



CES Guidance
Employment References
Frequently Asked Questions

Introduction

The purpose of this guidance is to explain the CES recommended procedure for references provided (in respect of education, training and/or employment in particular) by employers such as schools and by parish priests for applicants to Catholic schools.

The information particularly sets out answers to frequently asked questions communicated to the CES.

Throughout this document the term 'school(s)' will mean all Catholic schools and colleges, including schools in the trusteeship of a religious order. This includes maintained schools, academies, independent schools, sixth form colleges and non-maintained special schools.

Duty of care in providing a reference

Although an employer is under no general duty to provide a character reference, there is a duty to take reasonable care to ensure the reference is true, accurate and fair and that it is not misleading. This is a duty that is owed to both the applicant and to the potential new employer.

The CES model application forms therefore provide that a referee who is a current or former employer should have full access to the applicant's personnel records to the extent that this is achievable in compliance with the General Data Protection Regulation (GDPR).

If the applicant thinks they have been provided with an unfair or misleading reference, they may be able to claim damages in a court.

Data privacy and employment references

The GDPR stipulates that there must be a lawful basis for collecting and processing personal information. References provided by referees will usually include information relating to both the applicant and the referee themselves, i.e. their name, address, job title and place of work etc. It is important to ensure that data is processed and retained in accordance with the requirements of the GDPR.¹

In the context of responding to reference requests for past employees, schools should be careful to ensure that the individual has provided their explicit consent. It is not enough to rely on blanket

¹ See *Guidance Note: GDPR* available on the CES website at the following location:
<http://www.catholiceducation.org.uk/guidance-for-schools/data-protection-and-foi>

consent and specific consent should be obtained for any personal information included within an employment reference.

The CES has produced a Consent to Obtain References Form. This form should be completed by all applicants and returned with their application form. This form contains an appropriate consent and it should be provided to past employers by prospective employers where reference requests are being made. If the CES documentation has not been used and a Consent to Obtain References Form is not provided past employers should ask for the prospective employer to provide such consent or they should obtain it from the applicant before providing a reference.

Statutory Guidance on requesting references

Schools have an obligation to have regard to statutory guidance. Statutory Guidance on “Keeping Children Safe in Education” dated September 2018 (the Statutory Guidance) stipulates at paragraph 89 that governing bodies and proprietors have a statutory duty to ensure that a safer recruitment process is in place which involves carrying out appropriate mandatory recruitment checks. Schools should have a Safer Recruitment Policy in place covering the appropriate procedure for obtaining references. The Statutory guidance sets out at paragraphs 139 to 142 the following:

Employment history and references

139. Employers should always ask for written information about previous employment history and check that information is not contradictory or incomplete. The purpose of seeking references is to allow the school or college to obtain objective and factual information to support recruitment decisions. References should always be obtained from the candidate’s current employer. Where a candidate is not currently employed, verification of their most recent period of employment and reasons for leaving should be obtained from the school, college, local authority or organization at which they were employed.

140. References should be scrutinized and any concerns resolved satisfactorily before the appointment is confirmed, including for any internal candidate. Obtaining references before interview, will allow any concerns they raise to be explored further with the referee and taken up with the candidate at interview. They should always be requested directly from the referee and preferably from a senior person with appropriate authority, not just a colleague. Employers should not rely on open references, for example in the form of ‘to whom it may concern’ testimonials, nor should they only rely on information provided by the candidate as part of the application process without verifying that the information is correct. Where electronic references are received, employers should ensure they originate from an original source.

141. On receipt, references should be checked to ensure that all specific questions have been answered satisfactorily. The referee should be contacted to provide further clarification as appropriate, for example if the answers are vague or if insufficient information is provided. They should also be compared for consistency with the information provided by the candidate on their application form. Any discrepancies should be taken up with the candidate.

142. Any information about past disciplinary action or allegations that are disclosed should be considered carefully when assessing the applicant’s suitability for the post (including information obtained from the Teacher Services’ checks referred to previously).

Any offer of employment should always be provided subject to satisfactory references (as set out in the CES Application Forms and Supplementary Forms – Notes to Applicants document (“CES - Notes to Applicants”)).

Number of references required

The CES - Notes to Applicants states that “[all applicants are required to provide details of **at least two, and up to three, referees**”. This will include references from parish priests, if applicable.

Obtaining consent from referees (including Parish Priests)

It is, of course, always the responsibility of the applicant to obtain consent from referees prior to naming them on any application form.

The CES Model Application Forms and the Consent to Obtain References Form make it clear that this is the case.

Current employers can be contacted without permission?

The CES - Notes to Applicants document states that:

“Applicants must advise the school/college if they do not want them to contact any of their referees and provide reasons. For example, where applicants are currently employed, they may not wish the school/college to contact their employer until such time that they have given notice to terminate their employment.”

This is also made clear in the CES Model Application Forms. The applicant must provide reasons if they do not want their existing employer to be contacted. The default position therefore is that a school may contact referees unless it is stated otherwise by the applicant provided that the relevant consents have been received.

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

By virtue of the GDPR, employees are entitled to have access to data held about them. However, Schedule 2 of the Data Protection Act 2018 (DPA 2018) establishes an exemption and states as follows:

“The listed GDPR provisions do not apply to personal data consisting of a reference given (or to be given) in confidence for the purposes of— (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’.

Employers can rely on the exemption to withhold a confidential reference from a former employee.

If you are in any doubt about whether there might be a legal requirement for you to disclose certain information, you should seek independent legal advice.

Does a copy of a reference that has been received need to be disclosed?

The DPA 2018 has extended the exemption that was present in the superseded 1998 Act by closing a loophole that existed previously. Under the old law, an employee who was refused sight of a confidential reference provided by their former employer was entitled to obtain a copy from their new employer instead.

If an employer who is covered by the exemption does choose to show an employee a copy of a reference received in confidence, the employer should be careful not to disclose information relating to the third party who provided the reference. Unless there is a lawful basis for disclosing identifying information about the referee, only appropriate extracts from the reference can lawfully be disclosed.

If you are in any doubt about whether there might be a legal requirement for you to disclose certain information, you should seek independent legal advice.

Can information be withheld from the individual just because it is marked as confidential?

References that have been received and marked, for example, “in confidence” or “confidential”, may not actually include confidential information. Information therefore cannot be sensibly withheld which is already known to the individual about whom the reference is being written.

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.

At the time of writing, the Information Commissioner’s Office (ICO) has provided guidance on the GDPR but it has not updated all of its previous guidance. The ICO comments as follows in relation to the DPA 1998:

“We produced many guidance documents on the previous Data Protection Act 1998. Even though that Act is no longer in force, some of them contain practical examples and advice which may still be helpful in applying the new legislation.”

One such document is The Employment Practices Code which you can access here:

https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf

The ICO’s GDPR guidance can be accessed here:

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/>

Schools should check regularly for updates to the current guidance on the ICO website. In the meantime, the following guidance is still displayed on the ICO website:

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

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.”