

**SOMERSET COUNTY COUNCIL
THE CABINET**

KEY DECISION TAKEN BY THE LEADER OF THE COUNCIL

Indemnification of Somerset County Council's nominated member to SouthWest One Board

Cabinet Member(s): Mr K Maddock, Leader of the Council

Contact Details: Catherine Witham **email:** CWitham@somerset.gov.uk, Tel: 01823 355060

Date of Decision: 22 August 2011

Date of Publication of decision: 22 August 2011

Date decision comes into force: 22 August 2011

1. Cabinet Member Decision

The Leader of the Council :

1. Agreed that Somerset County Council provides a broad indemnity for its previous, current and future nominated member(s) to the SouthWest One Board of Directors as set out in Appendix 1.
2. Authorised the County Solicitor to finalise the terms and arrangements for the indemnity cover for the nominated member, including the ability to amend the terms set out in Appendix 1 if necessary.

The Leader of the Council and the Chairman of Scrutiny Committee agreed the use of special urgency to enable this decision to be considered and also the use of urgency provisions to enable its immediate implementation.

2. Reason for Decision (s)

To provide indemnity cover for the Council's nominated member to the SouthWest One Board.

3. Reason(s) for Urgency (where applicable)

To ensure that indemnity cover is in place for the Council's previous, current and future nominated members to SouthWest One Board.

4. Any relevant Personal Interest that the Cabinet Member may have under the Council's Code of Conduct for members.

None

5. Other background information considered by the Cabinet Member before making this decision.

As set out in attached officer report.

Officer Report

– 19 August 2011

Indemnification of Somerset County Council's nominated member to SouthWest One Board

Cabinet Member: Mr K Maddock, Leader of the Council

Division and Local Member: n/a

Lead Officer: Catherine Witham, County Solicitor

Author: Catherine Witham

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Please complete sign off boxes below prior to submission to Community Governance

Report Sign off	Seen by:	Name	Date
	Legal	Catherine Witham	22/08/11
	Corporate Finance	Kevin Nacey	22/08/11
	Human Resources	Richard Crouch	22/08/11
	Senior Manager	Matt Jones	22/08/11
	Chief Executive	Sheila Wheeler	22/08/11
	Cabinet Member	David Huxtable	22/08/11
Forward Plan Reference:	Special Urgency procedure agreed by the Leader of the Council and Chairman of Scrutiny Committee.		
Summary:	This report recommends that Somerset County Council (SCC) provides a broad indemnity for its nominated member to the SouthWest One Board of Directors.		
Recommendations:	<p>1. That Somerset County Council provides a broad indemnity for its nominated member to the SouthWest One Board of Directors as set out in Appendix 1.</p> <p>2. To authorise the County Solicitor to finalise the terms and arrangements for the indemnity for the nominated member, including the ability to amend the terms set out in Appendix 1 if necessary.</p>		
Reasons for Recommendations:	To provide indemnity cover for the Council's nominated member to the SouthWest One Board.		
Links to Priorities and Impact on Service Plans:	This report supports the aim of "Reducing the size of Somerset County Council whilst increasing its flexibility, effectiveness and influence" under the "People" theme in the County Business Plan.		
Financial Implications:	As set out in paragraph 4.3.		
Equalities Implications:	None specific.		
Risk Assessment:	As set out in paragraph 4.2		
Scrutiny Recommendation (if any)			

1. Background

- 1.1.** Southwest One was incorporated in England and Wales as a private limited company on the 18th September 2007 under the Companies Act 1985. The company operates as a Joint Venture, with Somerset County Council, Taunton Deane Borough Council, The Avon & Somerset Police and IBM participating as shareholders.

The Main Board of the company has overall accountability for the strategic direction and leadership of the Joint Venture, including all fiduciary and governance issues, the setting and delivery of business objectives, trends in growth, values and company strategic decisions, and business expansion.

In terms of Board membership, for the three public partner Authorities:

- One elected member representation from Somerset County Council,
- One elected member representation from Taunton Deane Borough Council,
- One representative from Avon & Somerset Police Authority.

And for Southwest One:

- IBM non-executives x 3.

- 1.2.** Somerset County Council (SCC) nominates a Member as a Director of the SouthWest One Board. SCC's nominated member is Councillor B. Little.
- 1.3.** Members of local authorities can incur personal civil and criminal liability as a result of their actions, both within the authority and as a result of their actions carried out on behalf of a wide range of outside bodies. Members enjoy statutory immunity from civil liability where they act within the powers of the authority in good faith and without recklessness. But this immunity does not apply where they go beyond the powers of the authority or act in bad faith, or where they are acting on outside bodies to which they may have been appointed by the authority, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.
- 1.4.** Members have no contract of employment and the ability of the authority to grant an indemnity to members had rested on a single court judgment (*R v Westminster City Council ex parte Legg / UMPO* (2000) 2 LGLR 961)¹ which only covered the instance of an authority agreeing to underwrite the member's legal costs in being represented before the District Auditor.
- 1.5.** The Local Authorities (Indemnities for Members and Officers) Order 2004 regulations give a specific power for authorities to grant indemnities, and/or to take out insurance, to cover the potential liability of members in a wide range of circumstances. It is up to each authority to decide whether to grant such indemnities, or take out such insurance, and to decide the extent of such indemnities and insurance.
- 1.6.** As set out above, members enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence. This immunity may also cover the case where a member acts within the overall powers

of the authority, but in a situation where the particular power rests with some other part of the authority (for example where a nominated Board Member purports to take a decision which can only be taken by a Cabinet Member), provided that he/she does so in the honest belief that he/she had the power to take that decision.

- 1.7. Councillor Little is not a Cabinet Member and under the Council's Scheme of Delegation he is not empowered to take decisions on behalf of SCC. Consequently, any decisions relating to SouthWest One which require approval from SCC will need to comply with the Council and Leader's Scheme of Delegation to Members and Officers.
- 1.8. It is proposed that the Council provides a broad indemnity for its nominated member to the SouthWest One Board. The model form of indemnity cover is set out in Appendix 1 and delegated authority is requested for the County Solicitor to finalise the indemnity cover arrangements.
- 1.9 The law provides that the Council cannot provide an indemnity for members that cover:
 - (a) any criminal acts on the part of the member;
 - (b) liability arising from fraud, deliberate wrongdoing or recklessness on the part of the member;
 - (c) the costs of pursuing (but not defending) a defamation action;
 - (d) liability for any action which is outside the powers of the outside body (South West One), even if the action was taken in the honest belief that it was within the outside body's powers.

2. Options Considered

- 2.1. The alternative option is for SCC not to provide indemnity cover for its nominated Board member which will mean either that the member is willing to accept the risks that may arise or that the member concerned will need to arrange for their own personal liability cover.

3. Consultations undertaken

- 3.1. The Chief Executive has consulted with the Cabinet Member for Resources, the Opposition Group Leader and the Chairman of Scrutiny Committee.

4. Implications

- 4.1. The legal powers to enable SCC to indemnify its nominated SouthWest One Board member are set out in paragraphs 1.4 and 1.5 above.
- 4.2. There are a range of risks if the Council does not indemnify its nominated Board member. The principal risk will be potential personal liability of the nominated Board member. Individual SouthWest One Board members are potentially personally liable to contribute to company assets in the event of insolvent liquidation if they did

not, in the opinion of a court, fail in their duty to take every step that a reasonably diligent person would take to minimise the potential loss. One of the proposed risk management strategies will be to provide further detailed written advice to the SCC nominated Board member on their potential personal liabilities and ways of managing these, together with the limitations on the proposed indemnity.

- 4.3.** Should there be a need for SCC to meet any costs associated with indemnifying its nominated Board member then these will be met at the relevant time by Council's Contingency Budget.
It is anticipated that effective management of risks will limit any indemnity costs to SCC

5. Background papers

5.1.

Notes

For sight of individual background papers please contact the report author.

The Leader or a Cabinet Member **must** have regard to officer advice before exercising a key decision and follow the procedures for taking key decisions. All proposed key decisions shall be notified via this template by email to the Group Manager – Community Governance – Julian Gale – (copied to Scott Wooldridge).

Key decisions to be taken by the Leader, a Cabinet Member or an Officer shall be notified to all Members of Council via the Council's website 5 working days before the decision is to be made. Any representations can be made to the decision maker and/or report author before the decision is to be made.

In accordance with Article 2.10(c) of the Scrutiny Committee Procedure Rules in the Council's Constitution, all key decisions are subject to the call-in for consideration by the Scrutiny Committee within 3 working days of the publication of decisions. Each call-in must specify what is being called-in, why it is being called-in, what information is required to help the Scrutiny Committee consider the call-in, if the implementation of the decision should be delayed until the scrutiny process is complete, and the preferred outcome. The only exception to this rule shall be 'urgent' decisions requiring immediate implementation – see urgency provision below.

Urgency can only be applied where delay in implementing a decision would be to the detriment of the interests of the Council. The case for urgency must be agreed by the Leader (or Deputy Leader in the absence of the Leader) and the Chairman of Scrutiny Committee prior to the decision being implemented.

All proposed decisions, decisions and supporting material shall be recorded on the Council's website and be available for public inspection at any time (unless the report contains exempt information under Schedule 12A of Local Government Act 1972).

Appendix 1

Terms of Indemnity

1.1 The Authority will, subject to the exceptions set out below, indemnify its previous, current and future nominated member to the SouthWest One Board of Directors against any loss or damage suffered by the member arising from his/her action or failure to act in his/her capacity as a member of the authority.

2.1 This indemnity will not extend to loss or damage directly or indirectly caused by or arising from:

- (ii) any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the member;
- (iii) any act or failure to act by the member otherwise than in his/her capacity as a member of the authority, or
- (iv) failure by the member to comply with the authority's Code of Conduct for Members.

3.1 The authority will, subject to the exceptions set out below, indemnify the member against all reasonable costs which he/she may incur in securing appropriate legal advice and representation in respect of any civil or criminal proceedings or Part 3 proceedings to which he/she is subject.

3.2 "Criminal proceedings" includes any interview or investigation by the Police, and any proceedings before a criminal court, in the United Kingdom.

3.3 "Part 3 proceedings" means any investigation or hearing in respect of an alleged failure to comply with the authority's Code of Conduct for Members under Part 3 of the Local Government Act 2000.

3.4 This indemnity will not extend to Part 3 proceedings where the allegation has been referred to the Monitoring Officer for local investigation and/or determination by the Standards Committee.

3.5 This indemnity shall not extend to any advice or representation in respect of the pursuance of a defamation action by a member but for clarification does extend to defending such an action

3.6 Where any member or officer avails him/herself of this indemnity in respect of defending him/herself against any criminal proceedings or Part 3 proceedings, the indemnity is subject to a condition that if, in respect of the matter in relation to which the member of officer has made use of this indemnity –

- (i) the member or officer is convicted of a criminal offence in consequence of such proceedings, or
- (ii) a Case Tribunal or Standards Committee determine that the member has failed to comply with the Code of Conduct for Members

and the conviction or determination is not overturned on appeal, the member shall reimburse the authority for any sums expended by the authority pursuant to the indemnity.

4.1 For the purpose of these indemnities, a loss or damage shall be deemed to have arisen to the member “in his/her capacity as a member of the authority” where:

(i) The act or failure to act was outside the powers of the authority, or outside the powers of the member, but the member reasonably believed that the act or failure to act was within the powers of the authority or within the powers of the member (as appropriate) at the time that he/she acted or failed to act, as the case may be;

(ii) The act or failure to act occurred not in the discharge of the functions of the member as a member of the authority but in their capacity as a member or employee of another organisation, where the member is, at the time of the action or failure to act, a member or employee of that organisation either -

- (a) *in consequence of his/her appointment as such member of that organisation by the authority; or*
- (b) *in consequence of his/her nomination for appointment as such member or that organisation by the authority; or*
- (c) where the authority has specifically approved such appointment as such a member or employee of that organisation for the purpose of these indemnities.

4.2 Such indemnity in accordance with Paragraph 4.1(ii) shall apply only in so far as the member is not able to recover under an insurance or indemnity provided by that other organisation.

4.3 The authority undertake not to sue (or join in action as co-defendant) the member in respect of any negligent act or failure to act by the member in his/her capacity as a member of the authority, subject to the following exceptions:

- (i) Any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the member; or
- (ii)** Any act or failure to act by the member otherwise than in his/her capacity as a member of the authority.

5.1 These indemnities and undertaking will not apply if a member, without the express permission of the Authority or of the appropriate officer of the authority, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of the resolution.

6.1 These indemnities and undertaking shall apply retrospectively to any act or failure to act which may have occurred before this date and shall continue to apply after the member has ceased to be a member of the authority as well as during his/her membership of the authority.