

From: Customer Services [CustomerServices@dbs.gsi.gov.uk]
Sent: 10 July 2015 15:07
To: Anthony Cox
Subject: RE: E061503992-174791 DBS Checks in relation to Councillors

Mr Cox – I refer to your email of 25 June 2015 and wish to apologise for the late reply.

The position of 'Local Authority Councillor' is not in itself eligible for the Enhanced Level Disclosure as it is not included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

As you may be aware, from the 10 September 2012, Regulated Activity has been amended. If the councillors/elected members fall within the old definition of Regulated Activity (explained below) they are eligible for an enhanced DBS check without a check of the barred lists.

Pre 10 September 2012 Guidance

With regards to working with children, to be eligible for an enhanced check, a member of the Council would need to be working in Regulated Activity as defined in the Safeguarding Vulnerable Groups Act 2006 Schedule 4 part 1 paragraph 1(9).

9) The exercise of a function of a person mentioned in paragraph 4(1) is a regulated activity relating to children.

4. Positions –

For the purposes of sub-paragraph 4 (1)(b), a person is a member of a relevant local government body if—

- a) he is a member of a local authority and discharges any education functions, or social services functions, of a local authority;
- b) he is a member of an executive of a local authority which discharges any such functions;
- c) he is a member of a committee of an executive of a local authority which discharges any such functions;
- d) he is a member of an area committee, or any other committee, of a local authority which discharges any such functions.

With regards to vulnerable adults, to qualify for an enhanced check the council members would need to meet the criteria in schedule 4 part 2 paragraph 7(9).

9) The exercise of a function of a person mentioned in paragraph 8(1) is a regulated activity relating to vulnerable adults

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(1) The persons referred to in paragraph 7(9) are –

- a) member of a relevant local government body;

(2) For the purposes of sub-paragraph (1)(a), a person is a member of a relevant local government body if—

- a) he is a member of a local authority and discharges any social services functions of a local authority which relate wholly or mainly to vulnerable adults;
- b) he is a member of an executive of a local authority which discharges any such functions;
- c) he is a member of a committee of an executive of a local authority which discharges any such functions;
- d) he is a member of an area committee, or any other committee, of a local authority which discharges any such functions.

(3) Any reference in sub-paragraph (2) to a committee includes a reference to any sub-committee which discharges any functions of that committee.

To clarify, on the 10 September 2012 the Protection of Freedom Act 2012 provided a new definition of regulated activity. Part of the amendment was that all "positions" within Office Holders (England) and some for Wales have been removed e.g. member of a relevant governing body etc. However, everybody within the pre-September 2012 definition of regulated activity will remain eligible for enhanced DBS checks, whether or not they fall within the post-10 September 2012 definition of regulated activity. They would no longer be eligible for barred list checks, unless they fall within the post-definition of regulated activity.

Incidentally I have passed your comments to our policy team for their general views but also for advice over whether there are any plans to amend our Exceptions Order to include the generic term 'Councillor'. Therefore I shall provide any further relevant advice in due course.

With regards to Eligibility Code 44 I would mention that this is used for roles that are at a director level where that individual is involved in the high level negotiating of contracts and has powers of representation. Such individuals would be eligible for a 'Standard' level check.

EU Directive 2004/18 relates to the coordinating of procedures for the award of public works contracts, public supply contracts and public service contracts.

The EU Directive allows for checks to a Standard level only to be carried out on those individuals of an "economic operator" i.e. an organisation tendering for a contract, and those individuals are restricted to the organisation's directors, senior managers or any other person who has powers of representation, decision or control.

The Directive 2004/18/EC is the European legislation as a broad framework and doesn't contain the wording "powers of representation, decision or control". The specific wording is taken from the UK legislation, The Public Contracts Regulations 2006 (<http://www.legislation.gov.uk/ukxi/2006/5/contents/made>), which implements the parts of the EU legislation that affect the UK.

This legislation is aimed at Director-level individuals within organisations who have the authority to bid for contracts and the decision about who has "powers of representation, decision or control" must be made by the organisation themselves, bearing this in mind. The legislation was not designed to be filtered down to staff who do not have those levels of representation when bidding for contracts, nor is it to be passed on to members of staff from other companies that are carrying out work that has been outsourced.

The checks do not extend beyond this point unless the contract work is such work that enables checks to be carried out anyway, i.e. regulated activity or a role included separately in the Exceptions Order.

If an application for a DBS check is not relevant then you may obtain a Basic Disclosure from Disclosure Scotland (see <http://www.disclosurescotland.co.uk/basicdisclosureonline/index.htm>) This type of check will provide the applicant with details of any "unspent" convictions.

I trust this provides the clarification you seek but please request any further advice by reply or in future via this email channel.

Yours Sincerely

Darren Nall

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For more information about DBS please visit our website or contact our Call Centre which is open 6 days a week, 8am to 6pm weekdays and 10am to 5pm on Saturday. If you would like to speak in Welsh, please phone our dedicated Welsh language line on 03000 200 191 which is open Monday to Friday 9am to 5pm. If you would like to use Minicom, please contact 03000 200 192. Did you know you can track your application(s) online at www.gov.uk/disclosure-barring-service-check/tracking-application-getting-certificate

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From: Anthony Cox [mailto:Anthony.Cox@walsall.gov.uk]
Sent: 25 June 2015 14:24
To: Customer Services
Subject: E061503992-174791 DBS Checks in relation to Councillors

Dear Sirs,

I have seen the recent report in the Local Government Chronicle 5th May 2015 in relation to Cornwall Council's policy in respect of seeking DBS checks on all councillors and have noted that your DBS relationship manager Sue O'Neill has been quoted as stating that powers to blanket check councillors on authorities that deal with education and Social Services have been removed under the Protection of Freedoms Act 2012. I accept this and the advice that councillors can only be checked where their roles have been individually assessed to confirm whether or not they meet the eligibility criteria for a DBS check. I also accept that the definition of regulated activity has been tightened. I am aware from my own research that the need for councillors to be DBS checked has been debated both in the media and by members of the public generally. This has also been debated at my own authority by the Standards Committee who still remains of the view that all elected members should be DBS checked. I think one of the difficulties in respect of this is the generic, multi-faceted and complex variety of roles that are undertaken by councillors in their day to day roles.

I would therefore welcome your advice on the following in light of various debates and decisions that have taken place at our Standards Committee which were supported by the Independent Person present at the Standards Committee meeting, who is also a senior employee with the NHS. Various options were set out before elected members from no DBS checks, to limited DBS checks dependent upon roles undertaken by elected members eg: sitting on children and adults overview and scrutiny committees, to blanket checking of all elected members. The Standards Committee after lengthy debate did favour the last option, which I appreciate, offends against the published advice given by the DBS. I have therefore tried to set out some of the considerations that our elected members debated not least concerning the actual role of a councillor.

It is hard to define the role of a councillor, there is no statutory definition of the same, however as said above it is a complex, multi-faceted role that can have an impact on the individual personal rights of citizens in a council area. I could attach a job description our authority uses for ward councillors however

it is so generic it would not provide a full flavour of all the roles they fulfil. I have tried to set out the same below.

The Government's own website at <https://www.gov.uk/government/get-involved/take-part/become-a-councillor> sets out the following:

“The councillor’s role centres around community leadership and engagement, responsibilities include:

- representing the ward for which they are elected
- decision-making - developing and reviewing council policy
- scrutinising decisions taken by the councillors on the executive or cabinet
- regulatory, quasi-judicial and statutory duties”

In many ways I think there are similarities between the role of a councillor and that of a magistrate, where under legislation, and the current guidance there is a requirement for a magistrate to be DBS checked but not a councillor.

Magistrates are required to be of “good character” I refer here to the publication, “Becoming a Magistrate – May 2015, which sets out the requirements for disclosure of any criminal convictions, cautions etc, and the need for a DBS check prior to being appointed as a magistrate. This is a matter of voluntary disclosure via an application form to become a magistrate reinforced by a DBS check. Similarly under s80 Local Government Act 1972 no one can be elected as a councillor if they have been within five years before the day of election or since election been convicted in the United Kingdom, the Channel Islands or the Isle of Man of any offence and has had passed on him a sentence of imprisonment (whether suspended or not) for a period of not less than three months without the option of a fine; or (e) is disqualified for being elected or for being a member of that authority under Part III of the [Representation of the People Act 1983] . This is not reinforced by the requirement for a DBS check and is reliant solely upon the honesty of the applicant. Furthermore, under s34 of the Localism Act 2011 there is a power for councillors to be convicted for failure to disclose a disclosable pecuniary interest which can on conviction be accompanied with a disqualification for up to five years from holding office as a councillor. Again is this something that can only be taken solely on self-declaration.

In addition to the above elected members/councillors have a leadership role within their communities and can often be placed in a position of trust in respect of the constituents they serve. They often deal with the most sensitive issues in this wider community role. Constituents’ issues may often involve matters concerning minors or vulnerable adults, and may involve councillors being in contact with minors and vulnerable adults outside any formal committee role given to a councillor by full council.

“Most councillors hold regular drop-in surgeries each month. Surgeries are a chance for residents to meet you and discuss their problems or concerns. You may also need to spend time visiting constituents in their homes. On top of this you will be dealing with letters, emails and phone calls from constituents. When dealing with casework or council business you may need to meet with council staff. These meetings, and any visits to council offices, may need to take place during the working day.”

Then there are council and scrutiny meetings. Scrutiny is the crucial process of looking at the work and decisions of the executive. As well as the close examination of councillors, it can also involve the community and interested parties. Handled well, scrutiny procedures can stimulate real local involvement in how the council manages and delivers its business. In practice however elected members experience of the effectiveness of scrutiny has been mixed, which to some extent has been reflected nationally and commented upon in recent reports such as the Francis Report into failings at the Stafford Hospital February 2013 report, and more latterly the Jay report into the cover up of Child Sexual Exploitation in Rotherham. This has also been commented upon by the Communities and Local Government Select Committee in November 2014, “It will, of course, be a matter for our successor committee in the next

parliament to determine its own programme but we see a case for an inquiry into the operation of scrutiny within local government in England". This role for those councillors on such committees will in essence involve oversight into delivery of health services and childrens and adult services. It is also quite possible for elected members to be substitutes at such committee meetings, where another elected members may be unable to attend a committee meeting, therefore membership of various council committees can be fluid. I make this point as I am aware that the view of the DBS is that the councillor role in itself does not as of right demand a DBS check, however if a councillor fulfils certain roles subject to assessment then a DBS check may be required.

"Councillors may also sit on quasi-judicial committees, for example the planning committee, which takes non-political decisions on planning applications. The number and length of these meetings varies from council to council. If you are a member of a political party you will also be expected to attend political group meetings, party training and other events."

"Stand for what you believe in. be a councillor. Published by the Local Government Association (http://www.local.gov.uk/c/document_library/get_file?uuid=fa4de86d-1009-4b58-a9e7-3103fe3d9a36&groupId=10180)

If we also turn to the governments own advice on certifying documents, the role of councillor is included in a list whereby all of the other office holders of "good standing" are listed as under the Annex you provide as part of the guidance issued as to eligibility for DBS checks (v7 – March 2015) this again would appear to be incongruous. I do accept however as does your own guidance that the Annex cannot be an exhaustive list and only applies to the most commonly submitted positions and duties that are known exceptions to the Rehabilitation of Offenders Act 1974.

"Certifying a document

Who can certify a document

To certify documents, ask a professional person or someone well-respected in your community ('of good standing') like a:

- bank or building society official
- councillor
- dentist
- police officer
- solicitor
- teacher or lecturer

(<https://www.gov.uk/certifying-a-document>) "

It would also appear to be incongruous that under the Licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 where Taxi Drivers and Private Hire Vehicle drivers are required to have a DBS check whereas those with the responsibility of granting, refusing and reviewing licences ie: councillors, are not required to have a DBS checks.

In respect to the annex itself I would like further specific advice in relation to Ref No 44 under Positions, Professions, Employment, Offices and Works included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, which stipulates – "For the award of public work contracts, public supply contracts and public service contracts in accordance with Directive 2004/17/EC and 2004/18/EC of the European Parliament and the Council of March 2004 (a)". I raise this issue as elected members who comprise the council's cabinet under the council's constitution do actually award strategic contracts for

goods works or services that exceed £500,000. Therefore is this position relevant for consideration of a DBS check under ref no 44 of the annex as a consequence of this?

Therefore elected members have not only considered this in a narrow safeguarding role but also in the wider roles and functions that they undertake as elected members, and the issue of maintaining public confidence in themselves as significant community leaders who have to uphold high standards of conduct and ethical behaviour as required by statute. I note having read the Cornwall Council report to their Constitution and Governance Committee dated the 29th April 2015 that they make reference to Nottinghamshire County Council undertaking enhanced checks on all councillors with the approval of the DBS service, post the changes made by the Protection of Freedoms Act 2012, so I was wondering if this issue does require further consideration.

I accept that you can only advise in relation to this matter but would be grateful for any assistance that you may be able to provide.

Yours Sincerely

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