

Case 202100204

**Enforcement Order**

**Foster's Supermarket**

22 September 2021

**EXECUTIVE SUMMARY**

The complainant applied for a job at Foster's Supermarket but was not shortlisted for interview. He was told that this was as a result of concerns that were raised during reference checks. He submitted a subject access request under the Data Protection Act (2021 Revision) (DPA) for copies of all information held in relation to his job application, including all correspondence with his previous employers.

The information supplied to the applicant contained several redactions, mainly the names of Foster's staff and individuals from other companies who had supplied references. The complainant did not agree that these redactions were necessary and wanted to be supplied with the full information that was held.

The complainant was not told that references would be collected prior to any interview, and it was unclear who would be contacted for references. He was also concerned that some of the reference requests had been sent to generic role accounts rather than to specific individuals within organizations. He felt that this was a data security issue as it exposed his data to more people than necessary.

The Ombudsman found that none of the redactions, aside from the names of Foster's junior employees on one page of the disclosed information, could be supported. She required Foster's to disclose the remaining information in full.

The Ombudsman recommended that Foster's draft a more comprehensive privacy notice relating to their recruitment process, to explain to applicants how their personal data would be used throughout the process.

The Ombudsman also recommended that Foster's consider changing their practice relating to employment references so that they ask for a named individual contact for reference requests.

## A. BACKGROUND

- [1] In March 2021, the complainant applied for a job with Foster's. After he followed up for progress on his application, he was informed that they were completing reference checks before they could move to the next step of the process. On 30 March he was informed that his application had been unsuccessful "due to concerns based on previous employment reference check".
- [2] The complainant made a request to Foster's under section 8 of the DPA for access to the following:
- 1) *All communication from Fosters to all previous employers.*
  - 2) *All communication received by Fosters on behalf of me from all previous employers.*
  - 3) *The names and titles of all persons that had access to my personal information at Foster's.*
- [3] The complainant was dissatisfied with Foster's response as he believed that they had not provided all of the information they held, and he was unhappy that certain information had been redacted from the documents contained in the attachments. Foster's explained in its response to the complainant that the redactions were made to protect the personal data of other individuals and were made in line with sections 8(7) to 8(10) of the DPA.
- [4] The response to the complainant, contained two attachments, one called 'Current.pdf' and one called 'Archived.pdf'. Foster's confirmed to us that this was all the information that was held in relation to the complainant's request.
- [5] The 'Current.pdf' file contained some redactions. Our investigation considered whether the redactions within the 'Current.pdf' file were appropriate. The 'Current.pdf' file related to the complainant's recent application for a role at Foster's. As part of our investigation, Foster's provided us with an unredacted version of this file.
- [6] The complainant was concerned that he had not been told that references would be collected prior to interview, and that it was unclear who Foster's would be contacting for

references. This raised a question around the fairness and transparency of the processing of his personal data which we considered under the first data protection principle.

- [7] The complainant was also concerned that some of the reference requests had been sent to generic role email accounts rather than to specific individuals within organizations. He felt that this was a data security issue as it exposed his data to more people than needed to see it. We considered this issue under the seventh data protection principle.

## **B. CONSIDERATION OF ISSUES**

### **Response to Subject Access Request**

- [8] Section 8 of the DPA details the fundamental rights of access to a data subject's own personal data.
- [9] The provisions covering the disclosure or redaction of personal data relating to other data subjects are found in sections 8(7) to 8(10). Redaction is only permitted for personal data relating to another data subject who could be identified from that data.
- [10] In preparing the response to the complainant, Foster's stated that it was cognizant of these provisions and attempted to limit the information that had to be redacted through a careful assessment of each instance of personal data relating to other data subjects. There were, however, some inconsistencies in their approach, which were highlighted as we considered each redaction in turn.
- [11] The redactions involved two categories of individuals: internal Foster's employees and external third parties. The considerations were slightly different for each of these categories, so they were dealt with in turn.
- [12] The first set of redactions, on page 2, consisted of names of HR staff at Foster's, alongside actions they had carried out on the complainant's file. The explanation for these redactions given by Foster's HR Senior Manager was that they were withheld to protect the identity of the HR Administrators who had completed certain digital forms on the system. She stated

that she could be contacted for all HR matters and that names of her staff did not need to be disclosed, although her name was one of those redacted on this page.

- [13] Some of the entries referred to emails sent by the HR Administrators to the complainant, and these emails were provided elsewhere in the disclosed document, with the staff names included in unredacted form. This was an example of the inconsistency of approach taken to the redactions by Foster's in their response to the request. Given that these names were disclosed elsewhere in the response, there is no benefit to refusing to disclose them in this case. Where the names were not disclosed elsewhere, and given that these were mainly relatively junior staff in the HR team, the remaining redactions on page 2 were reasonable.
- [14] The other redactions relating to internal Foster's employees were in an email chain. They consisted of a discussion between the HR Senior Manager and the Managing Director about the response that had been sent to the complainant informing him that he was not shortlisted for an interview.
- [15] It was initially claimed that this was an "internal communication not relating to [the complainant] but [that] formed part of the email chain". When questioned about this, Foster's confirmed that it now considered that this information did relate to the complainant and that they would be happy to disclose it.
- [16] The remaining redactions all related to individuals who were external to Foster's and who were involved in providing references about the complainant.
- [17] On page 17 the names of two third-party individuals were redacted. One was the name of an individual who gave an unfavorable reference about the complainant, which was redacted three times from email correspondence. In this correspondence, the individual responded that "I would not hire" the complainant. The other individual was identified as the source of a positive reference from his previous employer.
- [18] Foster's informed us that they did not seek the consent of third parties for the disclosure of their data as "considering the context of the request, it was reasonable to assume that they would not consent". Foster's ought to have asked the third-party data subjects, given the factors detailed in section 8(10) of the DPA. An express refusal of consent from those data subjects, and the reasons given for that refusal, would have provided helpful clarity when

considering whether it was reasonable in all the circumstances to disclose the personal data without the consent of the data subjects.

- [19] Nothing in the correspondence with the third-party data subjects demonstrated that they were given under an explicit duty of confidentiality. The individuals whose names were redacted were not given any information about the possible disclosure of their names alongside the references in the event of a request. While they might have had an expectation that their names would be withheld, they could not reasonably expect that their identities would be kept confidential in all circumstances.
- [20] The UK Information Commissioner's Office produced useful guidance on the factors to consider when balancing the data subject's right to know the source of the information that is held about them against the right to privacy of the third party who can be identified from the information. It is found in the Supplementary Guidance to The Employment Practices Code<sup>1</sup>, and is relevant for the balancing exercise in this case.
- [21] Factors in favor of withholding the identities of the third parties were as follows:
- It was assumed that they would not have consented to the disclosure.
  - There may have been an assumed, implicit duty of confidence owed by Foster's to the third parties.
  - The author of the negative reference may have felt that disclosure of their identity could be damaging to them.
- [22] Factors in favor of disclosing the identities of the third parties were as follows:
- One of the references appears to have directly led to the complainant not being shortlisted for interview, and therefore had a significant impact on actions and decisions affecting him.
  - The complainant ought to have been made aware of such a reference and the identity of its author as he was entitled to dispute the contents and challenge its validity.
  - Disclosure of the identity of the author of the positive reference would not likely have caused any harm to that individual.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1066/employment\\_practice\\_code\\_supplementary\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1066/employment_practice_code_supplementary_guidance.pdf)

- The third parties in both cases would be identified in a business capacity, and therefore should have a lower expectation of privacy than if they were acting in a personal capacity.
- There was no express refusal of consent from either third party.
- There was no explicit duty of confidence owed by Foster's to the third parties, and they were not told that the references would be kept confidential.
- No background evidence or detail was provided in the negative reference, and the complainant had a right to challenge any decision made on such a basis.
- The identities of third parties who provided references from another of the complainant's former employers were provided on pages 3, 5 and 19, which demonstrates an inconsistency of approach.

[23] On the basis of the above, I find that the identities of the third parties that were redacted on pages 17, 20 and 22 should be disclosed.

[24] The remaining redaction to be considered was found on page 19. The reason given for the redaction of the company name was that it could allow inferring the identity of the person who supplied the negative reference. Foster's argued that this was a small company on island so it would be easy to identify the individual. Foster's later conceded that "while an inference could still be drawn that the individual was somehow related to [the company] we do not see that the individual referee could be identified with any particular certainty". Since I already concluded above that the name of the author of the negative reference can be disclosed, it follows that the name of the company that was redacted from page 19 can also be disclosed.

[25] Therefore, I support none of the redactions, aside from some of the names of Foster's employees on page 2.

#### **First Data Protection Principle - Fairness of Processing**

[26] The complainant was concerned that he had not been told that references would be collected prior to interview, and that it was unclear who Foster's would be contacting for references.

[27] The first data protection principle states that:

*Personal data shall be processed fairly...*

[28] In the interpretation of the principles in schedule 1, part 2, paragraph 2, this requirement is expanded upon:

*For the purposes of the first principle personal data shall not be treated as processed fairly unless the data subject has, as soon as reasonably practicable, been provided with, at a minimum –*

- (a) the identity of the data controller; and*
- (b) the purpose for which the data are to be processed.*

[29] When questioned about this, Foster's referred us to the privacy policy on their website<sup>2</sup>. However, this policy appeared to be mainly focused on visitors to the website. Although it did mention job applicants, there was no specific section of the privacy policy that detailed the purpose for which personal data is processed in relation to job applicants.

[30] Foster's agreed that the privacy policy was mainly a customer facing policy that mostly concerned their website, and that it did not contain details of how they conduct reference checks. They said that they would endeavor to draft a more comprehensive privacy notice relating to their recruitment processes. I recommend that this action is completed as soon as possible to ensure future compliance with the first data protection principle.

### **Seventh Data Protection Principle – Sending Reference Requests to Role Accounts**

[31] The complainant was also concerned that some of the reference requests had been sent to generic role accounts rather than to specific individuals within organizations. He felt that this was a data security issue as it exposed his data to more people than necessary.

[32] The seventh data protection principle states that:

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<sup>2</sup> <https://fosters.ky/privacy-policy/>

*Appropriate technical and organizational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*

- [33] When asked about this issue, Foster's explained that they often send requests to group role accounts in situations where they do not have specific named contacts already on their database. They stated that they would never release personal data to a group role account, but that they saw no danger from a data security perspective in sending a reference request to such accounts.
- [34] The risk to data subjects from this practice is generally low, and as such is not likely to result in a breach of the seventh data protection principle. The only information that is shared about data subjects is that they are seeking employment with Foster's and that a reference is being requested. To reduce this risk even further, Foster's could consider changing their practice so that the first contact to group role accounts asks for a named individual contact for reference requests. The reference requests that identify individual applicants could then be sent to the named individual. Of course, we understand that it can be difficult to obtain responses to such queries and that some companies may not readily give out individual contact details.

### **C. FINDINGS, RECOMMENDATIONS AND DECISIONS**

Under section 45(1) of the Data Protection Act (2021 Revision), for the reasons explained above, I make the following findings and decisions:

- I find that all the redacted information, aside from the names of Foster's junior employees on page 2, can be disclosed to the complainant.
- I require Foster's to disclose the full, unredacted information on pages 17, 19, 20, 22 and 34 within 15 days.
- I recommend that Foster's draft a more comprehensive privacy notice relating to their recruitment processes.
- I also recommend that Foster's consider changing their practice relating to employment references so that they request references from named individuals rather than a general contact email address.



Under section 47 of the Law, a person who receives an enforcement order under the DPA may, within 45 days of receipt and upon notice to the Ombudsman, seek judicial review of the Order to the Grand Court.

Sandy Hermiston  
Ombudsman