



EDINBURGH NAPIER UNIVERSITY

GUIDANCE NOTE ON REFERENCES

1. Introduction

This note is to provide basic guidance on the subject of references generally and compliance with the requirements of the Data Protection Act 1998, in particular. It has been drafted using JISC guidelines for the HE and FE sector and published guidance on case law. If you are in doubt about any of the details or wish to discuss an individual case please contact Human Resources or your Faculty/ Service Data Protection co-ordinator in the first instance and then the Data Protection Officer.

The two principal aims of a reference are to provide facts and opinions as to a candidate's suitability. The following should be observed when providing references, whether internal or external and for present and past employees and students.

2. The Legal Position

- i. A reference can be the subject of an action for negligence as well as for defamation.
- ii. 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.
- iii. Recent 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.
- iv. 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.
- v. The Data Protection Act 1998 applies to references.

3. General Good Practice Advice

- 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. Personal references may not be produced on university headed notepaper.
- You should be able to support the facts by professional evidence and/or examples. If in doubt leave it out.
- 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
- Only provide information that is requested, unless the exclusion of certain facts could lead to the information being misinterpreted
- 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".
- Do not make statements which you are not qualified to make.

- 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.”
- Where information requested relates to 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 4. on Data Protection below). A suitable response might be “I am not in a position to comment on X’s health/sickness”.
- 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.
- Do not provide an unsolicited reference i.e. where a person has not, to your knowledge, cited your name as a referee.
- Statements should be direct and simple, avoiding ambiguous or coded language.
- 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."
- Avoid telephone or verbal references; see 4. below for further guidance.
- Mark all correspondence “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 consider the most secure method of sending it.
- Keep and file copies of any references provided, written and verbal for a period of one year
- 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 – see 5. below.

4. The Data Protection Act 1998 (The Act)

- i. University employees, both academics and other senior members of staff, have an implied duty (as well as a moral obligation) 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 Act applies.
- ii. 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.
- iii. 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.
- iv. Emailed requests for reference should not be responded to by email. Checks should be made to verify the identity of the person/organisation requesting the reference and then if appropriate a reference can be provided in hard copy.
- v. 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 they relate to sensitive data – see 3. above and 4.1 below. 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 back, limit the information provided to essential facts and keep a record of the reference that was provided (see 3 above). However it is **strongly** recommended that all such requests are followed up with a fax or letter on headed notepaper.

4.1 Sensitive personal data

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.

4.1.1 Disclosure of a disability in a reference

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 unforthcoming, no reference should be written.

4.1.2 Disclosure of disciplinary action in a reference

Staff must always carefully exercise their judgement when writing references, bearing in mind the legal and data protection implications detailed in 2, 3 and 4 above.

In general, disciplinary matters should not be explicitly mentioned unless they are specifically asked about in a reference request and it is advisable in all the circumstances to refer to disciplinary action or the reference is 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 and references 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 such cases the Head of School must be consulted before the reference is given.

Serious misconduct

There are two other important issues of conduct which should not normally be omitted from a reference:

- 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 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.

Less serious instances of disciplinary action taken against students should not normally be raised beyond graduation.

5. References provided by the University

- i. If someone asks for a copy of a confidential reference, this does not have to be provided because of an exemption in the Act (schedule 7). This includes confidential references provided in relation to:
 - education, training or employment
 - the appointment of an individual to any office; or
 - the provision of any service by an individual.
- ii. Notwithstanding that, the UK Information Commissioner (ICO) advises that a referee "may chose 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." But please note that this would not prevent a subject going to the recipient of a reference provided by the University and requesting a copy – see also 6. below.
- iii. 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

6. References Received by the University

- i. References received from another person or organisation are not treated in the same way and are **not** exempt from the right of access. **However** the Act implies that you may legitimately refuse to disclose such a reference (since the referee's name is personal data) unless:
 - the referee has given consent
 - his/her identity can be protected by anonymising the information; or
 - it is reasonable in all the circumstances of the case to release the information without consent.
- ii. In considering whether it is reasonable in all the circumstances to comply with a request, the ICO suggests 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 employee should have already been advised of any weaknesses; and
- Any risk to the referee

Any refusal to disclose a reference received in confidence must be supported by cogent reasons and if in doubt HR or the University's Data Protection Officer should be consulted. It should be noted that disclosure of the identity of an organisation, but not an identifiable individual as referee, does not breach the terms of the Act.

- iii. All references received, including those for unsuccessful applicants, should be retained for 6 months from the date of appointment and then securely disposed of by shredding or ripped up and placed in a confidential waste sack.

7. 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. It should be noted that the ICO considers internal references to be 'management data' rather than references and that therefore disclosure may be required.

8. Further Information and guidance on references and the DPA 1998

This is available from HR or the Governance Officer (Data Protection & Legal).

The ICO's guidance is at:

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/references_v1.0_final.pdf

HM/G & MS
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