



Guidance for Local Authorities in the Identification of Politically Restricted Posts

prepared by the
Local Government Political Restrictions
Exemptions Adjudicator for Scotland

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Abstract

This Guidance summarises the current legislation applying to politically restricted posts under local authorities and gives advice on the interpretation of the provision regarding classification of posts as politically restricted on the basis of their duties. It is intended to assist local authorities in applying the law, but is not a substitute for the legislation itself. It replaces earlier Guidance issued in 2007 and amended in 2012 and comes into effect on 1 November 2016.

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Background to the Issuance of this Guidance

1. The Local Government and Housing Act 1989 (c.42) (LGHA 1989) identifies a number of politically restricted posts in a local authority⁽¹⁾. It further identifies certain categories of post deemed to be politically restricted on the basis of one or more defined characteristics⁽²⁾ and introduces the requirement for every local authority to prepare and maintain a list of such posts⁽³⁾.
2. One of the characteristics defined in section 2(2) of LGHA 1989 was that any post, the remuneration of which was at or exceeded a level determined from time to time by Scottish Ministers, was politically restricted. That restriction based on remuneration was repealed by the Local Governance (Scotland) Act 2004 (asp 9)⁽⁴⁾ with effect from 28 February 2007. The removal of the salary-related criterion for inclusion in the list of politically restricted posts means that any such inclusion is now based solely on the other characteristics contained in the legislation.
3. LGHA 1989 imposes a duty on Scottish Ministers to appoint a person to⁽⁵⁾
 - adjudicate in any case where exemption from political restriction imposed on a post by virtue of section 2(2) is sought;
 - give directions to a local authority requiring it to include a post in the list of politically restricted posts kept by the authority; and
 - give general advice to local authorities on the application of section 2(3).
4. The person appointed is known as the Local Government Political Restrictions Exemptions Adjudicator for Scotland, referred to in this document as the Adjudicator. The most recent such appointment by Scottish Ministers took effect from 1 July 2015.
5. The former Guidance and amendments have been reviewed and, following a consultation exercise, this Guidance – which updates and consolidates the earlier Guidance and amendments – is now issued to assist local authorities in the application of the legislation. This Guidance is issued to provide advice in terms of sections 2(5) & 3(1)(b) of LGHA 1989. The paragraphs dealing with matters other than the application of section 2(3) of LGHA 1989 are included solely to assist local authorities in complying with the legislation. This Guidance comes into effect on 1 November 2016.

Relevant Legislation

6. The principal legislation governing politically restricted posts is the Local Government and Housing Act 1989 (c.42) and the relevant sections are 1, 2 and 3. Within these sections reference, relevant to Scotland, is made to the following Acts:
 - House of Commons Disqualification Act 1975 (c.24);
 - Local Government (Scotland) Act 1973 (c.65) (as amended by the Local Government (Access to Information) Act 1985 (c.43);
 - Fire Services Act 1947 (c.41) (now largely repealed by the Fire (Scotland) Act 2005 (2005 asp 5); and
 - Social Work (Scotland) Act 1968 (c.49).

Note:

The last two references in the list above are solely in respect of the definition and title of a Statutory Chief Officer.

7. Sections 1 to 3 of LGHA 1989 have been amended, in relation to Scotland, by the following acts:
 - Local Government etc. (Scotland) Act 1994 (c.39)
 - Local Governance (Scotland) Act 2004 (asp9)

Notes:

The effect of LGSA 1994 on the legislation regarding politically restricted posts is confined to changes in the titles of one or more of the Statutory Chief Officers. The significant changes are in LGSA 2004.

8. There are also a number of Statutory Instruments relevant to the application of the legislation in Scotland:
 - Local Government Officers (Political Restrictions) Regulations 1990 (S.I. 1990/851) as amended by the Local Government Officers (Political Restrictions) (Amendment) Regulations 1998 (S.I. 1998/3116)
 - Management of Offenders etc. (Scotland) Act 2005 (Supplementary Provisions) Order 2006 (SSI 2006/389).

Notes:

SI 1990/851 (amended by SI 1998/3116) describes all the restrictions that apply to politically restricted posts. SSI 2006/389 introduces a new politically restricted post.

The Local Government (Politically Restricted Posts) Regulations 1990 (S.I. 1990/42) have not been mentioned above as they concerned salary thresholds, and so no longer apply given the repeal mentioned in paragraph 2 above.

Restrictions Applying to Politically Restricted Posts

9. The Local Government Officers (Political Restrictions) Regulations 1990 (as amended)⁽⁶⁾ define the political restrictions imposed upon the appointee to a politically restricted post as a result of their terms of appointment and conditions of employment.
10. In summary these are:
 - (1) The appointee may not announce himself or herself, or allow himself or herself to be announced by another, as a candidate for election as a member of:
 - the House of Commons
 - the Scottish Parliament
 - the European Parliament
 - any local authority.
 - (2) In the event that the appointee notifies the local authority in writing of his or her intention to resign in order to become a candidate for election as a member of the House of Commons or of the Scottish Parliament, his or her appointment shall terminate forthwith.
 - (3) The appointee shall not act as an election agent or sub-agent for any candidate for election as a member of the House of Commons, the Scottish Parliament, the European Parliament or any local authority.
 - (4) The appointee shall not be an officer of any political party or branch if his or her duties as such include party or branch management or acting on behalf of the party in dealings with people outside the party or its associated parties.
 - (5) The appointee shall not canvass on behalf of a political party or on behalf of a candidate for election as a member of the House of Commons, the Scottish Parliament, the European Parliament or any local authority.

Notes:

Insofar as the restriction relates to canvassing on behalf of a political party (rather than canvassing on behalf of a candidate for election) there may be an issue if an appointee wishes to canvass in relation to one of the choices in a referendum. Whilst it will depend on the specific nature of any referendum, it is probable that political parties will have their own views

on the outcome. If the appointee wishes to canvass for a particular outcome, the appointee should exercise caution in undertaking any canvassing activity that might reasonably be taken to amount to support for a political party. Such activity might include mentioning a political party when speaking to voters, wearing party material, distributing material which bears the name or logo of a party, assisting a party with postal or doorstep campaigns in any way, providing material to a party for its use in campaigning, or taking part in any radio, press or TV campaign organised by a party.

- (6) The appointee, other than one appointed under section 9 of LGHA 1989, shall not speak to the public with the apparent intention of affecting public support for a political party.
- (7) The appointee, other than one appointed under section 9 of LGHA 1989, shall not publish, or have published by another, any written or art work, of which he or she is the author in whole or in part or the editor, if the work appears to be intended to affect public support for a political party. This does not preclude the display by the appointee of a poster on his or her house or car.

Note:

Publishing will include the use of social media where the message or material sent is available to the public.

- (8) Insofar as any of the actions described in sub-paragraphs (6) or (7) above are part of the proper performance of the appointee's official duties, he or she is not precluded from engaging in them.
- (9) An appointee appointed under section 9 of LGHA 1989 shall not speak to the public in a way likely to create the impression that he or she is the authorised representative of a political party.
- (10) An appointee appointed under section 9 of LGHA 1989 shall not publish, or have published by another, any written or art work, of which he or she is the author in whole or in part or the editor, in a way likely to create the impression that the publication is authorised by a political party.

Identification of Politically Restricted Posts

- 11. There are four categories of politically restricted post⁽⁷⁾:
 - posts individually identified in the legislation;
 - posts defined by their relationship to others;
 - undefined posts, the duties of which have certain characteristics described in the legislation (*in some authorities, these have been described in the past as politically sensitive, but the law defines them as politically restricted*);
 - posts to which duties have been delegated.

The third and fourth categories of posts have to be included in lists prepared and maintained by the local authority.

- 12. The identified posts are:
 - Chief Executive;
 - Statutory Chief Officers;
 - Chief Social Work Officer
 - Chief Finance Officer
 - Monitoring Officer⁽⁸⁾;
 - Political Assistants⁽⁹⁾; and
 - Chief Officer of a Community Justice Authority⁽¹⁰⁾.

Note:

Chief Officers of Community Justice Authorities are not employees of local authorities and therefore do not fall within the scope of this Guidance, unless they are on a secondment from a local authority for a period of up to two years, as permitted by the legislation.

13. The posts defined in terms of their relationship with others are:
 - Non-Statutory Chief Officers
 - a person for whom the Chief Executive is directly responsible; or
 - a person who, as regards all or most of his or her duties, reports directly to, or is directly accountable to, the Chief Executive or the local authority themselves or any committee or subcommittee of the local authority.
 - Deputy Chief Officers
 - a person who, as regards all or most of his or her duties, reports directly to, or is directly accountable to, one or more of the Chief Officers.
14. The posts identified by the characteristics of their duties are:
 - Those involving the provision of advice to the local authority⁽¹¹⁾
 - A person who, on a regular basis, gives advice to the local authority themselves, or to any committee or subcommittee of the authority, or to any joint committee on which the authority are represented
 - Those involving contact with the media⁽¹²⁾
 - A person who, on a regular basis, speaks on behalf of the authority to journalists or broadcasters.
15. The posts included by virtue of delegation are defined as those posts in a list kept by the local authority⁽¹³⁾, which specifies the powers of the authority exercisable by officers of the authority and identifies the officers empowered to exercise those powers. The list need not include any delegations made for under six months.

Note:

This inclusion ensures that a person who is in a post not normally politically restricted, but who, for the time being, is exercising powers normally exercised by the holder of a politically restricted post, is regarded as being in a politically restricted post for the duration of the delegation.

Statutory Exemptions from Political Restriction

16. There are two exemptions from political restriction provided by statute.
 - The holders of teaching posts (head teachers, principals, teachers and lecturers) are not to be regarded as being in politically restricted posts, even if, in other respects, their posts would appear to be included in one of the groups above. They, therefore, do not have to be included in the list of such posts maintained by the local authority⁽¹⁴⁾.
 - Secretarial, clerical and support staff, even if they report to the Chief Executive or to a Chief Officer, are not regarded as Chief or Deputy Chief Officers for the purposes of political restriction⁽¹⁵⁾. They may, however, be deemed to be in politically restricted posts if their duties fall within the scope of section 2(3) of LGHA 1989.

Requirement to Keep a List of Politically Restricted Posts

17. It is the duty of every local authority⁽¹⁶⁾ to prepare and maintain a list of posts which are deemed to be politically restricted by virtue of the application of section 2(3) of LGHA 1989 (those whose holders give advice to the authority and/or are in contact with the media). All such posts should be included in this list, even if they are also deemed to be politically restricted by virtue of the application of section 2(1) LGHA 1989 (Chief Executive, Statutory Chief Officers, Non-Statutory Chief Officers, Deputy Chief Officers, Monitoring Officer, Political Assistants, and Officers on the list of delegated powers).
18. There is no requirement to keep a list of those posts deemed to be politically restricted by virtue of the application of section 2(1) that do not also fall within the remit of section 2(3).
19. However, in practical terms, the best way for the local authority to maintain clarity in respect of politically restricted posts is to annotate a staff list to show those posts restricted by virtue of section 2(1) and those restricted by virtue of section 2(3). Some posts will have both annotations, some will have one only and many will have none. The local authority must notify holders of posts, which are subject to political restriction, of the restrictions. The benefit of a list of this type is that it will facilitate both this notification and the role of the Adjudicator as described below. Authorities may exercise discretion in the extent of this list by considering only those posts which might reasonably be considered to be liable to fall within the ambit of the legislation.

Applications for Exemption and Directions for Inclusion

20. As mentioned at paragraph 3 above, the Adjudicator has the functions of:
 - adjudicating in any case where exemption from political restriction imposed on a post by virtue of LGHA 1989 section 2(2) is sought;
 - giving directions to a local authority requiring it to include a post in the list of politically restricted posts kept by the authority; and
 - providing guidance to local authorities on the application of LGHA 1989 section 2(3).
21. The Adjudicator will consider any application for exemption from political restriction, in respect of a post under a local authority, made by the holder of that post, provided that the post is included in the list of politically restricted posts maintained by the local authority on the basis of LGHA 1989 section 2(2) as described in paragraph 14 above⁽¹⁷⁾.
22. Any holder of a politically restricted post who wishes to apply for the political restrictions to be lifted may apply either directly to the Adjudicator or through the relevant officer of the local authority. The application should give the title of the post, the job description for the post, the basis upon which the post is currently deemed to be politically restricted and the reasons why the applicant considers that political restriction is no longer appropriate. Prior to adjudication, the Adjudicator will request the authority to state its position in regard to the application.
23. If the Adjudicator finds that the duties of the post do not fall within the terms of section 2(3) of LGHA 1989, he will direct that, for a specified period, the

post will not be regarded as politically restricted and should be removed from the list of politically restricted posts maintained by the authority⁽¹⁸⁾.

24. The Adjudicator may, on application from any person or on his own initiative, review any post not included in the list of politically restricted posts⁽¹⁹⁾. If he considers that the duties of the post fall within section 2(3) of LGHA 1989 and that the post is not currently included in either the list of politically restricted posts or in the list of delegated powers, then he may issue a direction that it be included in the list of politically restricted posts.
25. The Adjudicator will give priority to any application for removal from the list of politically restricted posts by a person who certifies that it is for the purpose of enabling him or her to stand as a candidate in a forthcoming election⁽²⁰⁾.
26. The local authority must give the Adjudicator all the information he may reasonably require for the purpose of carrying out his function⁽²¹⁾.
27. The local authority must make the terms of any direction for inclusion of a post in the list of politically restricted posts known to the incumbent of that post and must ensure that the post is included in their list of politically restricted posts⁽²²⁾.

Arrangements for Employees Standing for Election

28. Section 7 of LGSA 2004 repeals the disqualification of an employee of a local authority from being nominated as a candidate for election as a member of that local authority⁽²³⁾. In its place it inserts section 31A of LGSA 1973 which requires that any employee so elected must resign his or her employment from that authority the day after his or her election and that that resignation should take immediate effect. Failure to resign results in the person being disqualified from remaining a member of the local authority to which he or she was elected but does not affect their continuing status as an employee. A person who resigns in circumstances required by section 7 of LGSA 2004 may also wish to consider the effect of such resignation in respect of his or her terms and conditions of employment.
29. This change does not affect the legislation in regard to political restrictions⁽²⁴⁾. The holders of politically restricted posts are still, therefore, disqualified from announcing their candidature for election without prior resignation of their appointment.

Employment of Former Members of a Local Authority

30. For twelve months after a person ceases to be a member of a local authority (and whilst a member) that person is disqualified from being appointed by that authority to any paid office, other than to the office of convener or deputy convener⁽²⁵⁾.
31. This changed as from 2 May 2007 when section 10 of LGSA 2004 came into force. This provides that a former member of a local authority is disqualified for three months from the date upon which he or she ceased to be a member from being appointed to any post with that local authority which is not politically restricted and is disqualified for twelve months from being appointed to a politically restricted post with that local authority⁽²⁶⁾.

32. A former member of a local authority who, within the twelve months before he or she ceased to be a member, participated directly in the appointing of any person to one of the following politically restricted posts will also be disqualified for twelve months from any paid office, employment or other place of profit in the gift of the local authority⁽²⁷⁾. The posts concerned are Chief Executive, Statutory Chief Officer, Non-Statutory Chief Officer, Deputy Chief Officer and Monitoring Officer. These posts are more fully defined in paragraphs 12 and 13 above.

Adjudicator's Discretion

33. The only area over which the Adjudicator has discretion is whether or not a post falls within the parameters set out in LGHA 1989 section 2(3), which states:

"The duties of a post under a local authority fall within this subsection if they consist in or involve one or both of the following, that is to say—

- (a) giving advice on a regular basis to the authority themselves, to any committee or sub-committee of the authority or to any joint committee on which the authority are represented; or
- (b) speaking on behalf of the authority on a regular basis to journalists or broadcasters."

34. There are several questions raised by this wording:
- (a) What is a 'post under a local authority'?
 - (b) What do the words 'consist in or involve' imply?
 - (c) What constitutes advice?
 - (d) What constitutes a regular basis?
 - (e) Does advice have to be proffered to the whole authority, committee, sub-committee or joint committee or to any one member of such a body?
 - (f) Does speaking mean giving formal presentations or does it include answering telephone queries? Would distributing a written press release constitute speaking to journalists and broadcasters?
35. Although adjudication of matters arising from LGHA 1989 section 2(3) remains the function of the Adjudicator, this Guidance aims to assist local authorities in their decisions as to whether or not a post is politically restricted. The questions posed in paragraph 34 are therefore addressed below. For the avoidance of doubt, the Adjudicator will consider each application and issue about political restriction on its own merits. The guidance set out in the form of the answers below is not binding on either the local authority or the Adjudicator, and is intended to offer assistance in decision-making without fettering the discretion of the Adjudicator.
36. In interpreting the provisions of LGHA 1989 section 2(3), the following guidance may be taken into account.
- (a) 'Post under a local authority' in this context may be taken to mean any post established under a local authority, whether the incumbent is
 - a permanent or temporary employee of the local authority,
 - a person seconded to the local authority from another body, or
 - a consultant under contract (being in the nature of a contract of employment) to the local authority.

Note:

It is the nature of the post rather than the status of the post-holder which determines whether or not political restrictions apply.

- (b) 'Consist in or involve' in this context may be taken to mean that either giving advice to the Authority or speaking to the media, or both, constitutes a recognised part of the post holder's activities.
- (c) 'Advice' in this context may be taken to mean information provided either verbally, in writing or in graphical form with the intention that it should inform, guide or influence:
- the policy adopted by the local authority in respect of any matter properly before it; or
 - any strategic decisions made by or on behalf of the local authority.
- It does not include guidance given on the application of current legislation, regulations or procedures.
- (d) 'Regular basis' in this context may be taken to mean that giving advice to the authority, or speaking to journalists or broadcasters on behalf of the authority, is:
- incorporated in the job description for the post; or
 - undertaken as part of the post holder's normal duties; or
 - undertaken on more than an occasional basis, though not necessarily frequently.
- (e) The persons to whom the advice is offered may, in this context, consist of any number of members (including a single member) as long as the member or members concerned are acting in their official capacity as members of the local authority or any of its committees, sub-committees or joint committees.
- (f) 'Speaking' in this context may be taken to mean communicating with a journalist or broadcaster, who is acting in that capacity, with the intention that the journalist or broadcaster may use the communication in relation to any publication or broadcast. Any person who communicates with a journalist or broadcaster in writing or some other form will be taken to be a person who 'speaks' to journalists or broadcasters unless the Adjudicator is satisfied otherwise.

Action to be taken by Local Authorities

37. All local authorities should – as a matter of good practice - keep their list of politically restricted posts under review to ensure it is properly up-to-date.
38. Holders of new posts (including existing posts which have been re-designated with new responsibilities) which are politically restricted as a result of the application of this Guidance should be so informed and their conditions of service provided (or amended) accordingly. The posts affected should be added to the list of politically restricted posts maintained by the authority.
39. Posts which are no longer politically restricted as a result of the application of this Guidance should be removed from the list. Holders should be informed of the change and their conditions of service amended accordingly.
40. Priority must be given to considering the situation of any post-holder who indicates an intention to stand as a candidate in a forthcoming election.
41. Local authorities should review their own list of politically restricted posts by **28 February 2017** and, as soon as it is available, send a copy of the revised list to the Adjudicator. The list should be kept under review and any amended copy sent to the Adjudicator.

Contact Details for Adjudicator

42. Any person or local authority seeking assistance or adjudication in respect of any politically restricted post may contact the Adjudicator by any of the means described below:

post: Local Government Political Restrictions
Exemptions Adjudicator for Scotland,
P.O. Box 10153,
DUNDEE DD2 9BS.

website: www.lgpreas.org

e-mail: adjudicator@lgpreas.org

D Stuart Allan

**Local Government Political Restrictions Exemptions Adjudicator for
Scotland**

31 October 2016 amended October 2020

Politically Restricted Posts Guidance Endnotes:

Legislative references for statements made within the text of the Guidance -

- (1) LGHA 1989 section 2(1)(a) to (f)
- (2) LGHA 1989 section 2(1)(g)
- (3) LGHA 1989 section 2(2)
- (4) LGSA 2004 section 9, commenced by the Local Government (Scotland) Act 2004 (Commencement No. 4) Order 2007 (S.S.I. 2007/25)
- (5) LGHA 1989 section 3
- (6) SI 1990/851 as amended by SI 1998/3116
- (7) LGHA 1989 section 2(1)
- (8) Appointed in terms of LGHA 1989 section 5
- (9) appointed in terms of LGHA 1989 section 9
- (10) SSI 2006/389 section 2(1)
- (11) LGHA 1989 section 2(3)(a)
- (12) LGHA 1989 section 2(3)(b)
- (13) in terms of section 50G(2) of LGSA 1973 (as amended by the LG(AI)A 1985)
- (14) LGHA 1989 section 2(10)
- (15) LGHA 1989 section 2(9)
- (16) LGHA 1989 section 2(2)
- (17) LGHA 1989 sections 3(2)(a) & 3(3)(a)
- (18) LGHA 1989 section 3(4)
- (19) LGHA 1989 section 3(2)(b)
- (20) LGHA 1989 section 3(7)
- (21) LGHA 1989 section 3(6)(a)
- (22) LGHA 1989 section 3(6)(b) & (c)
- (23) LGSA 1973 (as amended by LGSA 2004) sections 31 & 31A
- (24) LGSA 1973 (as amended by LGSA 2004) sections 31A(6)
- (25) LGSA 1973 section 67
- (26) LGSA 1973 (as amended by LGSA 2004) sections 67(2) & (4)(a)
- (27) LGSA 1973 (as amended by LGSA 2004) sections 67(3) & (4)(b)

