

Good Practice Note

Subject Access & Employment References

This good practice note has been published as guidance only and should be read in conjunction with the Data Protection Law.

It seeks to clarify how the Law applies to employment references. The recommendations also apply to other types of reference, such as those provided for educational purposes.

This guidance relates to both the Data Protection (Jersey) Law 2005 and the Data Protection (Bailiwick of Guernsey) Law, 2001.

Where the Laws differ and to show differences between the two jurisdictions the page will be split as shown below.

Jersey

Commissioner = Information
Commissioner

a = article within the Law

Guernsey

Commissioner = Data Protection
Commissioner

s = section of the Law

Where numbering of passages from the Laws are the same it will be shown as a/s.

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The main issues

The Data Protection Commissioner receives a lot of enquiries about:

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

Individuals have a right to a copy of information held about them that is covered by the Law. When an individual asks for a copy of a reference written about them, many employers refuse to provide it because it was supplied 'in confidence'. This may breach the Law. The Law applies differently to references which have been given by an employer and those which have been received by an employer.

Do you have to give a copy of a reference you have written?

If someone asks for a copy of a confidential reference you have written about them relating to training, employment or providing a service, you are not obliged to provide it because of an exemption in the Law.

Jersey

The exemption is found in paragraph 1 of Schedule 7 of the Law.

Guernsey

The exemption is found in paragraph 1 of Schedule 6 of the Law.

However, you may choose to provide the information despite this exemption. It would seem reasonable to provide a copy if a reference is wholly or largely factual in nature, or if the individual is aware of an appraisal of their work or ability.

Do you have to give a copy of a reference you have received from someone else?

References received from another person or organisation are not treated in the same way. If you hold the reference in a way that means it is covered by the Law, you must consider a request for a copy under the normal rules of access. An individual can have access to information which is about them, but may not necessarily have access to information about other people, including their opinion, provided in confidence.

The references you have received may be marked 'in confidence'. If so, you will need to consider whether the information is actually confidential. You cannot sensibly withhold information which is already known to the individual. Factual information such as employment dates and absence records will be known to an individual and should be provided. Information relating to performance may well have been discussed with the employee as part of an appraisal system.

Where it is not clear whether information, including the referee's opinions, is known to the individual, you should contact the referee and ask whether they object to this being provided and why. Even if a referee says that they do not want you to release their comments, you will need to provide the reference if it is reasonable in all the circumstances to comply with the request without their consent.

You should weigh the referee's interest in having their comments treated confidentially against the individual's interest in seeing what has been said about them.

When considering whether it is reasonable in all the circumstances to comply with a request, you should take account of factors such as:

- any express assurance of confidentiality given to the referee;
- 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.

You should consider whether it is possible to withhold the identity of the referee.

Recommended good practice

In most circumstances, you should provide the information in a reference, or at least a substantial part of it, to the person it is about if they ask for it. Even if the referee refuses consent, this will not necessarily justify withholding the information, particularly where this has had a significant impact on the individual, such as preventing them from taking up a provisional job offer.

However, there may be circumstances where it would not be appropriate for you to release a reference, such as where there is a realistic threat of violence or intimidation by the individual towards the referee.

You should consider whether it is possible to conceal the identity of the referee, although often an individual will have a good idea who has written the reference. If it is not reasonable in all of the circumstances to provide the information without the referee's consent, you should consider whether you can respond helpfully anyway (for example, by providing a summary of the content of the reference). This may protect the identity of the referee, while providing the individual with an overview of what the reference says about them.

Jersey

Please note that each request must be treated on a case by case basis and in accordance with Article 7 and Schedule 7 of the Law.

Guernsey

Please note that each request must be treated on a case by case basis and in accordance with Section 7 and Schedule 6 of the Law.

Contact the Commissioner

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