

Sixty second summary

Data protection in the LGPS: the “joint controller” issue

For data protection purposes, Fund Actuaries (as specialist service providers) are likely to be considered to be ‘joint controllers’ of personal data, together with administering authorities. The Fund Actuary and the administering authority need to agree their respective responsibilities. We would also propose this is the case where Hymans Robertson is appointed to the Fund in a different capacity (e.g. investment or benefits adviser).

Background

The data controller determines the purposes for and the manner in which personal data is processed. This means that the data controller exercises overall control over the ‘why’ and the ‘how’ of a data processing activity. The Council in its role as an administering authority in the Local Government Pension Scheme (LGPS) is, accordingly, a data controller

However, administering authorities invariably use specialist service providers such as lawyers to provide them with legal advice, and actuaries to provide advice on scheme funding, consultants on investment matters etc. In such cases, the Information Commissioner’s Office (ICO), as the UK’s data protection authority, suggests that the administering authority may not have sole data controller responsibility, even though it initiated the work by asking for advice or commissioning a report.¹ Responsibility also lies with the specialist service provider, which is subject to professional, ethical and legal obligations and consequently itself often determines what information to obtain and process in order to do the work.

Prompted by the ICO’s views on the matter, the Institute and Faculty of Actuaries (IFoA) issued guidance to actuaries and the firms for which they work.² Whilst much of this refers to Scheme Actuaries (in a private sector pension capacity) and their firms, it also applies to Fund Actuaries in the LGPS. It also makes sense to apply these professional principles across non-actuarial services which Hymans Robertson provides.

The ICO and IFoA produced their guidance in the context of the *Data Protection Act 1998*. It is expected to be equally relevant to the *General Data Protection Regulation* (GDPR), which will supersede the Act with effect from 25 May 2018. The GDPR makes explicit provision for cases involving joint controllers.

What does the GDPR require of joint controllers?

Joint data controllers have to agree in a transparent manner the allocation of responsibilities, and to communicate the essence of this arrangement to individuals in an accessible format.

Regardless of the terms of the arrangement between the joint data controllers, however, the data subject remains entitled to exercise his or her rights against each of them, individually. Accordingly, the arrangement should be seen by joint data controllers as a method of determining day-to-day operational responsibilities, rather than an opportunity to contract out of their legal obligations.

¹ *Data Controllers and Data Processors: What the Difference Is and What the Governance Implications Are* (version 1.0), available at <https://ico.org.uk/media/for-organisations/documents/1546/data-controllers-and-data-processors-dp-guidance.pdf>.

² *Data Controller Responsibilities: Guidance for Actuaries and Firms Dealing with Personal Data* <www.actuaries.org.uk/documents/data-controller-responsibilities-guidance-material-actuaries-and-firms-dealing-personal-0>.

How may this be addressed in practice?

Although the GDPR does not state that the arrangement between joint data controllers must be set out in a legally binding contract, agreements in place between the actuarial firm and the administering authority (i.e. the services agreement) may be a convenient vehicle in which to set out their respective responsibilities.

In terms of communicating the arrangement to scheme members, the fund's annual report and accounts, benefit statements, or member newsletters may present an ideal opportunity. Or information could be included in privacy notices which are made available to members by the administering authority.

Hymans Robertson has developed documentation setting out the allocation of responsibilities based on the ICO and IFoA guidance. We will be in touch with our clients over the coming months to discuss this as part of our review of contractual arrangements for GDPR compliance. For those Funds who appointed Hymans Robertson via an LGPS Framework, we are actively discussing with the Framework the impact of GDPR on the Terms & Conditions.

We have also produced information for scheme members explaining the role of the actuarial firm and the allocation of joint controller responsibilities, which we would be happy to share with you on request