

Sixty second summary

Data protection: the “joint controller” issue

For data protection purposes, actuarial firms and individual scheme actuaries (as specialist service providers) may be considered to be ‘joint controllers’ of personal data, together with the pension schemes’ trustees. The actuarial firm, scheme actuary and the trustees need to agree their respective responsibilities.

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 trustees of an occupational pension scheme are, accordingly, data controllers.

However, trustees invariably use specialist service providers such as lawyers to provide them with legal advice, and actuaries¹ to provide advice on scheme funding. In such cases, the Information Commissioner’s Office (ICO), as the UK’s data protection authority, suggests that the trustees may not have sole data controller responsibility, even though they initiated the work by asking for advice or commissioning a report.² 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) commissioned legal advice and issued guidance to scheme actuaries and the firms for which they work.³

A ‘*scheme actuary*’, that is to say an actuary appointed by the trustees in accordance with the *Pensions Act 1995*, occupies an atypical position. It is a personal appointment, distinct from the actuarial firm’s role. In these circumstances, the scheme actuary, personally, could be a joint data controller. The actuary is likely to be employed by a firm that provides other services to trustees, outside the remit of the scheme actuary role. The firm too is subject to professional requirements, and may also therefore be a joint controller of personal data in relation to the scheme. In such circumstances, it is essential to determine which role—data controller or data processor—each of the parties occupies when they are performing different functions.

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.

¹ Whilst this Sixty Second Summary focuses on actuarial services, there is clearly an application to other kinds of services and firms who are ‘*specialist service providers*’ (explained in more detail in the ICO’s guidance—see footnote 2).

² *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>>.

³ *Scheme Actuary—Data Controller Responsibilities* (Advice Note prepared by Pinsent Masons) <www.actuaries.org.uk/documents/scheme-actuary-data-controller-responsibilities-advice-note>; *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>.

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 individual 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.

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 (i) the actuarial firm and the trustees (i.e. the services agreement), (ii) the scheme actuary and the trustees (i.e. the statutory appointment letter) and (iii) the actuarial firm and the scheme actuary (e.g. the employment contract) may be convenient vehicles in which to set out their respective responsibilities.

In terms of communicating the arrangement to scheme members, the trustees' annual report, benefit statements, or summary funding statements may present an ideal opportunity. Or information could be included in privacy notices which are made available to members by the trustees.

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.

We have also produced information for scheme members explaining the role of the actuarial firm and the scheme actuary and the allocation of joint controller responsibilities, which we will be pleased to make available to trustees.