

## LOCAL GOVERNMENT ASSOCIATION

### TEMPLATE MEMORANDUM OF UNDERSTANDING FOR LGPS FUNDS

1. This template memorandum of understanding has been prepared for the Local Government Association. We understand that copies will be provided to the administering authorities of Local Government Pension Scheme funds in England and Wales. **This template will need to be tailored to the specific circumstances of each fund.** Accordingly we accept no liability to individual funds or their administering authorities unless we provide formal advice specific to that authority.
2. This template is not advice to other connected or stakeholder parties, their auditors or other advisers, or other third parties ("Third Parties"). Other than as noted in paragraph 1 above, no part of this template may be passed on to Third Parties without our written agreement but, if it is so passed, we accept no responsibility, and will have no liability in contract, tort or otherwise, to those Third Parties in relation to this template.
3. This template has been prepared based on an understanding of the law (including taking into account guidance issued by the Information Commissioner and the EU Article 29 Data Protection Working Party) as at the date of issue. In particular, the Data Protection Bill is still going through Parliament and the Information Commissioner is expected to issue further guidance which may be relevant. Accordingly, it is possible that this template will need to be updated if the law changes or guidance is revised. However, we will only do so if the Local Government Association specifically give us written instructions to do so.
4. This template has been prepared for administering authorities, in their capacity as data controller of personal data relating to the Local Government Pension Scheme fund for which they are responsible, to set out for other participating employers in that fund their respective rights and obligations in relation to such data. In particular, this template assumes that other participating employers are themselves data controllers of the personal data, a copy of which they pass to the administering authority. Administering authorities will need to consider whether that is the case in respect of their own fund and tailor the memorandum of understanding to their individual circumstances. If in fact either party processes personal data on behalf of the other or if the two parties maintain a collective pool of personal data (such that they are joint data controllers for the purposes of the General Data Protection Regulations ("GDPR")) then this memorandum of understanding will require amendment to ensure it complies with GDPR.
5. This template has been prepared as a memorandum of understanding for administering authorities to issue to participating employers in their fund. It does not require signature by the employers and is not a legally binding document. There is no requirement under GDPR for data controllers to enter into formal contractual relationships with other data controllers with whom they share and from whom they receive personal data. However, data controllers may wish to do so in order to create enforceable rights as to the data received or provided, how their systems are accessed and/or to demonstrate they have taken appropriate technical and security measures before transferring personal data. Administering authorities should

consider whether employers should be asked to sign a copy of the memorandum to acknowledge and accept its contents and/or to create a binding contract that the administering authority could look to enforce if a particular employer did not satisfy its terms. We have not considered or advised on any tax or commercial implications that individual funds may wish to consider in conjunction with this memorandum. The memorandum reflects the strict legal requirements imposed on data controllers but individual funds may wish to include additional provisions. For example, funds may wish to include details of their expectations as to the provision of data by employers (format, accuracy, timeliness etc.) or requirements for employers and the fund to cooperate in the event of a data breach or any exercise by a fund member of their rights under GDPR.

**Squire Patton Boggs (UK) LLP**  
**29 March 2018**

## LOCAL GOVERNMENT PENSION SCHEME

### Memorandum of Understanding<sup>1</sup> regarding Compliance with Data Protection Law

#### 1 INTRODUCTION

1.1 The Local Government Pension Scheme (“**LGPS**”) in England and Wales is an occupational pension scheme registered under section 153 of the Finance Act 2004 and its rules are currently set out in The Local Government Pension Scheme Regulations 2013 (SI 2013/2356) as amended (“**LGPS Regulations**”).

1.2 The LGPS is administered locally by administering authorities which are defined in Regulation 2 of the LGPS Regulations and listed in Part 1 of Schedule 3 of the LGPS Regulations.

1.3 [NAME OF ADMINISTERING AUTHORITY] (“**Administering Authority**”) is an administering authority under the LGPS Regulations. The Administering Authority manages and administers the [NAME OF FUND] pension fund within the LGPS (the “**Fund**”) in accordance with its statutory duty under Regulation 53 of the LGPS Regulations. Employers employing employees who are eligible to be members of the LGPS will participate in the Fund as a “**Scheme Employer**” (as defined in schedule 1 of the LGPS Regulations). The Administering Authority and the Scheme Employer (together the “**Parties**”) are required to share personal data relating to the Scheme Employer’s current and former employees who participate in the Fund (the “**Members**”) and their dependants, in order for the Administering Authority to fulfil its statutory duties to manage and administer the Fund under Regulation 53 of the LGPS Regulations and provide the Members with benefits upon retirement, pay ill-health benefits, pay death grants, pay survivors’ pensions to Members’ spouses, civil partners and co-habiting partners, pay children’s pensions upon the death of the Member, offer Members the option of paying additional voluntary contributions to one or more providers in accordance with Regulations 1 – 52 of the LGPS Regulations.

1.4 Scheme Employers are under a statutory obligation, as detailed in Regulation 80 of the LGPS Regulations, to provide certain personal data relating to its Members on an annual basis to the Administering Authority, including the Member’s name, gender, date of birth, national insurance number, pensionable pay, employer and employee pension contributions, details of any additional pension contributions and additional voluntary contributions.<sup>2</sup>

1.5 This Memorandum of Understanding sets out:

- (a) the basis on which data will be shared between the Parties;

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<sup>1</sup> Please note that this Memorandum of Understanding is a template and will need to be tailored to the circumstances applicable to the Administering Authority with legal advice where appropriate. The Memorandum of Understanding has been drafted on the basis that it does not need to be signed by all Scheme Employers in the Fund. It is intended that this is put on the Administering Authority’s website and/or sent out to all current and new Scheme Employers in the Fund. The Administering Authority may wish to take further legal advice to ensure full compliance with GDPR.

<sup>2</sup> The Administering Authority may wish to consider adding in or cross referencing any other document which reminds the Scheme Employer of specific requirements and / or standards for the format, timing and accuracy of the data provided to the Administering Authority.

- (b) the Administering Authority's expectations of the Scheme Employer during its participation in the Fund;

in order to comply with Data Protection Law, including the General Data Protection Regulation (2016/679) ("GDPR") which will have direct legal effect in the UK on and after 25 May 2018<sup>3</sup>.

1.6 References to "**Data Protection Law**" in this Memorandum of Understanding mean the Data Protection Act 1998, the Data Protection Directive (95/46/EC), the Electronic Communications Data Protection Directive (2002/58/EC), the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) (as amended), the General Data Protection Regulation (2016/679) and all applicable laws and regulations relating to personal data and privacy which are enacted from time to time, including (where applicable) the guidance and codes of practice issued by the Information Commissioner's Office and any other competent authority.

## **2 DATA CONTROLLERS<sup>4</sup>**

2.1 The Parties acknowledge that they will:

- (a) not hold a pool of joint data<sup>5</sup>;
- (b) be separate and independent data controllers in relation to the copies of the Members' personal data they respectively hold;
- (c) act as data controller in relation to personal data transferred to them;
- (d) each be responsible for complying with the requirements in Data Protection Law that are applicable to them as data controllers.

2.2 References to Members' personal data includes personal data relating to the Members' dependants (including children) and spouses/civil partners (where applicable).

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<sup>3</sup> Administering Authorities should note that the Memorandum of Understanding is not legally binding. There are alternatives to issuing the Memorandum of Understanding, for example the Administering Authority could request that all Scheme Employers in the Fund sign a data protection agreement, which would be legally binding. Administering Authorities may wish to seek legal advice to assist them in deciding what documentation to put in place to comply with GDPR. In particular, GDPR requires specific contractual terms to be put in place with data processors and joint data controllers. This template assumes the Parties are separate data controllers.

<sup>4</sup> Consideration to be given to the roles and responsibilities in practice. For example, some Administering Authorities operate a practice whereby Scheme Employers are given access to parts of the pension administration system in order to view or update their members' records. It needs to be established which of the Parties (i.e. the Scheme Employer and the Administering Authority) is a data controller, which is a data processor and whether there are data processing agreements in place. The outcome will be a question of fact based on each individual situation. The Administering Authority may wish to receive legal advice.

<sup>5</sup> The Administering Authority may wish to take legal advice to establish whether or not there is a pool of joint data held – if there is, this Memorandum of Understanding may not be suitable.

### 3 DATA SHARING<sup>6</sup>

3.1 The Parties confirm that they understand their respective obligations under Data Protection Law as data controllers and agree to only process personal data<sup>7</sup> relating to the Members:

- (a) fairly and lawfully and in accordance with the data protection principles set out in Data Protection Law;
- (b) where there are lawful grounds for doing so<sup>8</sup>; and
- (c) in accordance with Data Protection Law and best practice guidance (including the Data Sharing Code issued by the Information Commissioner's Office and updated from time to time).

3.2 Each Party will separately inform the Members (as required under Data Protection Law) of the respective purposes for which they will each process their personal data and provide all required information to ensure that the Members understand how their personal data will be processed in each case by the Administering Authority or Scheme Employer (as applicable). The Scheme Employer's privacy notice to Members will inform them that their personal data will be provided to the Administering Authority and a copy of that notice will be provided to the Administering Authority on request<sup>9</sup>.

3.3 [Each Party confirms that it understands its respective obligations under Data Protection Law, to ensure that the Members' personal data of which it is a data controller is kept and used securely at all times and to take such technical and organisational security measures against unauthorised and unlawful processing of, accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to the Members' personal data transmitted, stored or otherwise processed as may be required<sup>10</sup>. Such measures will have due regard to the state of technological development and the cost of implementation of these measures, to ensure a level of security appropriate to the harm that might result from such processing and the nature, scope, context and purposes of processing the Members' personal data and the risk or likelihood and severity for the rights and freedoms of data subjects. Such measures will ensure:

- (a) the ongoing confidentiality, integrity, availability and resilience of processing the Members' personal data;
- (b) the ability to restore the availability and access to the Members' personal data in a timely manner in the event of a physical or technical incident;

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<sup>6</sup> The Administering Authority may wish to consider including specific commitments from the Scheme Employer to, for example, ensure the data they provide is accurate and they are entitled to provide it to the Administering Authority. Note, however, the Memorandum of Understanding is not legally binding so the Administering Authority would not easily be able to bring a claim in the event those commitments were not satisfied.

<sup>7</sup> The Administering Authority may wish to consider defining what constitutes personal data.

<sup>8</sup> The Administering Authority may wish to seek legal advice in order to establish the legal basis on which members' personal data can be processed.

<sup>9</sup> The Administering Authority may wish to consider if it would want any further control over or input into the Scheme Employer's privacy notice.

<sup>10</sup> The Administering Authority may wish to consider specifying the security measures that are to be put in place. Such measures may vary depending upon the Scheme Employer's IT systems.

- (c) carrying out of regular testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.]

3.4 Each Party undertakes to notify the other as soon as practicable if an error is discovered in the Members' personal data of which it is a data controller and which was received from or a copy of which has been provided to the other Party, to ensure that such other Party is then able to correct its own records. This will happen whether the error is discovered through existing data quality initiatives or is flagged up through some other route (such as the existence of errors being directly notified to the Administering Authority or Scheme Employer (as appropriate) by the Member (or the Member's dependants, spouse/civil partner) themselves).

#### **4 TRANSFER OF MEMBERS' PERSONAL DATA**

4.1 The Parties agree that Members' personal data will only be transferred from one Party to the other via an acceptable method specified by the Administering Authority which may include any of the following<sup>11</sup>:

- (a) [face to face]
- (b) [courier]
- (c) [secure email]
- (d) [SFTP link]
- (e) [encrypted removable media]
- (f) [access secure website]
- (g) [third party solution as agreed by the Parties]
- (h) [INCLUDE DETAILS OF ANY OTHER PREFERRED METHOD]

4.2 Each Party will, when transferring the Members' personal data of which it is the data controller to the other Party, ensure that that data is secure during transit (whether physical or electronic).

4.3 If either the Administering Authority or the Scheme Employer appoints professional advisers, third party administrators or another entity which provides other services involving the transfer of Members' personal data, those third parties will be data processors or data controllers in their own right. The Administering Authority or the Scheme Employer (as applicable) will comply with its own obligations in accordance with Data Protection Law (in particular, by ensuring that any entity to which it transfers Members' personal data also complies with Data Protection Law) and shall ensure that that nothing in the terms of

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<sup>11</sup> The Administering Authority should consider which of these method are suitable and appropriate. The Administering Authority may wish to take into account the Scheme Employer's IT systems. The Administering Authority may wish to consider whether to use additional data encryption when sensitive personal data such as health data is being sent.

engagement between the Administering Authority or the Scheme Employer (as applicable) and such third party would contradict this Memorandum of Understanding<sup>12</sup>.

## **5 RIGHTS OF MEMBERS (INCLUDING THE MEMBER'S DEPENDANTS, SPOUSES/CIVIL PARTNERS (WHERE APPLICABLE))**

5.1 Each Party shall, in respect of the personal data of which it is a data controller, respond to any requests from Members to have access to any of their personal data or a complaint or enquiry relating to that Party's processing of the Members' personal data received by that Party in line with its own obligations under the Data Protection Law.

5.2 Each Party agrees to provide reasonable assistance to the other as is necessary to enable the other Party to comply with any such requests in respect of Members' personal data of which that Party is a data controller and to respond to any other queries or complaints from Members.

## **6 DATA SECURITY BREACHES AND REPORTING PROCEDURES**

6.1 Each Party confirms that it understands its respective obligations under Data Protection Law in the event of any personal data breach, unauthorised or unlawful processing of, loss or destruction of or damage to any of the Members' personal data, including (where necessary) an obligation to notify the Information Commissioner's Office and/or the Member(s).

## **7 RESPONSIBILITIES OF SCHEME EMPLOYERS**

7.1 Notwithstanding the statutory obligations which apply to Scheme Employers under the LGPS Regulations and as a data controller under Data Protection Law, the Administering Authority, as Administering Authority for the Fund, expects Scheme Employers participating in the Fund to comply with the responsibilities set out below in relation to Members' personal data.

7.2 On request, the Scheme Employer will inform [NAME OF PERSON/POSITION] at the Administering Authority of any appointed qualified person to fulfil the role of data protection officer ("DPO") together with their contact details. If the Scheme Employer has not appointed a DPO, the Scheme Employer, on request, will inform [NAME OF PERSON/POSITION] at the Administering Authority of the details of a nominated person for GDPR compliance purposes.

7.3 [The Scheme Employer will demonstrate to the Administering Authority's satisfaction when dealing with ill health early retirement applications for current employees that explicit Member consent has been received which gives consent to processing by both the Scheme Employer and the Administering Authority. In the absence of such consent, the Administering Authority may not be able to process the Member's application.]<sup>13</sup>

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<sup>12</sup> The Administering Authority should consider whether it would want any control over appointments by Scheme Employers, particularly if the third party might have access to data held by the Administering Authority and/or its systems. This would require a formal contract between the Administering Authority and the Scheme Employer, rather than a non-binding Memorandum of Understanding.

<sup>13</sup> Consent is needed under the Access to Medical Reports Act 1988 in relation to health data in any event, therefore the Administering Authority may wish to seek its own legal advice in relation to this in order to establish a policy in this area. Consent for GDPR purposes is recommended, but needs to be fully informed, specific, unambiguous and freely given by way of a statement of clear affirmative action by the Member. The Administering Authority may prefer to seek such consent itself rather than relying on the Scheme Employer.

7.4 The Scheme Employer acknowledges the financial penalties that can be imposed by the Information Commissioner's Office in relation to breaches of Data Protection Law [and will inform the Administering Authority within [TIMESCALE] from the point that it becomes aware that the Scheme Employer may be liable to pay such a financial penalty]<sup>14</sup>. [The Scheme Employer further acknowledges that any liability it may have to pay a financial penalty to the Information Commissioner's Office may result in a revision of the rates and adjustments certificate in accordance with Regulation 62(7) of the LGPS Regulations.]

## **8 [COMPLIANCE WITH THE MEMORANDUM OF UNDERSTANDING]**

8.1 Failure by the Scheme Employer to comply with the terms set out in this Memorandum of Understanding may result in the Administering Authority taking any or all of the following actions:

- (a) [reporting the Scheme Employer's non-compliance to the Information Commissioner's Office];
- (b) [ANY OTHER ACTION WHICH THE ADMINISTERING AUTHORITY DEEMS APPROPRIATE AND WHICH IS WITHIN ITS POWERS TO DO SO].]<sup>15</sup>

## **9 REVIEW AND AMENDMENT OF MEMORANDUM OF UNDERSTANDING**

The Administering Authority will review the Memorandum of Understanding [annually / from time to time]<sup>16</sup>. The Administering Authority reserves the right to amend the Memorandum of Understanding at any time [and with immediate effect]<sup>17</sup> [and will provide written notice to the Scheme Employer of such amendment]<sup>18</sup>.

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<sup>14</sup> The Administering Authority should consider whether it would like to be informed of any financial penalty which is imposed/is likely to be imposed on a Scheme Employer. This could have an impact on the Scheme Employer's covenant to the Fund if sufficiently material. Note that if the Administering Authority and Scheme Employer are in fact joint data controllers they could have joint and several liability for any financial penalty. In those circumstances the Administering Authority might wish to seek an indemnity from the Scheme Employer for any financial penalty imposed on the Administering Authority as a result of a breach by the Scheme Employer (e.g. if the data provided by the Scheme Employer was inaccurate and the Administering Authority was held liable for breach of its own obligation to maintain accurate data). Any such indemnity would need to be contained in a legally binding contract rather than a Memorandum of Understanding in order to be enforceable.

<sup>15</sup> The Administering Authority may wish to consider what action, if any, it would take against a Scheme Employer who was not complying with the requirements set out in this Memorandum of Understanding bearing in mind that it is not legally binding unless it is signed.

<sup>16</sup> The Administering Authority should consider how often it would like to review the Memorandum of Understanding.

<sup>17</sup> The Administering Authority may wish to consider when it would like any amendments to take effect.

<sup>18</sup> The Administering Authority may wish to consider whether it would like to provide notice of any amendment to the Memorandum of Understanding.