "letters of reference". None of those statutes contains a definition of the term. Moreover, we have been unable to find any reported court decision construing a "letter of reference" exemption in a public information statute. *But see Board of Trustees of Stanford Univ. v. Superior Court of Santa Clara County*, 174 Cal. Rptr. 160 (Ct. App. 1981), discussed in text accompanying note 5 below.

"natural and ordinary signification". *Smelser v. Criterion Ins. Co.*, 293 Md. 384, 388-89 (1982).

Turning first to the dictionary, we find no entry for "letters of reference". A "reference" is defined in *Black's* as a "person who will provide information for you about your character, credit, etc." *Black's Law Dictionary* 1151 (rev. 5th ed. 1979). This definition suggests that a letter of reference is one solicited by the job-seeker.⁴

On the other hand, "reference" is defined in *Webster's* as *either* "[o]ne of whom inquiries can be made as to the integrity, capacity, etc. of another" or "[a] written statement of the qualifications of a person seeking employment, . . . given by his previous employer or by someone familiar with his character, ability, experience, training, or the like". *Webster's New International Dictionary* 2092 (2d ed. 1953). The latter definition certainly covers unsolicited letters.

The only reported court decision that seems to have construed the term "letters of reference" also suggests that the term may or may not refer to unsolicited letters, depending on the context. In *Board of Trustees of Stanford Univ. v. Superior Court of Santa Clara County*, 174 Cal. Rptr. 160 (Ct. App. 1981), one issue was whether an employee who was suing the university for defamation was entitled to discover "letters of recommendation or reference to the university concerning [the employee], written when he was being considered for employment at the university". 174 Cal. Rptr. at 166.⁵

⁴ *Black's* does contain the following definition of "letter of recommendation":

"A writing whereby one person certifies concerning another that he is of good character, solvent, possessed of commercial credit, skilled in his trade or profession, or otherwise worthy of trust, aid, or employment. It may be addressed to an individual or to whom it may concern, and is designed to aid the person commended in obtaining credit, employment, etc." *Black's Law Dictionary* 1144 (rev. 5th ed. 1979).

Presumably, an unsolicited commendation would come within this definition. However, a "letter of recommendation" by definition is laudatory; a "letter of reference" need not be. Thus, the two terms are not synonymous, and the scope of the "letter of recommendation" definition cannot simply be imputed to the statutory term "letter of reference".

⁵ It is not clear whether any of the letters were in fact unsolicited. This point was not germane to the case.

Under a California statute, the employee was entitled to inspect his personnel file, except for "letters of reference". The statute did not define the term. The court wrote as follows about the meaning of the term:

"It is undoubtedly true that the phrase will often mean communications concerning the 'qualifications of a person seeking employment . . . given by someone familiar with them.' But just as often it will connote answers in writing from persons 'to whom inquiries as to character or ability can be made.' (See Webster's New Collegiate Dict. (7th ed. 1972) 'reference', p. 719.)" 174 Cal. Rptr. 167-68.

In sum, the term "letters of reference" is uncertain. Intrinsically, it neither embraces nor excludes unsolicited letters.

Thus, we must look beyond the language itself to the structure and apparent purposes of the PIA. In that light, we conclude that the exemption for "letters of reference" applies to solicited and unsolicited letters alike.

One evident purpose of the PIA is to balance the right of public access with the protection of personal privacy. "[T]he provisions of this act shall be construed in every instance with the view toward public access, unless an unwarranted invasion of the privacy of a person in interest would result therefrom." Article 76A, §1A [SG §10-612(b)]. The exemption for "letters of reference" serves this purpose, because letters of this type—whether solicited or unsolicited—often contain private information about the subject of the letter.⁵

Indeed, if an unsolicited letter about an employee's qualifications is incorporated into that employee's personnel file, the letter in that file would not be available for public access, because the custodian may not disclose "personnel files". Article 76A, §3(c)(iii) [SG §10-616(h)]. The employee's privacy interests are thereby protected. It is difficult to see why the General

⁵ The federal Freedom of Information Act contains no comparable exemption. A letter of reference must be disclosed unless its disclosure would result in a "clearly unwarranted invasion of personal privacy". 5 U.S.C. §552(b)(6). See *Philadelphia Newspapers, Inc. v. Department of Justice*, 405 F.Supp. 8 (1975). The General Assembly's express inclusion of a blanket "letters of reference" exemption suggests its intention to protect letters that might be disclosable under the federal standard.

Assembly would have intended a different result when an unsolicited letter concerns the qualifications of a prospective employee.

A second purpose that we may reasonably ascribe to the "letters of reference" exemption is the furthering of candor in the selection process. Those who are inclined to write about the qualifications of a prospective State or local government appointee are more likely to be plainspoken if their letters are not made publicly available. Again, this goal of increased candor applies to solicited and unsolicited letters alike.⁷

We find support for this latter point in the law of defamation. "It is an established general rule that a communication respecting the character of an employee or former employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a definite interest therein, and this is true even though the communication contains a charge of crime." 50 Am.Jur.2d *Libel and Slander* §273 (1970).⁸ Under this rule, a defamatory letter of reference does not give rise to a damage action unless the letter is not only false but also sent with actual malice. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 599 (1976).

⁷ It can be argued that someone who writes an unsolicited letter about a prospective appointee to a prominent body like the WSSC has no expectation of confidentiality. That may often be true. However, even some writers of solicited letters of reference are indifferent about subsequent disclosure. The General Assembly has evidently made a judgment that it wishes to protect the entire class of "letters of reference", without differentiation as to expectations of confidentiality.

Should the General Assembly decide to change the law in this regard, one possible model is the federal Buckley Amendment, governing access to educational records. Under this statute, access may be denied to certain "confidential letters and statements of recommendation". 20 U.S.C. §1222g(a)(1)(B)(ii). The only elaboration of the term "confidential" is a regulation that describes these letters as "solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality". 45 C.F.R. §99.12(a)(2)(i).

⁸ The qualified privilege extends to "persons [who] have a *bona fide* belief that they owe a moral or social duty to inform a new or prospective employer about an employee". *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 68-69 (1975), *aff'd.*, 276 Md. 580 (1976). Certainly citizens who write unsolicited letters about prospective appointees to public office are carrying out their social duty.

The reason for the development of this qualified privilege at common law is similar to the policy that in part underlies the "letters of reference" exemption in the PIA: the public interest that requires protection of candor in those communications. See *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 67-68 (1975), *aff'd*, 276 Md. 580 (1976).

Thus, it is especially noteworthy that the Court of Appeals has expressly applied the qualified privilege to even *unsolicited* communications concerning a prospective employee. In *Fresh v. Cutter*, 73 Md. 87 (1880), an employee sued his former employer for slander. The former employer, "voluntarily and without being requested", told the plaintiff's prospective new employer that the plaintiff was a thief. 73 Md. at 91. To the objection that voluntary statements are outside the scope of the qualified privilege, the Court responded: "[T]he mere fact of the communication being voluntarily made, does not necessarily exclude it as a non-privileged communication; for a publication warranted by an occasion apparently beneficial and honest, is not actionable in the absence of express malice." 73 Md. at 93.

We think it clear that this reasoning would apply to volunteered statements about the qualifications of prospective appointees to public positions. See *Token v. Pollak*, 405 N.Y.S.2d 1, 7 (N.Y. 1978) (voluntary communication to judicial selection committee is qualifiedly privileged).⁹ And, because the PIA exemption for "letters of reference" serves similar public policy objectives, we conclude that such unsolicited statements are intended to be included within the exemption.

III

Conclusion

In summary, it is our opinion that the provision of the Maryland Public Information Act that requires the custodian to deny requests for inspection of "letters of reference" applies to

all letters—solicited and unsolicited—that concern a person's fitness for public office or employment.

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⁹ See note 8 above.