

# Guide to References

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## 1. Aims of this Guidance

It is the University's practice to provide references for its staff and students, although it does not fall under any common law duty to do so. In recognising the duty of care that it owes to its current and former employees and students, and the potential for liability, the guidance is intended to assist staff in writing references, managing the reference as a record and managing expectations of confidentiality.

References fulfil an important purpose and no one's interests are served if this purpose is undermined and the reference rendered so anodyne as to be meaningless. By presenting a clear picture of our duties of care, the guidance intends to demonstrate that the author of a reference can still provide a useful reference while respecting the rights of the individual, and that accountability can enhance rather than diminish the quality of our records.

The following guidance relates to the creation and receipt of references for staff and students. It does not cover references written in a private capacity (i.e. outside the remit of your employment). Anyone approached for a reference for a peer or colleague for whom they do not have management responsibility must clearly state the nature of their relationship with the individual concerned. Such references should normally state that it is given in a private capacity and should not be provided on University headed paper.

- The guidance should be read in conjunction with the University's [Data Protection Policy](#).
- For the use of references as part of the University's recruitment and selection process, see section 7.1 of the [Handbook on the Recruitment and Selection of Staff](#)

## 2. Duty of Care

When writing references, authors owe a duty of care to the subject of the reference. Recent case law has demonstrated that, as an employer, we have an implied contractual duty to employees and ex-employees to take reasonable care in the preparation of a reference and to ensure its fairness and accuracy. **The reference** does not, of itself, have to be full and comprehensive, but it **must be true, accurate and fair, and the overall impression given to the reader by the reference as a whole must not be misleading**.<sup>1</sup> Corporately or individually, we may be liable in damages to the subject of the

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<sup>1</sup> *Bartholomew v London Borough of Hackney* [1999] IRLR 246 CA. While a reference doesn't have to be comprehensive, an employer should not be unduly selective about the information it provides if that information is likely to give a misleading picture overall (*Kidd v Axa Equity and Law Life Assurance Society plc and another* [2000] IRLR 301 HC).

reference if loss is caused through negligence on our part. We owe a similar duty of care to the intended recipient of the reference.<sup>2</sup>

Where references are given by staff in the context of their employment, any action arising from a negligent or defamatory reference would be covered by the University's insurance policy. Staff providing references thus have a further duty of care to the University to act reasonably. The insurance policy does not cover references given in a private capacity (i.e. outside the remit of your employment): such references should not be given on University headed paper.

As references involve the creation, handling and disclosure of personal data – and sometimes sensitive personal information – in the form of facts and opinions about an individual, they are covered by the Data Protection Act 1998. It is therefore essential that those staff who provide or handle references are conversant with the Act's provisions and that our use of personal data is fair and lawful. Further information on the Act, including the University's Data Protection Policy, can be found at <http://www.york.ac.uk/recordsmanagement/dpa/>

### 3. Writing a Reference

The aim of a reference is both to confirm facts and provide opinions. If you receive a request for a reference you should always ensure that:

- You have the implicit/explicit consent of the subject to provide a reference on their behalf, and so disclose their information. Have you been asked to be, or named as, a referee? Has the organisation been provided with confirmation of the individual's consent to disclose (e.g. with mortgage applications)? If not, consider your ability to respond – see 'Unsolicited references'.
- The information is *factually* accurate and true. It is thus important that staff and student records are well maintained. If you need to check information contact Human Resources or, for students, consult Departmental files or Student Administrative Services accordingly. Don't rely on your memory.
- You are fair – to both the student/member of staff and the recipient of the reference.
- Fact and opinion are clearly differentiated. Where opinions on someone's suitability are disclosed, your comments should be justifiable on reasonable grounds. If you are asked to express an opinion about which you have limited knowledge (e.g. someone's integrity) respond appropriately (e.g. 'I know of nothing that would lead me to question X's honesty or integrity').
- You only express opinions that are relevant and that you are competent to give.
- The context/parameters in which the reference is being given are clearly stated. For instance, how long the subject has been known to the referee, and in what capacity, and the area(s) in which you, as referee, are qualified to comment.
- Where writing about someone whom you did not know personally (e.g. a head of department writing a reference for a student in the absence of their tutor) it is advisable to quote the source of your information: e.g. "I do not know X personally, but have carefully read her file and her former personal tutor said..."

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<sup>2</sup> Hedley Byrne and Co Ltd v Heller & Partners Ltd [1964] AC 465 HL.

- You avoid overly ambiguous language. If your knowledge of the person leads you to a definite opinion, express it. If your feelings (whether negative or positive) are less definite, don't air them. Ambiguous or coded hints will not be helpful to either the subject or recipient and risk misinterpretation.
- You don't disclose sensitive personal details without the *explicit* consent of the member of staff/student concerned (see below).
- You mark clearly on the reference whether or not you are providing it in confidence. It is recommended that references and any surrounding correspondence be marked as 'private and confidential'.
- You check that there are no outstanding disciplinary proceedings or investigations against the subject of the reference (see below).
- You don't make remarks in breach of anti-discrimination legislation (e.g. age, sex, race, disability, sexual orientation, religion or belief). Note that discrimination legislation can apply after our relationship with someone has ended, so will still be valid when giving references for former staff/students.

#### **4. Telephone References**

The same rules will apply as for written references but, wherever possible, avoid providing oral references. Oral references can be easily mis-heard, misinterpreted or mis-transcribed, particularly as information filters through another organisation's recruitment procedures. Providing written references not only provides an auditable record of what was (and wasn't) said but, importantly, it allows referees the space to consider their reference more fully.

Where supplying an oral reference is unavoidable (and only then when in the candidate's interest), limit the reference to a statement of facts and immediately follow this up in writing (e.g. fax). When responding, having first ascertained the information that is required, seek to call the caller back at an arranged time to give your statement. This will allow you the time to prepare a measured response and help verify that the caller is bona fide and who they say they are. Do not make any statements you would not be otherwise prepared to make in writing.

If requesting a telephone reference, be sensitive to these issues and assist the referee by seeking factual responses to clearly defined questions and allowing them the opportunity to confirm their responses in writing.

#### **5. Unsolicited References**

Where you have been asked to provide a reference for someone who has not, to your knowledge, cited your name as a referee, it is advisable to limit your statement to a confirmation of public facts. Further information should not be disclosed without the consent of the individual concerned. Where requests are received for confirmation of employment status and salaries (e.g. for mortgage applications), if the applicant has not provided evidence of the individual's authorisation with their request, ask them to do so before releasing or confirming any personal details.

#### **6. Handling sickness questions and sensitive personal data**

You should not give out information on someone's physical or mental health without their *positive* consent. As sensitive personal data (which also includes information on the commission or alleged

commission of any offence or the surrounding legal proceedings or sentences), such information cannot be disclosed without the subject's *explicit* consent (an email acknowledgement is adequate). The fact they are seeking a reference is not sufficient grounds for the disclosure of sensitive data. If no consent is forthcoming, then it may be necessary to consider whether you can respond to the question at all.

Where consent is provided, avoid making value judgements ('X has an extremely poor sickness record') but, instead, keep it factual and fair. Having gained the individual's consent, concern about their ability to undertake a particular role, may be expressed as follows: "I am aware that there are health related issues which may have affected X's performance. Please refer to X and/or their General Practitioner/Occupational Health Service, in accordance with your own organisational policy, if you require further information".

You may be asked to provide the number of days an individual was absent. As non-sensitive, factual information, this can normally be provided: although care should be taken to avoid such figures being misinterpreted. While supplying a figure may be factual and correct, it may not always create a fair impression (particularly if related to a disability), and in more extreme cases could lead to an employer withdrawing an offer and the employee suffering a loss as a result. In cases where such a figure might be open to misinterpretation and further context/explanation (e.g. the nature of the illness, a period of hospitalisation) cannot be given without the subject's consent to disclose sensitive information, if you lack that consent, you may have to consider your ability to provide such information.

## **7. Disciplinary Proceedings and Penalties**

### Staff

If a member of staff has been subject to disciplinary proceedings, or his/her performance is under review through the University's Capability Policy, please seek advice from Human Resources about what information should be provided in the reference.

### Students

Where information is provided, care should be taken to ensure that the information is given in context and that the overall impression of the person/situation that is given is fair and that facts and opinions can be substantiated. Where disciplinary actions are concerned you should be aware of the status of the proceedings, their records and any attendant agreements or understandings.

#### *'Live' Disciplinary Penalties*

Where the disclosure is felt to be relevant and warranted, the student should be informed that such a reference will be provided. Where the student has been expelled, the date and reason for expulsion should be given, and any outstanding appeal stated.

For students who have suspensions in force, take particular care and seek the advice of the Academic Registrar as appropriate. It is essential that the nature of the suspension is determined before any reference to it is included.

#### *'Spent' Disciplinary Penalties*

Reference to spent warnings should only be made where it is considered highly relevant (a) to the position/studentship the student is applying for and (b) to the duty of care you owe the recipient of the reference. For instance, if the job or course assumes a high level of responsibility and/or personal integrity, then it may be appropriate to refer to the person's

poor standing. Naturally, any comments should be capable of being supported by the relevant investigation/resulting documentation.

#### *Ongoing/unresolved proceedings*

You may need to state that an investigation into alleged misconduct had/has commenced: seek advice from the Academic Registrar as necessary. If the subject matter of the proceedings is not relevant to the post/course being applied for, it is unlikely that mentioning them will be appropriate. If you are permitted to refer to such proceedings, keep to the basic facts. Do not give opinions as to the strength of a case and, in the interests of being fair and to avoid misleading the recipient, seek to include the comments of the student regarding the allegations raised against them. If the investigation/disciplinary proceedings are/were not concluded, then you must state so.

#### *Ongoing legal proceedings*

Where such proceedings are still active, it may be necessary to refuse to provide a reference until such time as the proceedings are completed. Where a discrimination claim has been lodged, however, refusal may be classed as victimisation.<sup>3</sup> Seek the advice of the Academic Registrar as necessary.

### **8. Rights of Access to References**

The Data Protection Act strengthens individuals' rights to gain access to the information held about them by organisations. This is to ensure that organisations are abiding by the Act and its Principles and is known as the 'right of subject access'. The Act also recognises that such rights may be inappropriate where there is a particular need for confidentiality.

*Do I have to show someone the reference I've written about them?*

Where you have written a *confidential* reference about an individual you are not obliged to provide a copy to them as result of a specific exemption in the Act. This exemption covers references given, or to be given, in confidence for education, training or employment purposes and protects the confidentiality of an active appointment process. (Once the reference is received, however, it will be liable to disclosure by the recipient – see below).

Where there is no duty of confidentiality, you may of course choose to provide the information. It would seem reasonable, for instance, 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. It is good Data Protection practice to be as open as possible with employees about information which relates to them.

*Can an employee require me to provide a copy of the reference provided by their former employer, or a reference that the University has received?*

Confidential references received from another person/organisation are not automatically exempted from the right of access provided by the Data Protection Act. This means that students and staff may be able to see some, or all, of the information contained in references received by the University through a subject access request.

Individuals only have a right of access to their own personal information under the Act. They may not necessarily have access to information about other people, including their opinions, provided in confidence. Where references have been supplied in confidence, the University will seek the author's

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<sup>3</sup> Coote v Granada Hospitality Ltd (No 2) [1999] IRLR 252 EAT. See 'Can I refuse to supply a reference?' below.

views before disclosure. Where consent is given, or it is reasonable to disclose without their consent, the information will be made available. Where this is not the case, and third party data provided in confidence cannot be disclosed, then the University will provide as much of the requested information as possible without disclosing the identity of the third party. In most circumstances, however, unless the referee as a third party can provide a compelling reason as to why the information should be edited or withheld, individuals may be able to obtain access through the DPA. This is particularly the case where a reference is likely to have a serious impact on future job prospects or has had/is likely to have a significant adverse effect upon the employee.

### *Internal References*

The exemption for corporate references given by the employer does not extend to references provided by one part of the employer's business to another (e.g. for promotions, transfers or internal applications). As information which is also received by the University, access to internal references is provided in the same way as access to other personal information held by the University.

### *Implications*

- Under the Data Protection Act it is no longer possible to guarantee that a reference will remain confidential. Always consider writing open references, which are shown to the individual concerned before they are sent. This has the advantage of openness, assists in the provision of a fair and accurate reference, and reduces the risk of litigation.
- Where a reference is given in confidence, make any expectation of confidentiality explicit by marking it as confidential.
- When seeking applicants' references, if providing a general assurance of confidentiality, draw referees' attention to the limits of such a policy and the potential for disclosure under the Data Protection Act. Asking referees to state unequivocally whether or not they object to the reference being released to the data subject in the event of a subject access request is one means making expectations clear, ensuring that the wishes of referees are considered, while fostering greater openness.

## **9. Managing the Record**

The Data Protection Act requires that all personal data that we create and hold should be kept in line with its eight Principles. These include an obligation to keep personal information, such as references, securely and for no longer than necessary.

As with all personal data, references should be kept in a secure location: free from unauthorised access/use and safe from accidental damage or loss. Retention requirements for references can vary depending on the context in which they are held (e.g. where part of a personnel file the retention period will be that for the file). The following guidance represents a *minimum* recommended retention period.

- Copies of references created/sent by the University: provision of reference + 1 year
- References received by the University:
  - *Successful applicants*: retention period associated with staff/student file (normally duration of contract/relationship with University + 6 years)
  - *Unsuccessful applicants*: completion of recruitment/application process + 6 months.

Copies of references should be kept in a central location as part of a maintained filing system (e.g. the relevant departmental file). Re-use of a reference the University has previously generated is acceptable, but take care to ensure that the reference includes the most up-to-date information, that its content remains relevant, and that it is properly dated (so that each iteration is clear and appropriately recorded).

Records should not be kept indefinitely just 'because they *might* be useful for a reference'. At the time of writing, the Records Management Programme is seeking to establish retention policies, with departments, for major classes of University record. This should reduce the risk of information being kept which is no longer relevant.

## 10. Requesting a reference be written

Staff and students should always seek permission before giving the name of a member of staff as a referee. Not only is this a courtesy, but it will enable the referee to establish that information is being disclosed fairly. Without this reassurance, requests stand to be treated as unsolicited. The University has a duty to ensure that those requesting references are genuine and are not attempting to obtain information by deception.

## 11. Can I refuse to supply a reference?

While the University is not statutorily obliged to provide references, it has a duty of care to its staff and students and it is its practice to supply references. References should only be refused with good reason. Where a refusal is being communicated to a potential employer, or other organisation, care should be taken to ensure that the refusal is carefully worded so as to avoid the implication that any reference supplied would be negative.

Where an employee has lodged a complaint of a breach of anti-discrimination legislation (or has helped another employee with such a complaint) and you do not provide a reference for the individual, it should be noted that this could give grounds for a claim of victimisation.<sup>4</sup>

## 12. Challenges over a Reference

If a reference you have provided is challenged by its subject, or it is alleged that the reference supplied by the University is defamatory or negligent, the matter should be referred to the Director of Human Resources (staff references) or Academic Registrar (student references) immediately. It is *essential that staff do not, at any stage, admit liability* – to do so may invalidate the University's insurance.

## 13. Further Guidance

- University Data Protection Policy and Guidelines  
<http://www.york.ac.uk/recordsmanagement/dpa/dppolicy2002.htm>
- Short Guide to References  
[http://www.york.ac.uk/recordsmanagement/dpa/references\\_quick.pdf](http://www.york.ac.uk/recordsmanagement/dpa/references_quick.pdf)
- Information Commissioner: Data Protection subject access and employment references  
[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/subject\\_access\\_and\\_employment\\_references.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/subject_access_and_employment_references.pdf)

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<sup>4</sup> Coote v Granada Hospitality Ltd (No 2) [1999] IRLR 252 EAT. Rhys-Harper v Relaxation Group plc [2003] IRLR 33 HL.

- Information Commissioner: Data Protection Act and Professional Opinions  
[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/how\\_does\\_data\\_protection\\_apply\\_to\\_professional\\_opinions.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/how_does_data_protection_apply_to_professional_opinions.pdf)
- University Handbook on the Recruitment and Selection of Staff  
<http://www.york.ac.uk/admin/persnl/handbooks/recruit/>
- University Records Management Policy and Guidelines  
<http://www.york.ac.uk/recordsmanagement/rm/>
- University Diversity and Discrimination Training  
<http://www.york.ac.uk/admin/pod/diversity/>  
<http://www.york.ac.uk/admin/eo/>