

Variation of Data Protection liability levels in Corporate Contract with Serco Limited

Councillor Mohammed Farooq, Cabinet Member for Digital Services and Transformation

June 2019

Deadline date: N/A

Cabinet portfolio holder: Responsible Director:	Councillor Mohammed Farooq, Cabinet Member for Digital Services and Transformation Peter Carpenter, Acting Director of Resources
Is this a Key Decision?	YES If yes has it been included on the Forward Plan: YES Forward Plan reference number: KEY/10JUN19/03
Is this decision eligible for call-in?	YES
Does this Public report have any annex that contains exempt information?	YES Appendix 1 as the information contains commercial terms proposed and under negotiation between the Council and Serco Limited (reference paragraph 3 of Schedule 12 A of the Local Government Act 1972) and a background context which is commercially sensitive to the contractor. The public interest test has been applied to the information contained within the exempt annex and it is considered that the need to retain the information as exempt outweighs the public interest in disclosing it because to do so could compromise the Council's and the Contractor's position in negotiating future contracts.
Is this a project and if so has it been registered on Verto?	NO

R E C O M M E N D A T I O N S

The Cabinet Member is recommended to:

1. Approve the new contractual terms provisionally negotiated between Peterborough City Council and Serco Limited in relation the respective parties' liabilities under new data protection legislation (the General Data Protection Regulation 2016/679 and the Data Protection Act 2018).

2. Amend the corporate services agreement between the Council and Serco Ltd to incorporate the new terms.

1. PURPOSE OF THIS REPORT

- 1.1 This report is for the Cabinet Member for Digital Services and Transformation to consider exercising delegated authority under paragraph 3.4.3 of Part 3 of the constitution in accordance with the terms of their portfolio at paragraph (c).
- 1.2 The attached report/background information in Appendix 1 is NOT FOR PUBLICATION in accordance with paragraph 3 of Schedule 12A of Part 1 of the Local Government Act 1972 in that it contains information relating to commercial liability terms proposed and under negotiation between the Council and Serco Limited in relation to the respective parties' contractual liability levels under the GDPR/DPA 2018. The public interest test has been applied to the information contained within the exempt annex and it is considered that the need to retain the information as exempt outweighs the public interest in disclosing it as to do so.

2. TIMESCALES

Is this a Major Policy Item/Statutory Plan?	NO	If yes, date for Cabinet meeting	N/A
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3. BACKGROUND AND KEY ISSUES

- 3.1 The Council is currently negotiating higher mutual contractual liability levels under its corporate agreement with Serco Limited, under a Notice of Change to the Serco PSP Agreement in relation five service elements, in order to bring these into line with the new data protection legislation. These five service elements involve the processing by Serco of the Personal Data which carries relatively high risk, due to its sensitivity and volume. They are:

- Customer Services
- Revenues and Benefits
- Housing Benefit and Council Tax Reduction Scheme
- Payroll
- Business Support

However, the proposed changes hereunder, in relation to the data protection liability levels of the parties will apply to all data processing by Serco Limited for the Council under the Serco PSP Agreement.

- 3.2 Under the GDPR/DPA 2018 higher levels of responsibility and accountability are imposed on both controllers, but also on processors of personal data and data breaches can result in heavy fines, which in the worst cases can be as high as 20 million Euros or 4% of turnover. In this context the Council is a data controller and Serco a data processor.
- 3.3 Under the proposed new arrangements both the Council and Serco, respectively shall bear unlimited liability for any ICO fines imposed as a result of that party's data breach or breach of the legislation
- 3.4 Serco have responded to our proposed amendments to the PSP Agreement (to bring into line with the new data protection legislation) by asking that the Council accept a higher liability level i.e. capped at a higher amount (in relation to data breaches or breaches of the data protection legislation) in relation to third party claims for which the Council may be responsible. This has the effect of increasing the Council's liability and altering the cap on

their liability to us as set out in Appendix 1 and by offering a differently calculated liability cap in relation to claims/breaches for which they are responsible.

3.4 It is worth noting that as with all liability caps, if third party claims are successfully brought against either party and the damages exceed the agreed liability cap, the non culpable party can only recover damages from the other to the limit of the cap and the balance would have to be born by it and its insurance.

3.5 The insurance implications of the proposals have been discussed with the Council's Insurance Manager (IM) (as the Council's insurance needs to cover liability levels as a minimum) and the IM is satisfied with the proposed changes to the Council's liability and risk levels and has advised that the Council's public liability insurance levels cover it amply.

4. CONSULTATION

4.1 N/A. The Change Control is required as a result of the introduction of the new data protection legislation. The changes to the parties' risk/liability positions have been reviewed (with the Council's Insurance Manager) and found acceptable.

5. ANTICIPATED OUTCOMES OR IMPACT

5.1 Both the Council and Serco will have revised their contractual liability levels to offer a level of protection in line with the parties' increased legal responsibilities under the GDPR/DPA 2018 and from the Council's point of view, these will be comfortably within the Council's insurance cover.

6. REASON FOR THE RECOMMENDATION

6.1 The current proposals are considered both a commercial and reasonable response to the new responsibilities each party bear under the data protection legislation as well as fair, as part of the terms of the context of the Notice of Change bringing the PSP Agreement into compliance with the new data protection legislation. They have been evaluated and approved by the Council's Insurance Manager.

7. ALTERNATIVE OPTIONS CONSIDERED

7.1 Do Nothing: not approving the revised liability levels could further delay this and render the parties respective liability levels less favourable to the other and result in a cost to the Council if it is unable to recover damages from Serco in the event of a data breach or breach of the new legislation.

8. IMPLICATIONS

Financial Implications

8.1 See 7.1 above. In addition in the event of a data breach or breach of the legislation by the Council the Council will be liable to compensate Serco at the higher amount/cap. However, the Council will be insured against this risk. The Council is satisfied that over the long term the new liability limits/arrangements offered by Serco will be of benefit to the Council.

Legal Implications

8.2 The legal implications are set out in paras 3.1 to 3.4. In brief the Council will be contractually liable to compensate Serco to higher amount under the PSP Agreement than previously, in relation to third party claims resulting from the Council's own (if any) breach of the legislation.

Equalities Implications

8.3 None.

9. DECLARATIONS / CONFLICTS OF INTEREST & DISPENSATIONS GRANTED

9.1 None.

10. BACKGROUND DOCUMENTS

Services Agreement (In Respect of Various Services) between Peterborough City Council and Serco Limited of 25th November 2011.

10.1 *None.*

11. APPENDICES

11.1 Appendix 1 – Peterborough City Council/Serco Contract Liability Limits (EXEMPT)