

Practice Information Notes

The purpose of Practice Information Notes is to review current information and knowledge, outline the key issues and examine the implications for foster care, and provide best practice recommendations for fostering service providers and links to key documents. Each service will decide on practice based on the needs of the young people in its care and its foster carer population.

Practice Information Note Personal and Confidential References and the Data Protection Act 2018

The purpose of this *Practice Information Note* is to:

- Clarify the difference in data protection law between a personal reference and a confidential reference.
- Outline the implications of this for fostering services when undertaking fostering assessments.
- Make recommendations regarding policy and practice in relation to obtaining personal references during fostering assessments and highlight the responsibilities of fostering services when managing references obtained as part of a fostering assessment.

References to Legislation, Regulation and Statutory Guidance

- The Data Protection Act (DPA) 2018
- The UK General Data Protection Regulations 2018 (UKGDPR)
- The fostering regulations in the respective UK nations:
 - **England:** [The Fostering Services \(England\) Regulations 2011](#) 26(2)(b) and [Schedule 3\(12\)](#) as amended by [The Care Planning, Placement and Case Review and Fostering Services \(Miscellaneous Amendments\) Regulations 2013](#)
 - **Northern Ireland:** [The Foster Placement \(Children\) Regulations \(Northern Ireland\) 1996](#) 3(4)(a)
 - **Scotland:** [The Looked After Children \(Scotland\) Regulations 2009](#) 22(2)(a) and [Schedule 3\(14\)](#) and [Guidance on Looked After Children \(Scotland\) Regulations 2009](#)
 - **Wales:** [The Fostering Panels \(Establishment and Functions\) \(Wales\) Regulations 2018](#) 7(2)(c)

Key points

- Fostering services undertaking assessments of prospective foster carers are required to obtain a range of information about applicants from a variety of sources to inform their recommendation about the applicant's suitability to foster. This includes at least two personal references ([see statutory framework](#)).
- Given that personal references are requested as part of the assessment process, services have a duty to make clear to all parties the purpose and treatment of the information contained in them in relation to
 - who may have access,
 - how confidential information arising through the assessment process will be treated.
- Fostering regulations provide the legal basis for requesting personal references. A personal reference and a confidential reference have specific meanings within data protection legislation and are treated differently in the law. ***In practice services sometimes use the term personal and confidential references interchangeably, however there are now clear legal distinctions between the two types of references which have implications for what fostering services can or cannot disclose.*** The most significant difference is that confidential references cannot be disclosed without the consent of the author or for other lawful purposes.
- It is the provisions of data protection legislation and fostering regulations that determine the status of a reference and its treatment. It is therefore up to the fostering service, when requesting a reference, to explicitly state the type of reference being requested and its purpose.
- In a personal reference it is the service that has requested it, and not the author, who determines whether any part of it is of a confidential nature and therefore should not be shared other than as directed by law.
- The service should also provide the referee with information about how the information within their reference will be treated. Unless the fostering service determines that all or part of it should be treated as confidential, information in a personal reference will be shared with others through inclusion in the assessment report. It will be shared with the applicant either as part of policy around transparency of the assessment process or because of a subject access request.
- If the referee wishes to provide confidential information, this should be provided separately to the personal reference because of the disclosure rules pertaining to personal references or, if it is appropriately contained within a personal reference and noted as confidential it should be redacted.
- A fostering service requests and receives information from third parties in addition to personal references as part of the assessment process. It is good practice to verify information provided by the applicants with third parties, but this is best done as a separate information request and not as part of the personal reference.

- A fostering service should make clear to people contacted during the assessment process that safeguarding of children is a shared responsibility and that there is an expectation that they should share any concerns relating to the suitability of the applicants to be foster carers. The service should set out a process by which people can share information with the service, including options for them to do so confidentially.
- Confidentiality should be respected unless there are overriding responsibilities as set out in data protection legislation or of a safeguarding nature as set out in in [Working Together To Safeguard Children](#) (England), [Working Together To Safeguard People](#) (Wales), [Guidance to Safeguarding Board](#) (Northern Ireland) and [National Guidance for Child Protection](#) (Scotland) that mean it must be shared.

The statutory framework

Fostering regulations

In the fostering context, personal references are a statutory requirement in the process of assessing an applicant's suitability to foster.

The [legislation across the UK](#) provides the **legal basis** for the duty of fostering service providers to:

- ascertain the suitability of a prospective foster carer,
- interview at least two people to provide personal references, and
- provide written reports of the interviews.

At a practice level fostering services make use of the information provided in a reference in a variety of ways and this variation in use of the information may partially be explained by the extent to which the reference provided was treated in local policy as being confidential or personal. By being clear that the request is for a personal reference, a fostering service may:

- incorporate the reference fully into the appropriate part of the assessment form it makes use of,
or
- distinguish between those parts of the reference that are incorporated into the assessment form and those parts which are kept separate for example because
 - sensitive personal information is shared about a third party which does not impact negatively on the applicant's suitability,
 - at the request of the referee, they may have shared sensitive but relevant personal information to illustrate the applicant's suitability and details of which need not be disclosed publicly,
 - information is shared raising concerns about the applicant which have been investigated and resolved,
 - information is shared that raises significant safeguarding concerns about a third party that needs further investigation.

The General Data Protection Regulations 2018 (GDPR 2018)

The UK GDPR 2018 **introduced changes that amend and clarify how confidential references are to be treated under data protection legislation.**

The UK GDPR also creates new rights for people to access personal information held about them, new duties for the management and protection of such information, a clear responsibility to obtain consent where applicable, and a new fining regime alongside a range of specific exemptions.ⁱ

The UK GDPR makes it clear that when a reference or part of a reference is treated as confidential by the author and accepted as such by the recipient, a party who is the subject of the reference will no longer be able to make a subject access request to view its content.

In addition, data processors/controllers will also have to ensure the information is not disclosed in any other way outside of the statutory rules.

The Data Protection Act (DPA) 2018

The [DPA 2018](#) sets out the statutory framework for data protection in the UK. It replaces the DPA 1998 and incorporates into UK law the changes brought in by the GDPR 2018. For further information about what this means for fostering, visit: [Data Protection Act 2018 | The Fostering Network](#).

The Act, among other things, seeks to ‘ensure that sensitive health, social care, and education data can continue to be processed while ensuring that confidentiality in health and safeguarding situations is maintained’ⁱⁱ.

Any person about whom personal data is held and processed (a data subject) including previous fostering applicants, has among other rights, the right to access the data in specific circumstances. They can do this by making a [subject access request](#).

The information obtained by way of a reference is likely to be classified for the purposes of data protection legislation as [sensitive personal data](#) and must be obtained and held in a way that is compliant with the [requirements of law](#).

An immediate impact of the new data protection framework is a change in the way a confidential reference is to be treated, where consent to access the information within has not been given by the referee.ⁱⁱⁱ

The fostering regulations require the service to request at least two ‘personal references’, and the difference between a *confidential* and *personal* reference has become key within data protection legislation.

Confidential references and the DPA 2018

In general terms if a confidential reference is requested by an organisation i.e. is not part of the fostering approval process, the DPA 2018 Schedule 2 exempts the person about whom the reference is given from the UK GDPR 2018 provisions in respect of:

- the right to be informed,
- the right of access, and
- all the principles, but only so far as they relate to the right to be informed and the right of access

The DPA 2018 Schedule 2 Part 4(24) (d) states that:

*The listed GDPR provisions do not apply to personal data consisting of a reference given (or to be given) in confidence for the purpose of –
(d) the provision (or prospective provision) by the data subject of any service^{iv}.*

This applies in the case of a confidential reference provided about a prospective foster carer because foster carers provide a 'service'.

What this means is, unless the author of a **confidential** reference has given their expressed consent to share, when a subject access request is made in relation to a confidential reference:

- an organisation receiving the reference **is not required to disclose** it to an individual making a subject access request to view the contents, unless
- a court order is obtained, or there is evidence that non-disclosure will raise imminent safeguarding issues.

It is important to stress that these changes are only applicable to '**confidential references**'. Any other form of reference (for example local authority, medical or employment references) will still be subject to all other relevant provisions contained within the DPA 2018 or any other relevant legislation.

Personal references

Rights of Access where a subject access request is made in relation to '**a personal reference**' the following conditions apply:

Access to that information including permitted third-party information^v must be supplied to the data subject within the applicable time period^{vi} where:

'It is reasonable in all circumstances to comply with the request without the consent of the other individual'.

In determining what is reasonable in all circumstances, regard must be given to:

- any duty of confidentiality owed to the other individual^{vii}
- any steps taken to obtain consent
- the capacity of the person giving consent
- any express refusal of consent by the other individual.

Implications for practice

The change brought about by UK GDPR 2018 in relation to the treatment of confidential references means that fostering services must be clear about what they are asking for when seeking a reference.

Fostering services must have clear policies in place about the nature of the reference requested and how it will be treated particularly in relation to who will have access to the information. In addition, these policies must be appropriately communicated to all relevant parties.

As noted, the fostering regulations require personal and other references to be obtained as part of the assessment process.

Fostering services must strive to achieve a balance between the overall rights of, and protection due to, the data subject inherent in data protection and those matters relevant to their duties to safeguard children by making appropriate gatekeeping decisions about prospective foster carers.

If a fostering service is to keep strictly to the requirements of fostering regulations with regards to personal references, during the assessment of a prospective foster carer, a minimum of two *personal* references must be requested and obtained.

However, even when the service makes it clear that they are seeking a personal reference, there is nothing in statute that prevents them from deciding that part of it should be treated as confidential and not included in the assessment report or otherwise made generally available. This may arise if, for example:

- sensitive personal information is shared about a third party which does not impact negatively on the applicant's suitability
- at the request of the referee, they may have shared sensitive but relevant personal information to illustrate the applicant's suitability and details of which need not be disclosed publicly
- information is shared that raises significant safeguarding concerns about a third party that needs further investigation
- Information is shared raising concerns about the applicant which are investigated and resolved.

This implies, as often happens within the statutory framework for fostering, that there is scope for exercising some discretion in determining local policy about the treatment of personal references:

- If a reference is treated as purely personal in nature, the data subject will retain the right to make a subject access request in relation to the information contained within that reference.
- If all or part of the reference is treated as confidential, then that reference falls within the provisions contained within Schedule 2 of the DPA 2018 and consequently a data subject will not be able to access the information deemed confidential within it unless explicit consent has been obtained from the referee. Confidential areas must thus be redacted.

Developing a policy about references

Policies in relation to references should include:

- the purpose of the reference and why it is being sought
- clarity as to how the information contained within the reference will be used to inform the fostering approval process
- how a reference will be treated, i.e. as personal or confidential
- how and with whom will the information they provide be shared
- the expectation that references should contain and provide information as to the character and suitability of the applicants to foster

This policy should be made available to all relevant parties, including applicants, prospective referees and assessing social workers.

In England, NMS 13.2 requires that applicants are treated fairly, without prejudice, openly and with respect. Whilst transparency is the best way in which to achieve this,

where a referee needs to share concerns about the suitability of prospective applicants and is not willing for this to be known by the applicants, alternative ways for them to do so in confidence and outside of the personal reference should be set out within the policy to enable the safeguarding of children to remain the paramount concern.

When developing this policy, careful consideration should be given to the impact that it may have in determining whom an applicant may elect to put forward as a personal referee. Referees will have known the applicants for some time and may have known them through periods of stress or have information pertaining to periods in their chronology so they should be facilitated to share this information using the most appropriate channels.

Services should ensure staff are aware of the criteria applied to service access requests when determining what if any information should be redacted.

The Fostering Network makes the following recommendations:

- Fostering service providers should have a policy about the handling of personal data including the way references are to be treated, which meets the requirements of data protection legislation.
- Fostering services need to put in place robust procedures that facilitate the obtaining of written consent for the processing of personal data wherever appropriate.
- Fostering services should be clear about the distinction between personal and confidential references under data protection legislation: whom and for what purposes are references being requested and how they are to be treated, bearing in mind that the fostering regulations only require that services obtain at least two personal references.
- Applicants and referees should be informed that safeguarding is a responsibility of all those involved in fostering and they are encouraged to report concerns which will be treated sensitively and considered within the relevant context in relation to their impact on suitability to foster. Where appropriate they should be provided with guidance on how they can report any concerns they may have.
- A personal reference may become the subject of a subject access request. If for any reason the fostering service determines a personal reference or part of it is confidential in nature, all parties should be made aware that confidential elements^{viii} will be exempted from a subject access request. Access to the information by the subject will only occur with the explicit consent of the author or where applicable legal authority exists.
- Fostering services should ensure that staff and all other relevant parties (for example independent assessors) are fully conversant with their roles and responsibilities within the context of the DPA 2018.
- Fostering service should provide written information to prospective foster carers and their referees setting out how the data provided by them will be used and seek written confirmation that the parties have understood the information provided and give their consent.

Links to key documents

- The [Information Commissioner's Office](#) has a comprehensive range of information about data protection legislation
- Child protection and safeguarding:
 - [Working Together To Safeguard Children](#) (England)
 - [Working Together To Safeguard People](#) (Wales)
 - [Guidance to Safeguarding Board](#) (Northern Ireland)
 - [National Guidance for Child Protection](#) (Scotland)
- [The Data Protection Act 2018](#)
- For an outline of the way the DPA 2018 applies to fostering, visit: [Data Protection Act 2018 | The Fostering Network](#)

The Fostering Network offers practice support throughout the UK. In England, the practice support team comprises regional consultants who provide a range of services to members of The Fostering Network including practice advice, information, forums, support and guidance.

If you would like further information about the practice support team in England or practice support across the UK and what we can do to support you, please contact Sarah McEnhill, Head of Practice: sarah.mcenhill@fostering.net

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ⁱSchedules 2,3 and 4 contain the exemptions from and restrictions and adaptations to and the application of the rules of the GDPR. The provision and management of health or social care systems and services fall under these exemptions; others included in Article 9 are - that the data subject has given explicit consent, or is in their best interest where capacity to consent is absent, or the data subject has made the information manifestly public, or the processing is necessary for certain specific measures, or legal authority exists.

ⁱⁱ DPA does not apply to anonymised data as truly anonymised data doesn't constitute personal data for the purposes of GDPR. However, pseudonymous data (data that can still be linked to other identifiers held separately) does constitute personal data for the purposes of the GDPR.

ⁱⁱⁱ Under previous data protection legislation, (Data Protection Act 1998 (DPA) section 7, as repealed and replaced), a data subject could make a request to see a copy of a personal reference written about them, including confidential matters, subject to the exemptions explicit in the act, safeguarding principles and the duty of confidence.

^v Third party information is generally exempted from disclosure except where explicit consent has been obtained or it is reasonable to supply the information without consent or the request is manifestly excessive or unfounded.

^{vi} One month or such period not exceeding three months, DPA 2018 94(14)

^{vii} A duty of confidence arises when confidential information comes to the knowledge of a person in circumstances in which it would be unfair if it were disclosed to others.

