

EDINBURGH NAPIER UNIVERSITY

GUIDANCE NOTE ON REFERENCES

Disclaimer: this Guidance Note is intended to provide basic guidance to Edinburgh Napier University staff on the subject of references. It does not constitute legal advice and is not to be relied on as such. Edinburgh Napier University is not liable for any errors or omissions.

Introduction

This Guidance Note has been drafted using JISC guidelines for the HE and FE sector and published guidance on case law, to provide basic guidance to Edinburgh Napier University staff on the subject of references. If you are in doubt about any of the details or wish to discuss an individual case, please contact Human Resources (HR) or your Dean of School or Director of Service in the first instance and then the Information Governance Manager.

The two principal aims of a reference are to provide facts and opinions, where requested about an individual's suitability. The following should be observed therefore when producing references, whether internal or external and for present and past employees and students.

1. The Legal Position

- A reference can be the subject of an action by an employee or ex-employee for discrimination¹ (including victimisation) and defamation, malicious falsehood and/or negligent misstatement
- A referee has a duty of care in the preparation of a reference. It must not be misleading. Employees can sue employers for damages for failure to exercise reasonable care
- Case law has established that where there is negligence, actual loss of an appointment does not need to be proved, only that a reasonable chance of employment has been lost and thereby loss has been sustained
- A duty of care may also be owed to the recipient of the reference and the latter may be in a position to sue for negligence e.g. where a glowing reference has been given for an employee whose performance had not been satisfactory and that person goes on to perform badly in their new job.
- A failure to give a reference may also give rise to a claim that the University has broken the implied term of mutual trust and confidence, in the employment contract
- Data Protection Legislation applies to references

2. General Good Practice Advice

A reference must be:

2.1 True

- 2.1.1 You should be able to support the facts by professional evidence and/or examples. If in doubt leave it out

¹ On the grounds of sex, age, disability, sexual orientation or faith beliefs

- 2.1.2 Your opinions should be defensible and justifiable on reasonable grounds i.e. they are based on your honest belief and could not be regarded as 'malicious or perverse'

2.2 Accurate

- 2.2.1 A reference must be factually correct and state within what parameters it is given e.g. whether it is written on behalf of the University or in a personal capacity
- 2.2.2 Do not make statements which you are not qualified to make
- 2.2.3 If you are asked to express an opinion on an issue about which you have limited knowledge e.g. honesty and integrity, a suggested response is 'I know of nothing that would lead me to question X's honesty.'

2.3 Fair

- 2.3.1 Academic staff should indicate to students whether the reference they write will be based on the factual record of the student's file or will only be provided with the prior permission of the member of staff.
- 2.3.2 Only provide information that is requested, unless the exclusion of certain facts could lead to the information being misinterpreted.
- 2.3.3 Where information requested relates to [special category \(sensitive\) personal data](#) e.g. sickness or mental health problems or absence as a result of either, such information **must not** be provided without the express written consent of the subject. (See section 5. on Data Protection below). A suitable response might be 'I am not in a position to comment on X's health/sickness' - see also 4. below.
- 2.3.4 Where you receive a request for a reference from a potential employer and you are unable or unwilling to give a reference, you must take care in communicating refusal, not to convey/imply a negative reference and thereby disclose personal data.
- 2.3.5 A refusal to provide a reference may, in certain circumstances, give a former employee some grounds to pursue a claim for discrimination, an act of detriment or victimisation.
- 2.3.6 If the subject of the reference has been subject to disciplinary action you **must** ensure you have consulted 7.3 and 7.4 below and taken the recommended advice.

3. Do:

- 3.1 Use direct and simple language and avoid ambiguous or coded statements
- 3.2 Include a disclaimer clause but remember that this does not discharge your duty of care. Suggested wording is 'In accordance with Edinburgh Napier University's normal practice this reference is given in good faith and in confidence, without legal liability on behalf of the author or Edinburgh Napier University.'
- 3.3 Mark all correspondence 'Strictly Private and Confidential – for the attention of the addressee/committee/panel only', state that the reference is given only for the benefit of the addressee(s) and must not be disclosed to, or relied on by, any third party – see also 6. below.
- 3.4 Consider the most secure postal method of sending it; or alternatively send the reference addressed as above in an [encrypted email](#).
- 3.5 If possible discuss the reference with the subject so that there is no doubt about what was said and consider whether to give him/her a copy.
- 3.6 Keep and securely file copies of any references provided, written and verbal for a period of one year

4. **Do not:**

- 4.1 Provide an unsolicited reference i.e. where a person has not, to your knowledge, cited your name as a referee.
- 4.2 Give telephone or verbal references if you can avoid this; see 5.5 below for further guidance.
- 4.3 Produce a reference given in a personal capacity on University headed notepaper or email it from a University account.

5. **Data Protection Legislation [GDPR and DPA 2018] (the Legislation)**

- 5.1 University employees, whether academics or senior members of professional services staff, have an implied duty to provide a reference for students and members of staff, whose careers they are in a position to influence. Since this will involve the disclosure of personal data in the form of facts and opinions about the data subject, the Legislation applies.
- 5.2 In addition to standard references for employment or placement at another academic institution, University staff may provide references for internal candidates regarding their employment or for promotion. References in the form of 'academic peer review' may also be provided by external academics relating to the promotion or appointment of an academic with whom they may have a close working/research relationship.
- 5.3 In general terms the data disclosed for a student should be limited to his/her period of study, marks and/or degree class received, attendance mode and status. Further disclosures are likely to be irrelevant and excessive.
- 5.4 Emailed requests for references should not be responded to by email, unless the response containing the reference has been encrypted. Checks should be made to verify the identity of the person/organisation requesting the reference and then if encrypted email is not being used, the reference should be provided in hard copy as referred to in 3.5 above.
- 5.5 Telephone/verbal references are sometimes acceptable where specific consent has been given by the subject of the reference to provide information at short notice. In such circumstances they should be handled in a similar manner to written references and the referee **must** exercise caution and reserve the right not to answer certain questions, particularly where these relate to sensitive personal data. See: 7.1.below with regard to an oral reference; and 2. above and 7. below for further guidance.

The procedure which should always be followed is to:

- confirm the identity of the enquirer by taking the minimum precaution of noting a number and calling them back preferably via their main switchboard
- limit the information provided to essential facts
- keep a record of the reference that was provided

However it is **strongly** recommended that all such requests are followed up by providing a written version of the reference and sending it as prescribed in 5.4 above.

6. **Third parties' reliance on references**

References should be marked 'strictly private and confidential' to make it clear that they are intended only for the person to whom the reference is being given (the new employer for

example), and must not be disclosed to, or relied on by, any third party. Staff may wish to include a specific statement in the reference that no third party is to rely on it.

7. Special Category (sensitive) personal data

7.1 Although most references can be written without specific consent, any questions which relate to sensitive data i.e.

- physical/mental health
- racial/ethnic origin
- political opinions
- religious beliefs or similar
- trade union membership
- sexual life
- commission/alleged commission of an offence
- criminal convictions

must either be avoided or answered with the subject's **explicit** written consent in every case. Blanket consent is not acceptable. Further information about employees' health is available in Part 4 of the UK Information Commissioner's [Employment Practices' Code](#).

The legal basis on which a disclosure of data relating to sickness absence may be made was considered in a recent Employment Appeal Tribunal (EAT) case. It was held that the provision of a supplementary oral reference, which referred to sickness absence amounted to disability discrimination and similarly, that the prospective employer's decision to reject the employee on the basis of that reference was unlawful.

ADVICE MUST BE TAKEN FROM HR OR THE DEAN OF THE RELEVANT SCHOOL BEFORE ANY SUCH DISCLOSURES ARE MADE.

7.2 Disclosure of a disability

Where an individual refuses to consent to disclosure of a disability in a reference, the referee must decide if they can write a reference under those circumstances, reflecting their duty of care to both the individual and the person or organisation requesting the reference. If a referee feels that they cannot meet their duty of care to either party under those circumstances, they should inform the individual that they will be unable to write a complete reference without referring to the disability, and that this would not be in the best interests of either the individual, the person or organisation requesting the reference, or the University which is providing the reference. If consent is still not given, no reference should be written.

7.3 Disclosure of disciplinary action

Staff **must** always carefully exercise their judgement when writing references, bearing in mind the legal and data protection implications referred to above.

In general and subject to 7.4 below, disciplinary matters should not be explicitly mentioned in either a staff or student reference **unless** this is specifically asked about in a reference request **and** it is considered to be both relevant and advisable in all the circumstances to refer to disciplinary action taken. Lesser instances of disciplinary action taken against students should **not** normally be referred to beyond graduation.

7.3.1 Where a reference is being provided for a student studying on a programme which is governed by a professional code of conduct determined by a statutory body e.g. the Nursing

and Midwifery Council, the University's duty of care to patients and other vulnerable groups is paramount in these circumstances. References in such cases will be drafted to incorporate matters of concern which may, in the judgement of the relevant School, be serious enough to compromise the safety of vulnerable people.

IN THESE CIRCUMSTANCES THE DEAN OF SCHOOL OR HIS/HER NOMINEE MUST ALWAYS BE CONSULTED BEFORE THE REFERENCE IS GIVEN.

7.4 Disclosure of serious misconduct

There are two important issues of conduct which should be considered for inclusion and not normally omitted when writing a reference i.e. where there has been:

- a finding of **serious** misconduct e.g. forging University documents or theft
- other criminal behaviour that **fundamentally** affects a person's suitability for employment or further study

Where a staff member or student has been the subject of disciplinary proceedings for a matter of serious misconduct and a finding made, they should be informed that this and any action taken may be referred to in a reference. More serious criminal issues might, in relation to the Rehabilitation of Offenders Act, be treated as 'spent' five years after the occurrence unless the context (e.g. working with children or professional standards) suggests otherwise.

ADVICE MUST BE TAKEN FROM HR OR THE DEAN OF THE RELEVANT SCHOOL BEFORE ANY SUCH DISCLOSURES ARE MADE.

7.4.1 References for former employees

In a Court of Appeal case in 2011, it was decided that in the case of a reference for a former employee, an employer may flag up its concerns about a previous employee. This will not automatically mean that the reference is unfair or negligent, so long as it is true, accurate and fair and that it is not misleading when considered overall, even when those concerns had not previously been raised with the employee.

ADVICE MUST BE SOUGHT FROM HR IN ANY SUCH CASE BEFORE A REFERENCE IS PROVIDED.

8. References provided by the University

8.1 If someone asks for a copy of a confidential reference, this does not have to be provided because of an exemption in the DPA 2018(schedule 2, part 4(24)). This includes confidential references provided in relation to:

- (a) the education, training or employment (or prospective education, training or employment) of the data subject,
- (b) the placement (or prospective placement) of the data subject as a volunteer,
- (c) the appointment (or prospective appointment) of the data subject to any office, or
- (d) the provision (or prospective provision) by the data subject of any service.

8.2 Notwithstanding this exemption, the UK Information Commissioner (ICO) advises that a referee 'may choose to provide the information' particularly where 'the reference is

wholly or largely factual in nature or if the subject is aware of an appraisal of their work or ability.’

8.3 In addition in some circumstances an employer may be required to disclose a reference e.g.

- where required to by a Court or enforcement order
- in defending a claim for damages

9. References received by the University

9.1 References received from another person or organisation are also subject to the exemption referred to in Section 8 and therefore a request can be refused.

9.2 However you may still to choose to release the reference, the ICO advises that account should be taken of factors such as:

- whether the referee was given express assurances of confidentiality
- any relevant reasons the referee gives for withholding consent
- the potential or actual effect of the reference on the individual
- the fact that a reference must be truthful and accurate and that without access to it the individual is not in a position to challenge its accuracy
- that good employment practice suggests that an individual should have already been advised of any weaknesses; and
- any risk to the referee

9.3 Any refusal to disclose a reference received in confidence must be supported by cogent reasons and if in doubt HR or the Information Governance Manager should be consulted. It should be noted that disclosure of the identity of an organisation, but not an identifiable individual as a referee, does not breach the terms of the Legislation.

9.4 All references received, including those for unsuccessful applicants, should be retained for one year after completion of appointment and then securely destroyed.

10. Online references

The University is increasingly being asked to upload references directly to an online form. You must first establish that the request and the site to which you have been directed as a member of staff, are [genuine](#) and you are not about to upload personal data to a scam site. You should then consider the significant data protection issues associated with this which include:

- [where the site is hosted](#) i.e. within or outwith the European Economic Area (EEA);
- the security of the site i.e. does the url start with http:// (not secure) or https:// (secure)
- the Terms and Conditions of the site
- confidentiality i.e. who/how many will be able to access the reference
- who the reference will be shared with
- how you can keep a copy; and
- how long the reference will be retained online

If you are unsure about any of the above then the site must **not** be used and an alternative secure method of providing the reference must be considered e.g. [encrypted email](#).

11. Internal references

There may be circumstances where a reference is written on behalf of a data subject by an individual in one department of the University, to be used by an individual in the same or another department of the University. The ICO considers internal references to be 'management data' rather than references and that therefore disclosure may be required.

12. Complaint about a University reference

If you receive a complaint about the content of a reference you have provided, you must discuss this with your Dean of School or Director of Service and then inform HR or the Information Governance Manager as necessary **before** responding.

13. Further Information and guidance

- The University's [Data Protection Code of Practice](#)
- Contact your HR Client Partner or the Information Governance Manager

Governance Services/revised March 2019