

A reference should be truthful and accurate and without access to it, an individual is not in a position to know, or challenge, its content. The Data Protection Act (DPA) gives individuals a right of access to their personal data, which includes any expression of opinion about the individual. This is the right for individuals to be supplied with their personal data if they make a 'subject access request'.

This right of access therefore applies to personal data in employment references and this advice note clarifies how the DPA applies to employment references when a subject access request is received. This advice also applies to other types of reference, such as those provided for educational purposes.

## **The main issues**

The Information Commissioner receives many queries about:

- whether organisations can release a reference to the person who is the subject of the reference;
- how the DPA applies to references; and
- the fact that references may have been given 'in confidence'.

## **The Act applies differently to confidential references *given* by an employer and those that have been *received* by an employer, or potential employer.**

- **References given**

If you receive a subject access request from a person about whom you have given a *confidential reference* relating to employment, training or providing a service, you are not obliged to comply with the subject access request because there is an exemption from this requirement in the DPA.

However, the exemption is not mandatory and does not prohibit the provision of a reference you have written. A data controller may choose whether or not to provide the information. It would seem reasonable to comply with the subject access request if the reference is wholly or largely factual in nature, or if the individual is aware of appraisals of their work or capability issues referred to in that reference.

The exemption does not apply to references given without any express indication of confidentiality.

- **References received**

References received from another person, or organisation, are not treated the same way. If you hold the reference in a way that means it is covered by the Act, you must consider a subject access request under the normal rules.

Whilst the reference may have been given "in confidence", there is no equivalent exemption from the right of access for confidential references received.

## **Recommended good practice**

In most circumstances, you should provide the personal data in a reference, or at least a substantial part of it, to the person it is about if they ask for it. You cannot sensibly withhold information that is already known to the individual. For example, this would include factual information such as employment dates and absence records, and information relating to performance or appraisals.

In many cases, a copy of the reference is supplied, although the right of access is not a right to seek, or be supplied with, a copy of the document but only to be supplied with 'personal data'.

However, there may be circumstances where it would not be appropriate for you to release a copy of the reference as this would disclose third party personal data, such as the identifying details of the referee.

However, you are still required to provide as much personal data of the person making the request as possible without revealing third party identifying information.

You will need to consider how to conceal the identity of the third party. This may, for example, be by providing a redacted version of the reference, copy and pasting the relevant personal data of the individual into a new document, omitting third party personal data, or providing an accurate summary of the content of the reference.

When deciding which method to follow, you will need to weigh the requester's right to know what has been written about them, and to check for any inaccuracies, against the referee's interest in not having their name associated with the reference and the opinions stated in it.

Relevant considerations are likely to include:

- the requester's interest in being able to satisfy himself or herself that the reference is truthful and accurate;
- the likely impact of the reference on the requester;
- any clearly stated assurance of confidentiality given to the referee;
- any reasons the referee gives for withholding consent; and
- any realistic threat of violence or intimidation that disclosure may pose to the referee.

### **Acknowledgement**

Some of the information contained in this document has been extracted from guidance documents published by other Data Protection Authorities in the British Isles.