

## **Procedure 2.9 Academic references for students**

It is the responsibility of the Academic Head to ensure that staff who may respond to requests for references in respect of past or present students are aware of and abide by this procedure.

### **1 The legal position**

An inaccurate or defamatory reference can be the subject of an action for negligence or defamation against the Academy and/or the individual author and therefore the author of a reference owes a "duty of care" to the person about whom it is written. Where the author of a reference is proven to have acted negligently, the subject of the reference does not have to prove "actual loss" of employment, but only that he/she has lost a "reasonable chance" of employment and thereby sustained loss.

A duty of care is also owed to the recipient of the reference who may be able to sue the individual referee and/or the Academy if the information contained in the reference is inaccurate or misleading and causes some loss or damage to the recipient.

Case law also indicates that there can be a legal obligation to provide a reference, as a refusal to do so may damage the individual's opportunity of gaining employment. If any member of staff or the Academic Head has a concern about writing a reference for a current or past student, he/she should contact the Principal.

### **2 Aims of the reference**

There are two principle aims of a reference:

- to confirm the accuracy of statements made in an application by the student (which means, of course, ascertaining what those statements are)
- to give the referee's opinion as to the student's suitability for the post/course in question and his/her potential for the future.

### **3 The substance of the reference**

Members of staff who provide a reference in respect of a present or past student should make clear in what capacity they are providing the reference. If the reference is provided in relation to the student as a student (or former student) of the Academy and on behalf of the Academy, the reference should be given on Academy headed paper.

If the reference is provided in a private, personal or non- Academy capacity, Academy headed paper should **not** be used, and the relationship of the referee to the student concerned and the fact that it is given in a personal capacity should be made clear.

In writing a reference the author should always indicate for how long he/she has known or knew the student and in what capacity, and should ensure that the facts stated about the

student are correct. If information about a student's programme/history/study profile is needed, the Head of Administration should be consulted.

In a reference the facts about a student's career and any opinion of his/her ability should be differentiated. If an opinion is offered regarding a student's abilities or potential, the referee must be qualified to give such an opinion and the reasoning for such a view should be made clear. If challenged, the author would need to provide evidence to support his/her view.

Fact and opinion should not be confused: "*On her performance to date I would be surprised if X did not get a first-class degree*" is clearly an opinion; "*She will get distinction*" suggests that the method of classification is such that the issue is beyond doubt.

Opinions stated should be based on facts known to the referee and referees should not make statements they are not qualified to make: for example, "*I consider X to be well suited to the post for which he/she has applied, and am happy to support his/her application*" is better than "*X will be a success in the post of . . .*".

Particular care should be taken where a reference is provided about someone who is not known to the person providing the reference (for example, if the student's tutor or supervisor is absent or has left the Academy). Opinions should not be given which are not those of the author of the reference.

There may be issues on which an opinion is invited or requested about which the referee has limited knowledge, e.g. the honesty and integrity of the student. In these circumstances it may be necessary to say, for example, "*I know nothing which would lead me to question X's honesty.*"

In the event of being challenged over a reference, the referee must never admit liability as this may invalidate the Academy's insurance policy. The matter should be referred to the Principal.

References should be marked "Confidential" to the addressee.

A copy of any reference on behalf of the Academy should be kept on the relevant student file.

#### **4 Liability and disclaimers**

A reference should contain the following disclaimer in its final paragraph:

*In accordance with Docklands Academy, London's normal practice, this reference is given in good faith and in confidence, without legal liability on behalf of the author or Docklands Academy, London.*

As there is no guarantee that a disclaimer will not be successfully challenged in court, due care must be exercised when preparing a reference. Docklands Academy has insurance that covers members of staff (and ex-members of staff) who have written references in the course of their employment, if these guidelines have been followed. Academy insurance does not cover references by a member of staff in his/her private capacity. In the event that a member of staff is challenged over the content of a reference, he/she should refer the matter immediately to the Principal.

## **5 Confidentiality, disclosure and data protection**

The General Data Protection Regulation (GDPR) gives individuals the right to see a reference written about them.

All references are considered to be given in confidence, but the Academy or the recipient may be required to disclose a reference under certain circumstances, such as a Data Protection Subject Access Request or a request for disclosure by an Employment Tribunal or a Court dealing with a negligence or defamation case. If the Academy does become a Defendant in a Tribunal or Court case, the decision about what documents to disclose is a question for the Academy's legal advisers and not one for individual referees, who should not therefore volunteer any documents to a litigant or its legal advisers.

## **6 Protocols relating to confidential references**

### **6.1 References given by Academy employees**

Confidential references given by the Academy, including references written by employees in their formal capacity, or as part of a standard procedure, (for example, as Head of Departments, as part of a promotions exercise) are exempted from subject access requests where those references concern the:

- education, training or employment of the data subject
- appointment of the data subject to any office
- provision by the data subject of any service

### **6.2 References received by the Academy**

Confidential references received by Docklands Academy are not exempt from the right of access, but consideration must be given to the data privacy rights of the referee. Information contained in, or about, a confidential reference need not be provided in response to a subject access request if the release of this information would identify an individual referee unless:

- the identity of the referee can be protected by anonymising the information
- the referee has given his/her consent
- it is reasonable in all the circumstances to release the information without consent
- In cases where a confidential reference discloses the identity of an organisation, but not an identifiable individual, as referee, disclosure will not breach data privacy rights.

When faced with the question of subject access to a reference received in confidence from a referee, the Academy must consider what steps to take to try and obtain consent, whether

the referee has expressly refused to give their permission for the information to be made available, and whether the disclosure might result in harm to the referee.

The Academy may not refuse to disclose references received in confidence from third parties without providing reasons.

Academy staff requesting and giving references should consider:

- routinely informing third parties who will be providing references of this Academy procedure with regard to disclosure of confidential references
- requesting that third parties who will be providing references state unequivocally whether or not they object to the reference being released to the data subject in the event of a subject access request
- providing guidance to their staff as to acceptable form and content in references
- providing advice as to appropriate avenues of action in circumstances where staff do not feel that an applicant is suited to the job/course

### **6.3 References internal to Docklands Academy**

There may be circumstances where a confidential reference is written on behalf of a data subject by an individual in one department of the Academy, to be used by an individual in the same institution or even the same department. There is no obvious justification for differentiating between confidential references received from external third parties and confidential references received from within the Academy as regards any consideration of data subject access.

Upon receipt of a subject access request, the Academy Data Controller will apply the same criteria to a reference sent and received internally, as they would to a reference received from an external third party.

## **7 Telephone or verbal references**

Although requests for telephone or verbal references are frequently received, such requests should be declined other than in exceptional circumstances, since information given in this way may be misinterpreted in its transmission to the interview panel. If, exceptionally, a verbal reference is given, steps should be taken first to verify the identity of the enquirer and notes should be kept of the conversation. Where a verbal reference is given on behalf of the Academy, the person giving the reference should not make any statements he/she would not be willing to make in writing.

## **8 Unsolicited references**

It is generally inadvisable to provide unsolicited references addressed "*To whom it may concern*". If, exceptionally, such references are provided, they should be limited to factual statements such as dates of the student's registration, programme of study, and, if relevant, date and title of award.

Criminal convictions and disciplinary or other such sanctions: Care should be taken not to mention in references spent criminal convictions. Any query on this should be referred to the Academic Registrar.

If Docklands Academy has taken disciplinary or examination irregularity proceedings, against the subject of the reference or if such proceedings are pending, advice should be sought from the Principal as to how this may be mentioned in the reference, if at all.