

## Complaint about the school's disclosure of an applicant's reference

Date: 05-05-2022

### Decision

### Public authorities

The case revolved around the fact that a primary school – in continuation of a conversation with the complainant about a possible internship – had obtained a reference from the complainant's previous place of internship.

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### Summary

The Danish Data Protection Authority has made a decision in two cases about obtaining references from the same complainant.

The case concerned that a primary school (school A) – following a conversation with the complainant about a possible internship – had obtained a reference from the complainant's previous internship (school B).

The complainant thus complained about two matters: 1) that school A obtained a reference about complaints from school B, 2) that school B passed on a reference about complaints to school A.

### School A's collection of reference

It appears from the case that School A regarded the interview as non-binding, as it was about a position that had not yet been advertised. For that reason, School A did not record anything in connection with the interview – nor the reference obtained from School B.

The Danish Data Protection Authority thus found that school A's collection of information about complaints was not covered by the data protection rules, as the collected information was not - or was intended to be - processed electronically or included in a register.

You can read the Danish Data Protection Authority's decision on obtaining a reference [here](#).

### School B's passing on of reference

The Danish Data Protection Authority also found that school B's disclosure of the reference in the specific case could be accommodated within the authority's narrow space in order to make use of the balancing of interests rule (article 6, subsection 1, letter f).

In this connection, the Danish Data Protection Authority emphasized that school B was of the opinion that the complainant had agreed that the reference could be passed on, since school A had informed them of this. Due to the nature of the information, school B had no special duty to take further steps to ensure the complainant's acceptance.

The practice reflected in the decisions will be incorporated in the Danish Data Protection Authority's update of the guidance on data protection in connection with employment, which the Danish Data Protection Authority expects to publish before the end of 2022.

## 1. Decision

After a review of the case, the Danish Data Protection Authority finds that school B's disclosure of information about you to school A has taken place within the framework of the data protection regulation[1] article 6, subsection 1, letter f.

Below follows a closer review of the case and a rationale for the Data Protection Authority's decision.

## 2. Case presentation

It appears from the case that you were terminated in your previous internship at school B and after the termination had an interview with school A with a view to possible continuation of the internship there.

At the meeting between you and school A there was, among other things, talked about the background for terminating your internship at school B and that you were an on-call substitute at school C.

In this connection, you gave verbal consent for school A to contact an employee at school C with a view to obtaining a reference.

After the interview, you became aware that school A – in addition to contacting school C for a reference – had also contacted school B, as school A informed you after the interview that you were not offered an internship at the school due to feedback from school B.

You then contacted X Municipality, which informed you of the following:

"I have now received a response from the Department regarding the case where you believe that X Municipality has passed on information about you on an unjustified basis.

The subject area informs me that, in connection with the job interview at Y Municipality, you have given permission to obtain a reference from X Municipality. I am further informed that it is only in this connection that X Municipality has provided information about you, and that only legal information has been provided during the statement. I am informed that HR (human

resources) in X Municipality has been aware of the matter.

Based on the information I have received about the matter, I do not see that there has been an unjustified disclosure of your information, and I am therefore not taking any further action in the matter.

I must mention that I have only dealt with the personal data law aspects of your inquiry."

You subsequently contacted the Danish Data Protection Authority and complained about school B passing on information about you to school A without your consent.

## 2.1. Your comments

You have stated that you believe there has been a breach of confidentiality, as school B has provided information about your dismissal to school A without your consent. You have also stated that you cannot be informed by any of the parties what has been specifically disclosed about you.

You have also stated that school B has provided information about you which is unfavorable to you and which has helped to delay your education for 6 months.

## 2.2. School B's comments

School B has stated that the school has passed on information about you by telephone to school A, which is stored electronically in your personnel file.

School B has also stated that the information that has been passed on about you is covered by Article 6 of the Data Protection Regulation, and that no information about you of a sensitive nature covered by Article 9 of the Regulation or information about criminal offenses covered by the Regulation has been passed on Article 10.

The information was passed on with school A's obtaining a reference, which school B had the clear view that valid consent had been given by you, cf. the data protection regulation's article 6, subsection 1, letter a. However, this was only confirmed verbally, as the reference was obtained over the phone, which is why there is no further documentation on this.

The person interviewed did not have the information in front of them in a readable format. However, the information is also stored electronically, as the information appears in your personnel file - which they also did at the time of disclosure. The passing on information is thus seen not only to originate from the memory of the person interviewed.

## 3. Reason for the Data Protection Authority's decision

3.1. The Data Protection Regulation applies to processing of personal data that is carried out in whole or in part by means of

automatic data processing, and to other non-automatic processing of personal data that is or will be contained in a register, cf. the Data Protection Regulation, Article 2, subsection 1.

Disclosure of information can take place if one of the following conditions in the data protection regulation, article 6, subsection 1, letters a-f are fulfilled:

The data subject has given consent to the processing of his personal data for one or more specific purposes.

Processing is necessary for the performance of a contract to which the data subject is a party, or for the implementation of measures taken at the data subject's request prior to entering into a contract.

Processing is necessary to comply with a legal obligation owed to the data controller.

Processing is necessary to protect the vital interests of the data subject or another natural person.

Processing is necessary for the performance of a task in the interest of society or which falls under the exercise of public authority, which the data controller has been tasked with.

Processing is necessary for the controller or a third party to pursue a legitimate interest, unless the data subject's interests or fundamental rights and freedoms requiring the protection of personal data take precedence, in particular if the data subject is a child.

The first paragraph, letter f) does not apply to processing carried out by public authorities as part of the performance of their tasks.

About this limitation in public authorities' use of the data protection regulation, article 6, subsection 1, letter f, appears from recital 47 of the regulation:

"Since it is up to the legislature to determine by law the legal basis for the processing of personal data by public authorities, this legal basis should not apply to processing carried out by public authorities as part of the performance of their tasks..."

The limitation in public authorities' ability to process personal data on the basis of the data protection regulation's article 6, subsection 1, letter f, must thus be seen in the context that public authorities should, as a rule, only process personal data as part of the performance of their tasks, if they have been granted the necessary powers to do so by law, in which cases the processing can take place on the basis of of the data protection regulation, Article 6, subsection 1, letter e.

However, the Danish Data Protection Authority is of the opinion that there is a narrow scope for public authorities to process personal data on the basis of Article 6, paragraph 1 of the Data Protection Regulation. 1, letter f.

This will in particular be the case where the processing does not relate to the performance of the public authority's tasks, but where the processing is nevertheless necessary for the purpose of the authority being able to function in a satisfactory and appropriate manner, including in relation to the day-to-day operation of the authority, and the activity, which causes the processing of personal data, is otherwise both factual and legal for the authority to carry out.

However, it is not excluded that there may also be other very special cases where it will be possible for a public authority to apply the balancing of interests rule.

3.2. The Danish Data Protection Authority assumes that you had not given your consent, cf. the data protection regulation, article 6, subsection 1, letter a, so that school B could pass on information about you.

In this connection, the Danish Data Protection Authority notes that consent (Article 6, subsection 1, letter a of the Data Protection Regulation) would not, in principle, form the basis for passing on references, as such consent – in a recruitment and employment process or similar process – often does not exist up to the condition of having been submitted voluntarily, and therefore cannot be considered valid.

It is the Danish Data Protection Authority's assessment that the passing on of reference information in a case such as the present one, where the passing on was not necessary for school B's task performance as a public primary school, will not be possible within the framework of Article 6, subsection of the Data Protection Regulation. 1, letter e.

The legality of the processing must therefore be assessed in accordance with Article 6, paragraph 1 of the Data Protection Regulation. 1, letter f.

When assessing whether there is authority to pass on reference information, consideration for the data subject (the applicant) must be given considerable weight due to the potential consequences such an exchange of information may have for the data subject.

For the transferring data controller – in this case school B – this means that information can only be passed on if the data subject agrees that the employing data controller – in this case Y Municipality – has informed the data subject that – and from whom - references will be obtained, and the registered person has consented to this.

However, this does not imply that the data controller – in this case school B – would in all cases have to contact the data subject themselves in order to secure this.

If – as is the case in this case – it is a question of one authority making inquiries to another authority, the forwarding authority,

when the receiving authority informs this, can, as a starting point, assume that the registered has consented to, that information is obtained about the person concerned.

When passing on information of a more protection-worthy nature, such as information covered by Article 9 of the Data Protection Regulation or Section 8 of the Data Protection Act, the data controller will have to ensure in particular that the data subject is informed about the processing and that the latter agrees to this.

3.3. On the basis of the above, the Danish Data Protection Authority finds that school B's disclosure of information about you took place within the framework of the data protection regulation, article 6, subsection 1, letter f.

The Danish Data Protection Authority has thereby attached importance to the information provided by school B that school A had indicated by telephone to school B that you agreed to the exchange of information about you.

The Danish Data Protection Authority has also emphasized the information provided by school B that the information passed on was only covered by Article 6 of the Data Protection Regulation.

In light of this, the Danish Data Protection Authority is of the opinion that school B could reasonably assume that you had consented to the collection of information about you, and that there was therefore no special duty for school B to take further steps for to ensure your acceptance.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general data protection regulation)