

Law and Interview Notes

A Guide for Recruiting Managers

Note-taking during an interview with a candidate is second nature for most recruiters. However, before you put pen to paper, it is worth bearing in mind that your interview notes may well end up in the hands of the candidate, as Louise Fernandes of Field Fisher Waterhouse LLP explains below.

Interviewing a candidate without taking any notes is rare. Understandably, recruiters jot down impressions of a candidate and record details that may be relevant to the decision-making process. However, such interview notes are often considered to be personal documents, not intended to be viewed by anyone else, let alone the candidate concerned. It may therefore come as a surprise to many of those involved in the recruitment process that candidates will often be entitled to see interview notes.

Legislative Background

The relevant legislation for these purposes is the Data Protection Act 1998 (DPA), as developed by the Employment Practices Code (published by the Information Commissioner).

Whilst a detailed discussion of the DPA is outside the scope of this article, it is worth covering some of the basic concepts. The DPA essentially places legal requirements on "data controllers" i.e. organisations that process "personal data". Under the DPA, "personal data" broadly means "biographical" data which has the individual as its focus. All organisations processing personal data must comply with eight data protection principles.

The first principle is most relevant to the interview process, stating that personal data must be processed fairly and lawfully (and shall not be processed unless at least one of a number of conditions is met). The remaining principles cover a number of issues, including the purposes for which personal data is obtained, and the requirement for the data to be adequate, relevant, not excessive, accurate and up-to-date).

The DPA applies to personal data held on computer or in relevant filing systems, i.e. a well-structured manual filing system, the organisation of which mirrors the accessibility of computerised records. Well organised personnel files will ordinarily fall within the definition of relevant filing systems. The DPA therefore applies to most of the information held by an employer about its employees, and will extend to personal data held on job applicants.

The Employment Practices Code

The Employment Practices Code applies the DPA in the employment context providing good practice benchmarks in a number of areas, including recruitment and selection. It can be accessed at <http://www.ico.gov.uk/>

In relation to interviews, it is important that personal data recorded and retained following an interview can be justified as relevant to, and necessary for, the recruitment process itself, or for defending the process against challenge. Whilst the Code is not concerned with setting out how to conduct interviews, the collection of personal data at interview and its recording, storage and use will all constitute processing under the DPA.

Subject Access Requests

Under the DPA, individuals have a right of access to data that is kept about them by a data controller. This is known as "subject access." Unless a set of interview notes is held on a file which is so unstructured as to fall outside the DPA, a candidate would normally be entitled to access notes taken during an interview process.

To request such access, a candidate would have to make a subject access request in writing. Before complying, the data controller is entitled to request a fee of up to £10 and information to confirm the identity of the individual making the request and the location of the information. A data controller must comply with a subject access promptly and, in any event, within 40 days of receipt of the request (or, if later, within 40 days of receipt of the £10 fee, evidence to confirm the identity of the individual and any information required to locate the information requested).

Where provision of the data will involve disclosure of data relating to third parties, it will be important to balance the access right of one person against the right to privacy of another. This may involve blanking out some data, or prior discussion with the third party.

Concerns About Discrimination

A candidate who requests access to interview notes may be concerned that he or she has been discriminated against. An alternative to making a subject access request is to serve a statutory discrimination questionnaire. The questionnaire procedure is available under all six strands of discrimination legislation (sex, race, disability, sexual orientation, religion or belief and age) and can be used to elicit a range of information, including copies of interview notes.

If the questionnaire procedure is used, a recruiter would not be obliged to respond. However, a failure to do so within 8 weeks, or providing evasive or equivocal answers, could lead to an Employment Tribunal drawing inferences of discrimination in any subsequent proceedings.

Way forward

After reading this article, those involved in the recruitment process may never want to put pen to paper again. However, the underlying issue here is not limiting what is written down at interview but rather ensuring that selection is made against objective criteria such as the skills and experience of the candidates relevant to the role. It then follows that interview notes will be valuable both for making that assessment and proving, if called upon to do so, that selection was objective and not influenced by conscious or unwitting discrimination.