GAHAN AND STIRLING

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94061** **Decision Ref: D01994**

Participants:

Eileen Marie Gahan
Applicant

- and -

City of Stirling
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - clause 8(2) - refusal of access - documents of an agency - file notes of verbal reference written by an officer of the agency - personal information about applicant - confidential communications - prejudice future supply - public interest - whether matter exempt under clause 8(2).

Freedom of Information Act 1992 (WA) ss. 30; 63(1); 63(2); 68(2); 72(1)(a); 75(1); 102(1); Schedule 1 clauses 3, 8(2), 8(4).

Re Simonsen and Edith Cowan University, (Information Commissioner (WA), 13 July 1994, unreported).
News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR 550.
Re De Souza-Daw and Gippsland Institute of Technology (1987) 2 VAR 6.
Re Kamminga and Australian National University (1992) 15 AAR 297.
Ryder v Booth [1985] VR 869.

DECISION

The decision of the agency of 11 May 1994 to deny access to the document entitled *Reference Check* on the grounds that it is exempt under clause 8(2) of the FOI Act, is set aside. In substitution thereof it is decided that the document is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21st October 1994

REASONS FOR DECISION

1. This is an application for review by the Information Commissioner arising out of a decision of the City of Stirling ('the agency') to refuse Ms Eileen Gahan ('the applicant') access to a printed form entitled *Reference Check* containing hand written notes of a conversation between the personnel officer of the agency and a referee nominated by the applicant when she was seeking employment in the agency.

BACKGROUND

2. The applicant is a former employee of the agency. On at least two occasions since leaving the agency she has unsuccessfully applied for vacant positions with the agency. On 22 February 1994 she applied to the agency under the *Freedom of Information Act 1992* ('the FOI Act') for access to all documents relating to her employment with the agency and subsequent applications for re-employment.

3. On 30 March 1994 the agency provided the applicant with edited copies of the documents requested. Exemption was claimed for the edited matter under clause 3 (Personal Information) and clause 8(2) (Confidential Communications) of Schedule 1 to the FOI Act.

4. On 21 April 1994 the applicant sought internal review of the agency's decision to provide access to copies of some of the documents. She also claimed the agency had refused her access to other documents being copies of notes taken as a result of a telephone contact made with one of her referees and alleged that other documents relating to her application for the position of Accountant Collections in late 1987 had not been supplied to her.

5. On 11 May 1994 the applicant received a notice of decision from the internal reviewer Mr G S Bray, City Manager. He confirmed the initial decision to provide the applicant with edited copies of some of the documents. However, the level of editing was reduced to that which Mr Bray considered necessary to protect the identities of parties other than the applicant. Mr Bray also advised the applicant that the agency's records relating to her application for the position of Accountant Collections had been disposed of in accordance with retention and disposal guidelines followed by the agency.

6. On 25 May 1994 the applicant applied to the Information Commissioner for external review of the decision of Mr Bray of 11 May 1994. In that application she complained of 4 specific matters:

   (i) the excessive editing of one document showing numeracy scores which the applicant claimed could have been provided with minimal editing;
   (ii) the failure to provide the records relating to the applicant's application for the position of Accountant Collections in October/November 1987;

(iii) the refusal to provide a copy of a document containing notes taken as a consequence of a conversation with a referee; and

(iv) a lack of assistance from the agency including omission of information in relation to appeal rights to the Information Commissioner.

REVIEW BY THE INFORMATION COMMISSIONER

7. On 3 June 1994 I advised the agency and the applicant that I had accepted this complaint for review. In accordance with my authority under ss.75(1) and 72(1)(a) of the FOI Act I required the agency to produce the originals of the disputed documents for my inspection together with the agency's FOI file dealing with this application. I also sought additional reasons to justify the exemptions claimed and a copy of the authority under which the agency claimed to have destroyed documents.

8. The fourth matter of the applicant's complaint, about the lack of assistance provided to her by the agency and the agency's alleged omission in respect of her appeal rights, did not appear to have disadvantaged the applicant in this instance, as she had followed the procedures for applications under the FOI Act. The applicant discovered her review rights and lodged her complaint to this office within time. It was not a matter, therefore, that required to be dealt with as part of her complaint. However, it indicated a need for some education for the agency as to its statutory obligations. Accordingly, that matter was referred to staff in the *Advice and Awareness* sub-program for attention.

9. My office is structured in two sub-programs, a *Review and Complaint Resolution* sub-program and an *Advice and Awareness* sub-program. These two sub-programs deal with the functions of the Information Commissioner prescribed in ss.63(1) and (2) of the FOI Act. The *Advice and Awareness* sub-program has, as one of its prime objectives and functions, the responsibility of ensuring that agencies are made aware of their responsibilities under the FOI Act. Where concerns such as those identified by this applicant arise they are addressed by members of the *Advice and Awareness* sub-program independently of those of my staff of the *Review and Complaint Resolution* sub-program, who deal with complaints, so that the integrity of the review function is not compromised.

10. On 10 June 1994 the agency responded to my request for additional reasons to justify the exemptions claimed. However, the agency's response indicated to me that the agency did not fully appreciate the extent of its statutory obligations under the FOI Act, including the duty imposed by s.68(2) to advise third parties of a complaint to me and the requirement of s.30 to provide an adequate statement of reasons. In almost all of my formal decisions, I have found it necessary to comment on the generally low level of compliance with these statutory requirements by State and local government agencies whose decisions have been the subject of a complaint to me. As a result, when dealing with a complaint, it often becomes necessary for me to seek further and better reasons from agencies to justify the editing of documents or the refusal of access to

documents and to request the preparation of a schedule that lists and describes the documents in dispute.

11. This information is essential for the performance of my functions and it remains of concern to me that some agencies will not take the initiative in the first instance and adopt what must be accepted as a good administrative practice, namely, listing and describing each of the discrete documents identified by it as coming within the ambit of an access application. As I have said before, the preparation of a schedule of documents early in the process, rather than later would assist agencies to provide proper reasons for decision in accordance with their obligations under s.30.

The first matter of complaint.

12. The applicant claimed that the editing in one of the documents supplied to her by the agency was excessive. The document is a matrix of scores for a numeracy test which all applicants for the position of Accountant Collections had completed in 1994. It was the applicant's view that only the names of third parties referred to in that document required deletion, not their scores, as this information would enable her to compare her interview performance with that of other applicants. In my view, this suggestion was reasonable and the agency subsequently agreed to provide the applicant with a copy of the document containing the scores but with the names of third parties deleted. The applicant accepted this form of access and did not pursue this matter of complaint.

The second matter of complaint

13. The agency provided me with a copy of its Retention and Disposal Policy and extracted pages of guidelines relevant to Personnel Records. The agency said that this guide has been in operation since August 1986. The agency further advised me that it had been the practice of its Human Resources Department to dispose of records pertaining to positions vacant and the selection process, two years from the date of interview. Although the agency said it no longer held the documents sought by the applicant, the applicant identified an agency file number which she claimed would be likely to contain relevant documents. The agency subsequently advised me that the numbered file identified by the applicant contained administrative correspondence relating to the filling of vacancies but that it did not contain personal information about the applicant. The agency explained that it was normal practice for information about individual applicants for positions to be transferred from that file to an alphabetical index system. The agency said that it appeared that the applicant had been provided with documents containing personal information from this index system. When this explanation was conveyed to the applicant she did not dispute the account of the process provided by the agency.

14. However, the agency did supply me with a copy of a report relating to the filling of the position of Accountant Collections in 1987 which had not previously been

provided to the applicant. The agency subsequently agreed to supply the applicant with a copy of this document from which personal information about third parties had been deleted. The applicant accepted this edited document and did not pursue her complaint on this point.

The third matter of complaint.

15. The applicant maintained her claim that she was entitled to an edited copy of the third document, being file notes taken as a consequence of a conversation with a referee, recorded in a document entitled *"Reference Check"*. This document, for which the agency maintains its claim for exemption as a confidential communication under clause 8(2), is the only document remaining in dispute after the review process.

THE EXEMPTION UNDER CLAUSE 8(2)

16. In its letters of 30 March and 11 May 1994 to the applicant , the agency relied on clause 8(2) to justify the non-disclosure of the *"Reference Check"*. This clause contains two parts and the agency must address both requirements if the exemption is to be established. The exemption provided by clause 8(2) is also limited by a "public interest test", provided by clause 8(4). Clause 8(2) and 8(4) provide as follows:

> ***"8. Confidential communications***
>
> ***Exemptions***
>
> *(1) ...*
>
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on Exemptions***
>
> *(3) ...*
>
> *(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

Clause 8(2)(a) - Is the document a confidential communication?

17. On 28 June 1994, in support of the claim for exemption, the agency provided me with a copy of a memorandum received from the referee concerned. In that document the referee confirmed the referee's understanding of the confidentiality of the referee's verbal advice to the agency. I accept, from my examination of the referee's memorandum that the referee understood that the information was given by the referee to the agency, in confidence.

18. I also accept the agency's claim that it received the information in confidence. The *"Reference Check"* is a printed agency form, containing a notation that indicates that the information is provided in confidence and for a limited purpose, by agreement between the referee and the officer who carried out the reference check. The agency submitted, and I accept, that the *"Reference Check"* is completed by staff in the agency when referees are contacted by telephone, in accordance with usual practices within the agency relating to staff selection, including the practice of restricting access to documents of this nature. These staff selection practices are described in policy documents provided to me relating to Human Resource Management in the agency.

19. Therefore, I find part (a) of clause 8(2) to be established, namely that disclosure would reveal information of a confidential nature obtained in confidence. However, as I have said, to establish the exemption, part (b) of clause 8(2) must also be satisfied.

Clause 8(2)(b) - Prejudice to future supply

20. As I stated in my reasons for decision in *Re Simonsen and Edith Cowan University*, (13 July 1994, unreported), the Concise Oxford Dictionary defines "prejudice" as meaning, *inter alia, "harm or injury that results or may result from some action or judgement"*. The meaning of the phrase "could reasonably be expected to prejudice" was considered by all the judges of the full Federal Court in *News Corporation Limited v National Companies and Securities Commission* (1984) 57 ALR 550. In that case, Woodward J. said, at page 561:

> *"...I think that the words "would, or could reasonably be expected to...prejudice" mean more than "would or might prejudice". A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring...In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draughtsman, it is in that general sense that the phrase should be read."*

21. Once it is established that a document is a confidential communication of the type that is described in clause 8(2)(a), the three elements of part (b) of that clause must also be satisfied to establish a *prima facie* claim for exemption. Those three elements are:

(i) there must be an expectation of prejudice (harm or injury) to the future supply to the agency of information of the general class or character under consideration in this case;

(ii) it must be **reasonable** to expect that degree of harm or injury;

(iii) the expected harm or injury must result from the disclosure of the document.

22. In my view, the words *"that kind of information"* in part (b), when considered in the context of the matter before me, relate to frank comments given verbally by a referee about an applicant's work history .

23. It is also my view, that the phrase "*could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency*" is not to be applied by reference to whether the particular confider whose confidential information is being considered for disclosure could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of sources available or likely to be available to the Government or an agency.

24. Applying these tests to part (b) of clause 8, in my view, the question that should be asked by the agency is: "Is it reasonable to expect that disclosure of this document would pose more than a possibility or small risk of harm in the future, to the supply of verbal references to this agency?".

THE AGENCY'S ARGUMENTS

25. The agency is concerned to ensure that its usual practice of approaching referees informally via the telephone, to obtain "frank" comments about an applicant's work history, will not be disrupted. In a letter to me dated 8 June 1994, the agency claimed that *"[c]omments provided by referees generally in a telephone conversation are sought by Council staff in confidence and for the limited purpose of staff selection only. If this was not the case, the referees would be reluctant to provide information truthfully and openly about applicants."* Despite the agency's claim that referees would be reluctant to provide information truthfully and openly about applicants, the agency provided no evidence to substantiate that claim.

26. On 24 June 1994, I advised the agency that the material in the agency's notice of decision to the applicant, and in the additional submissions provided to me by the agency, did not persuade me that clause 8(2)(b) had been satisfied and that, if the exemption is to be established, the onus was on the agency to justify its claim that the release of the document could reasonably be expected to prejudice the future supply of information of that kind to the agency.

27. In a further submission dated 27 June 1994, the agency claimed that the future supply of verbal reference checks would be jeopardised by the disclosure of this document. The evidence in support of this the agency said, was the statements made by referee in the memorandum to the agency, referred to in paragraph 17 above.

28. The agency claimed that, *"...had the referee known that the information supplied, would be made available to Ms Gahan, the referee would not have volunteered it."* The agency further claimed that *"...the effect of releasing details of this information ("Reference Check") will be to reduce the willingness of referees throughout local government to provide honest and reliable information as to the capabilities of prospective employees."* If this occurred, the agency said, it would affect its ability to select the most suitable employees. Finally the agency also claimed that the referee *"...would in the future, not be prepared to provide similar information to any potential employer. As a result this attitude will permeate and compound within the local government industry, very much against the public interest."* The agency provided no additional evidence to support the conclusions drawn by the agency from the referee's memorandum.

29. I have examined the referee's memorandum and I do not accept that the conclusions drawn by the agency are correct. In that memorandum, the referee said:

> *"I understand that Ms Gahan has requested that details relevant to her interview be released.*
>
> *Should a written interpretation of my verbal conversation with one of your officers be released I would be extremely disappointed and quite concerned.*
>
> *Matters of this nature, I have always understood to be made in the strictest confidence.*
>
> *It should be noted that I had quite a lengthy discussion with your officer and that the particular officer only wrote down points they believed to be relevant. These pointers could be taken completely out of context by another individual not knowing the full conversation.*
>
> *Should this information be released I would not provide verbal references in the future.*
>
> *I again express my concern and hope that this particular information remains confidential."*

30. In my view, it is clear that the referee was concerned about the possibility that a written interpretation of the referee's conversation with the officer of the agency might be released. The referee's stated concern was that the points noted by the officer of the agency could be taken completely out of context by another individual not knowing the full conversation. The referee said that should that

information (i.e. the written interpretation of what the referee said) be released, the referee would not provide verbal references in the future because the information recorded by the agency's officer as a result of the telephone contact is not a complete record of what was said during that telephone discussion.

31. On 28 June 1994, I received correspondence from the Executive Director of the Western Australian Municipal Association (WAMA) expressing concern about matters relating to this complaint. In that letter the Executive Director said:

> *"It has come to our attention that the Commission is intending to order the release of information regarding verbal reference checks to unsuccessful applicants (City of Stirling and E Gahan).*
>
> *As the peak body for Local Government we express our concern that releasing this information would prejudice future supply of any information of this kind throughout Local Government. The personnel officers group within Local Government is a small working community whereby an honest and accurate information flow is the very culture of the industry. Verbal reference checking is an integral process used to verify claims made by applicants within the industry. ...We have been advised that had the referee known that the information would be made available to the applicant, that information would not have been volunteered. The information was given in good faith, in the belief that it was given in confidence".*
>
> *In summary, should the Commission direct Local Government to release verbal reference checks, there will be a risk of encouraging a covert culture of information which will impede the industry's accountability to the public."*

32. Whilst the Executive Director of WAMA expressed his concern that releasing the information the subject of this complaint would prejudice future supply of any information of this kind throughout Local Government, he did not provide any evidence to substantiate that claim. What he did say was there will be a risk of encouraging a covert culture of information which will impede the industry's accountability to the public. In other words, the information would still be exchanged and provided, but in a different manner.

33. I also received similar correspondence from the City of Melville on 14 July 1994. In that letter the Acting Chief Executive Officer (CEO) of the City of Melville expressed his concerns that an undesirable precedent would be set by the release of this information. He said:

> *"As you might well be aware appointment to any position is made on merit, which includes experience, qualifications, work history and the standard of performance in previous employment.*
>
> *With industrial laws becoming so demanding, it is essential for employers to follow correct pre employment processes, which include reference checking.*

Should your order issue the risk of employing an unsuitable person could be greatly increased."

34. Again, however, the Acting CEO of the City of Melville did not say that the future supply of references checks would be prejudiced, nor did he provide any evidence to substantiate his claim that the release of the information, the subject of this complaint, would greatly increase the risk of employing an unsuitable person.

35. In order to place these concerns in context, I sought an explanation of the staff selection processes followed by the agency and a copy of any instructions relating to reference checks. The agency provided me with that information including answers to a number of questions about the procedures employed on the occasion on which the applicant was interviewed. A document entitled "Employment Procedures", which procedures the agency advised me are the employment procedures used by the officers of the agency, states, *inter alia,* that the panel will prepare a report following interviews which summarises each application and which recommends the most suitable applicant subject to reference checks and pre-employment medical examinations being carried out. Reference checks are to be carried out by the Personnel Officer or senior member of the selection panel. References should be recorded and the referee must be made aware that the information is obtained in strictest confidence.

36. The agency told me that referees are generally contacted after interviews have been completed and that not all nominated referees are contacted, as this depends on their availability. The agency also advised me that the purpose of contacting referees is to check facts relating to previous positions held by the applicant, specific criteria requested for the job, tasks previously performed, the quality of the applicant's work and the applicant's personnel administration records including sick leave, attendance records and the like. I was also advised that if a referee makes adverse comments about an applicant, or information supplied is contrary to that provided by the applicant, the panel will be contacted to discuss the situation. The agency claims that its recruiting process complies with Equal Employment Opportunity (EEO) requirements and that it provides the most appropriate methodology for recruitment of the most suitable staff. It also said that these procedures were followed on the occasion that the applicant was interviewed.

37. Members of my staff also met with representatives of the agency and an industrial advocate for the Chamber of Commerce and Industry of Western Australia on 15 September 1994. That meeting confirmed that the kind of information which the agency sought to protect consisted of frank and candid "off the record" comments to identify desirable and undesirable traits in potential employees. Following that meeting the agency sought time to prepare a written submission which addressed the requirements of part (b) of clause 8(2) in detail. I received that submission on 21 September 1994.

38. In that submission, signed on behalf of R A Constantine, Acting City Manager, the Acting City Manager said *"To satisfy the requirements of Clause 8(2)(b), you have asked me to advise how I arrived at the conclusion that the future supply of this type of information could be prejudiced by release of this particular document, and why I believe it to be so".*

39. The Acting City Manager then submitted that:

> *"1. Local government in Western Australia is by its very nature a small industry where people tend to know each other well.* [The agency provided an example to illustrate how difficult it can be for people in local government, given its convoluted makeup, to separate personal friendship from professional appraisal and, therefore, how important it is for people in local government to expect that any information given will not be disclosed to any person, particularly pre-employment checks.]...*Should people within the industry become aware that this type of information can be released, then personal loyalties may override professional detachment.*
>
> *2. Local Government relies heavily on people to carry out its obligations. The staff recruitment and selection process is an essential part of ensuring that organisational health is maintained. Any action which could seriously weaken the rigourousness of pre-employment screening therefore has serious consequences for the industry. Historically, many referees contacted by our Human Resources Department have indicated that they will not give references if they are recorded. Releasing this document will exacerbate the situation.*
>
> *3. Written references are often supplied by job applicants only if they are favourable to the person concerned. Referees will write a reference in the knowledge that an employee will read it and use it in support of an application and therefore will not be as candid as they may be when spoken to direct by the City. The City therefore needs to approach referees direct and rely on their honesty.*
>
> *4. I have asked other metropolitan local authority Chief Executive Officers who are frequently asked to supply verbal references as to whether or not they would continue to do so in the knowledge that the information obtained could be disclosed to applicants. Their responses and reasons for same, are attached.*
>
> *5. The person supplying the information...has advised he would not have done so in the knowledge that it could be obtained by the applicant...I do not wish to release an edited copy of the document...as suggested by you in your letter of 24 June 1994, as it would serve no purpose...*
>
> *6. Local authorities are not subject to the same recruitment guidelines that apply to State and Commonwealth government agencies, in particular any appeal process of a staff appointment. This is important*

> *as the ultimate authority to which a person may appeal to with respect to dealings of a municipality is to the Council itself. Councils as a corporate body are made up of individuals drawn from the community who may or may not be politically motivated and who (in most cases) do not have experience with respect to staff recruitment In order for the process to be properly carried out, and to avoid any possible "politicisation" of local authority organisations, elected representatives should not be involved in staff selection..."*

40. I was also provided with copies of the responses received by the agency from some metropolitan local authority CEO's, indicating their willingness or unwillingness to provide verbal reference checks in the future. This was done on what appears to be a pro-forma letter, formulated for that purpose and containing three possible reasons for why the respondent would not to supply verbal references in the future. Thirteen of the CEO's used this standard letter to respond to the agency. The possible reasons included concerns for physical safety, the possibility of vexatious litigation in the event that an applicant did not agree with comments and loss of rapport with employees with whom the referee would have to continue working in the event of an unfavourable reference being given. Eleven of the CEO's indicated that they would not be prepared to provide this kind of information in the future. These were East Fremantle, Cockburn, Armadale, Fremantle, Nedlands, Belmont, Canning, Cottesloe, Claremont, Kwinana and Mandurah. Three indicated that they would not be deterred from doing so. They were Peppermint Grove, Subiaco and Bassendean.

41. In his response, the General Manager of the Shire of Mundaring said that officers of the Shire would not freely answer questions posed because of concerns about litigation, industrial relations and personal safety and also stated that *"we would not give a verbal comment on any individual unless the person undertaking the reference check was well known to us.*". The Acting City Manager of the City of Armadale also expressed "*some reservation that a conversational reference should be translated at all into a written record without confirmation and verification of the referee.*".

THE APPLICANT'S SUBMISSION

42. During the course of my dealing with this complaint the applicant was provided with copies of the additional reasons for the agency's decision which had been provided to me. Subsequently, the applicant identified the public interest in accountability as the main factor in favour of disclosure. She said *"...the scope of accountability is not simply limited to financial accountability but encompasses all the decisions taken by the agency. This includes decisions taken with respect to staff selection and appointment."*

> *"To be fully accountable to the public for employment decisions taken all relevant facts considered by an agency in arriving at a decision must be*

available - to individual applicants at least. This clearly is in the public interest."

43. The applicant did not dispute the desirability of the practice of undertaking referee checks. In fact she recognised that the practice was widely used throughout the public and private sector and that the practice was entrenched, reciprocated and essential to prudent and good staff selection procedures. However, the applicant stated that what may change in the future is the way the enquirer records the information provided by a referee and that, in fact, a document of the information received may not even be created. The applicant suggests that if a document is created, it may simply be limited to the inquirer making a subjective assessment following contact with a referee and recording this as a "score" or on a pre-determined scale. The applicant was of the opinion that, if this occurred, it would be unlikely that any referee would discontinue to provide information in the future.

THE LAW

44. The consequences of releasing written referee reports under FOI has been considered by the Commonwealth and Victorian Administrative Appeals Tribunals with differing results.

45. In *Re De Souza-Daw and Gippsland Institute of Technology* (1987) 2 VAR 6, the Victorian Tribunal found that a confidential written report sent by a senior academic of an agency to an academic in another agency, regarding the suitability of a particular applicant for an appointment, was an exempt document under the Victorian equivalent of clause 8(2). The Tribunal found that disclosure would be reasonably likely to impair the ability of the agency to obtain similar information in the future because there could be considerable embarrassment and a break-down in personal relationships leading to a serious decline in the efficiency of the agency in which both the writer and the subject of the reference worked. The likelihood of future contact between the persons concerned was the influential factor in the decision.

46. In *Re Kamminga and Australian National University* (1992) 15 AAR 297, the full Commonwealth Tribunal considered whether access to six written referees' reports should be refused. In that case, the University sought to argue that referees would provide reports which were less frank and thus less helpful to selectors if they thought that the reports might be made available to the applicant. It was also argued by the University that less candid reports would lead to the selection of poorer quality staff and that it was in the public interest that the best staff be selected in order to maintain the high quality of staff at the University.

47. On the argument that disclosure of the written referees' reports would lead to the selection of poorer quality staff, the Tribunal, at p.302, said:

"...Even if the argument that disclosure would lead to less candid reports is accepted, it is also necessary to consider any way in which non-

*disclosure would be **adverse** to achieving the goal of selection of the best staff. The Tribunal considers that there may be cases where adverse comment is made on an applicant which is unfounded or out of context. The goal of selecting the best staff in such cases would be facilitated by allowing applicants access to the reports. When this matter was put to witnesses for the University they said that existing procedures, such as the use of multiple references nominated by the applicant, provided adequate safeguard. The Tribunal does not accept this opinion."*

48. In *Ryder v Booth* [1985] VR 869, the Full Court of the Victorian Supreme Court considered whether the Victorian equivalent of clause 8(2)(b) applied to medical reports provided in confidence to the State Superannuation Board. On the question of whether disclosure would be reasonably likely to impair the future supply of similar information, Young C.J. said, at p 872:

"The question then is, would disclosure of the information sought impair (i.e. damage) the ability of the Board to obtain similar information in the future. Put in terms of the present appeals this means that the question is, would the disclosure of the information damage the ability of the Board to obtain frank medical opinions in the future. It may be noted that it is the ability of the Board that must be impaired. The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in the future but with whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information "in confidence" at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not provide such information in the future. It is not sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s.55(2) of the Act."

49. Whilst the document the subject of the complaint before me is not a written referee report, I consider these comments to be relevant to the complaint before me. The *"Reference Check"* contains information about the applicant which was recorded by an officer of the agency as a result of a telephone discussion between that officer and one of two referees nominated by the applicant when she applied for a position with the agency.

50. The matter contained within the *"Reference Check"* appears to consist of frank comments about the applicant. However, the referee concerned claims that the referee had quite a lengthy conversation with the officer of the agency and that that officer only wrote down points which that officer believed to be relevant. The referee also claims that the *"Reference Check"* is a written interpretation of what the referee said, which could be taken completely out of context by an individual not knowing the full conversation. In the context of this complaint and the exemption claimed, the question is, as I have said at paragraph 24 above, whether disclosure of this document could reasonably be expected to pose more than a possibility of prejudice (i.e. harm or damage) to the ability of the agency to

obtain in the future, frank comments about an applicant's work history and performance.

FINDINGS

51. Based upon the material put to me by the agency, I accept that there are some officers within local government, including some CEO's of metropolitan local authorities, who may be unwilling to provide verbal reference checks on the skills, abilities and work history of job applicants. However, taking account of the other responses received, I also accept that there are others who would not be so deterred.

52. There is limited evidence before me that the CEO's who responded to the agency are frequently asked to supply verbal references. The only evidence is that the agency claims that they are. Paragraph 2 of the pro-forma letter referred to in paragraph 41 said *"The City has asked me to indicate whether or not I would be prepared to give verbal reference checks in the future with the knowledge that any record made of the check could be disclosed to the applicant for the job concerned."* The thirteen respondents who used the pro-forma letter indicated their responses by ticking a box next to a response. If that response was that he or she would not be prepared to continue to do so, one or more of the three reasons referred to in paragraph 40 was either circled, crossed out or left unmarked. I have indicated at paragraph 40 what those responses were.

53. In my view, the responses received from the CEO's are not strong evidence in support of the agency's claims for two reasons. Firstly, the document, the subject of the complaint before me, is not a record of a verbal reference check made by an officer of the agency with a CEO. Secondly, it is apparent from my examination of the questions and responses that the CEO's were not asked whether they would decline to supply verbal reference checks under any circumstances in the future. The CEO's responses were addressed to the question asked of them by the agency.

54. In addition, there are 142 local government agencies in Western Australia. The fact that eleven CEO's from metropolitan local authorities have indicated their reluctance to provide verbal reference checks in certain circumstances is not, in my view, without more, persuasive evidence which would lead to a finding that the disclosure of this document could reasonably be expected to prejudice the future supply of such information from the substantial number of sources available or likely to be available to the agency.

55. I also find the agency's argument that the referee's memorandum was clear evidence that the future supply of verbal reference checks would be prejudiced unconvincing. As I said at paragraph 29, I am not persuaded that the conclusions drawn by the agency from the referee's memorandum are valid. Further, in my view, a memorandum from an individual referee is not a strong basis upon which it is possible to reach a conclusion that the future supply of verbal referees from all sources available to the agency would be prejudiced.

56. In the matter before me the agency has claimed that the disclosure of verbal reference checks would cause referees to provide verbal reports which were less frank, and thus less helpful to selectors, if they thought that the reports might be made available to the applicant. The agency also argued that less candid reports would lead to the selection of poorer quality staff and that the release of this information would adversely affect the City's ability to attract the best possible applicants for positions. This in turn would impinge upon the City's ability to provide the best possible service to the community and ratepayers.

57. The agency also based its claim for exemption on the need to obtain access to honest and candid comments about applicants. The "candour and frankness" argument has been consistently rejected by the Commonwealth Administrative Appeals Tribunal in the context of FOI appeals. Whilst I accept that the agency's views about the effect of disclosure may be genuinely held, I am unable to accept that they are correct. I also endorse the Commonwealth Tribunal's comments in *Re Kamminga* that even if the argument that disclosure would lead to less candid reports being provided is accepted, there may be cases where adverse comments that are recorded about an applicant, may be unfounded or out of context.

58. Notwithstanding the agency's claims to the contrary, I am not persuaded that officers in local government would be less candid or truthful than their counterparts in State and Commonwealth Government. There is no evidence put before me by the agency to persuade me that officers in local government would provide less candid, frank and truthful comments that are supported by factual records relating to a person's work history.

59. Further, in this instance, the documents provided to me by the agency, and in particular, the report of the selection panel upon the interviewees, suggest that the comments of the referee were not decisive in the selection process. Indeed, that report gives no indication that the referee's comments were taken into account by the panel or even that the panel contacted the applicant's referees. I am not, therefore, persuaded that had the selection panel not obtained those comments, or had the comments been any less frank, the selection panel would not have selected the best person for the job. By way of comment, I make the observation that where a referee is an applicant's former manager or supervisor, comments would, or should, not be made that have not already been made by the manager or supervisor to the employee concerned.

60. The crux of the requirement in clause 8(2)(b) is the ability of the agency to obtain similar information to that recorded in the document in dispute, in the future. The disputed document is, on the evidence of the referee who provided the verbal reference, a selective record of a long conversation between two people about the applicant. The agency has not claimed that the document is an exact or a complete record, nor to my knowledge, has its accuracy been verified by the referee.

61. The evidence before me is that as a matter of practice this agency contacts nominated referees to seek information about an applicant's work history. The agency has not claimed that it will discontinue its usual practice of approaching referees informally via the telephone to obtain verbal reference checks in the future. In my view, the agency will still be able to obtain frank comments given verbally by a referee about an applicant's work history, but the manner in which such information is recorded by the agency may change. The agency has not convinced me that its ability to obtain such information in the future is likely to be prejudiced by the release of this document.

62. Whilst I accept the agency's claim that local government is a small industry, where people know each other well, I do not accept that this fact necessarily creates a situation such as existed in *Re De Souza-Daw*. In that matter, the fact that the referee and the subject of the reference would continue to work in the same agency was a factor in the decision. In the matter before me that is not the case, as the referee and the applicant work in separate agencies. Although some future contact between applicants and referees may be likely to occur, it will not always be the case that they work together. In addition, not all applicants for vacancies within local government will necessarily be employed only within local government. For example, in this matter, there is evidence in the documents that some of applicants came from outside local government.

63. The onus to establish that its decision to deny the applicant access to the document was justified lies on the agency under s.102(1). Taking into account the correspondence from WAMA and the material provided to me by the agency and by the applicant, I am not satisfied that the expected prejudice to the future supply of such information contained in the document entitled *Reference Check,* is reasonable. Accordingly, I find that this document is not exempt under clause 8(2)(b).

64. Finally, as discussed in paragraph 16, clause 8(2) is limited by a "public interest test", provided by clause 8(4). However, as I have found that the document is not exempt from disclosure under clause 8(2)(b), it is unnecessary for me to consider whether, on balance, the disclosure of the document would be in the public interest.

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