

# **Public Records (Scotland) Act 2011 Stakeholder Forum 25 July 2018**

## **Third Party Compliance Breakout Notes**

### **SUMMARY OF DISCUSSION**

#### **ELEMENT XX: Third Party Compliance**

The Group agreed the revised Model Plan should include a new element to cover third party compliance. This element should be a concise statement. We prepared a draft statement for Forum member review:

*“Third party contracts must include the appropriate clauses for the information and/or records being created on behalf of the authority, taking a risk-based approach over the life-cycle of the contract.”*

#### **GUIDANCE MATERIAL**

The Group identified guidance material required to help authorities to comply with this element, building on current guidance, published as part of the SCA ARMS online toolkit.

This guidance should be provided within the Model Plan Guidance Documentation.

To maintain the focus of the Guidance and avoid it becoming over-complicated, links to more detailed or related reference materials should be provided.

- Categories of third party procurement/contracts e.g. ALEOs, commercial contractors, devolved procurement with related compliance roadmaps/flowcharts quickly signposting authorities to guidance relevant to their circumstances.
- Risk matrix
- Examples of evidence of compliance that the Keeper will look for
- How to audit compliance within your authority
- Model clauses
- Summary of contract requirements broken down by contract life-cycle stage e.g. what happens to the records at the end of the contract

#### **REVISION ACTIVITY BETWEEN FORUM MEETINGS**

##### **1. Method**

Unless a simple alternative collaboration tool, accessible to all, can be adopted, we agreed that email should be used for revision activity between meetings.

Subject line prefix naming convention should be agreed to classify emails by the relevant revision area, ie Model Plan, GDPR and 3<sup>rd</sup> party compliance

##### **2. Action due between July and August meetings**

Distribute what the sub-group developed in the break-out session to all Forum members for their feedback, in consultation with appropriate colleagues and peers e.g. Procurement within authorities, Scottish Government Procurement, SOLAR, ASLAWG, ARA, IRMS Scotland

##### **3. Requested categories of feedback**

- Expand on the issues we have already identified – develop existing ones and/or add new ones
- Feedback on our draft wording for the proposed new 3<sup>rd</sup> party compliance element – including suggested edits
- Feedback on suggested guidance revision requirements –thoughts on suggested approach, identifying gaps, providing good practice examples of guidance, templates, approaches etc...

## ADDITIONAL NOTES

### (1) INTRODUCTION BY HEATHER JACK

Example given of person looking for information about their childhood which involved 15 or 16 independent third party organisations, some of which no longer existed. Almost impossible to find any records, despite formal care provider being the local authority.

RMP elements – identified Element 14 as directly relevant but most other Elements indirectly relevant to 3<sup>rd</sup> Parties

To date, existing assistance can be found on SCA website

- Records Management Clauses for Contractors
- Guidance for Contractors
- <http://www.qpathway.com/ARMS/home.php>

(Noted that this is held on the SCA website because the Keeper cannot formally provide advice or guidance to bodies not listed on the schedule of the scope of the Act)

Proposed issues for discussion

- How are things working in practice
- Challenge of limiting 3<sup>rd</sup> party compliance to statutory functions (see below)
- Contractual clauses
- Regulatory 3<sup>rd</sup> party compliance obligations

### (2) BREAKOUT DISCUSSION NOTES

Consensus that 3<sup>rd</sup> Party compliance does require a separate element in the Model Plan.

- This should be scalable & flexible to match authority needs
- Massive issue for some authorities, non-existent for others
- Guidance should include questions –eg: do you sub contract any services?

#### Definitions of functions of public authorities

Initial discussion centred around the definition of a function and whether this was limited to statutory functions or included all functions carried out by a public authority.

Many services/functions of local authorities are now delivered by Arms Length External Organisations (ALEO)

Sub-contracting /contracting-out ranges from caring for Looked After children to cleaning hospitals.

- Recognised distinction between purchase of supplies and sub-contracting functions, however some grey areas requiring clarity
- Text of the Act read out
- Text of notes accompanying Bill during passage was provided on screen
- NRS noted that the Keeper was clear that the definition of a public authority's functions rested with the public authority and not with NRS.

Agreed that the authority has to ensure that the ALEO & sub-contractors are complying with the authority's RMP

- Guidance should include examples of 3<sup>rd</sup> parties
- Existing guidance for Re-use of Public Sector Information could assist public authorities to define their functions <http://www.nationalarchives.gov.uk/documents/information-management/guidance-on-public-task-statements.pdf>

## Issues

### 1. How are 3<sup>rd</sup> party contracts identified?

Some authorities building up a contract register. Contract monitoring in large authorities is left to individual services. This can lead to difficulties of ownership and responsibility. Contract manager / procurement leads large contracts (threshold examples vary from £10,000 to £50,000); however noted that procurement teams may only cover a small percentage of contracts in large authorities

- Key task is identifying the different types/categories of contracts with examples of 3<sup>rd</sup> party contractors who create records which are part of the authority's functions
- Example given of NHS with PFI hospitals
- There was a suggestion that an additional element in the Model RMP should be drawn up to cover procurement processes during this discussion but this was not agreed

### 2. How does the authority know if 3<sup>rd</sup> parties are complying?

Guidance for Contractors hosted on the SCA website is lightweight and very simple because it is intended for small 3<sup>rd</sup> party contractors and not applicable to a large organisation.

Records Management Clauses for Contractors are legal language and therefore much more technical and longer.

Noted that software contractors frequently require authorities to use the software terms & conditions/standard contracts

Also noted that some contracts result in contractor creating different records that authority may not be entitled to see eg: Occupational Health

- Key point is that public authority needs to decide what records must be maintained by the contractor/ALEO in each case
- Each contract should consider/specify what happens to the records at the end of the contract (are they owned by the contractor, are they given to the authority)
- authorities need to be protected by ensuring that there is a sensible legal contract in place
- risk matrix/ risk management approach is best practice
- Should cover entire lifespan of contract
- Authorities should look for assurances about various Elements of the RMP, eg: data protection; similar to assurances in contracts some authorities set up with data processors

May be helpful to develop additional guidance such as:

- High level risk matrix with set of examples
- Evidence to support implementation of the RMP
- Categories of 3<sup>rd</sup> party contractors leading to route map of what applies to each category (possible flow chart?)

Noted however that the Keeper cannot have a view on different kinds of contractors as that is the responsibility of the individual public authorities. The Keeper can only advise on what must happen when a public authority considers is contracting out one or more of its functions.