

## **Report by the Local Government Ombudsman**

**Investigation into a complaint against  
Cambridgeshire County Council  
(Reference number: 13 016 935)**

**20 January 2015**

## The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

# Investigation into complaint number 13 016 935 against Cambridgeshire County Council

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Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

## Key to names used

Mr N – service user

Mrs N – wife and person making complaint

Mrs O – Mr and Mrs N's daughter

Mr P – Mr and Mrs N's son

Officer A – social worker

Officer B – senior social worker

The names of the care homes in this report are not the real names of the homes involved.

## Report summary

### Adult Care Services

The Council failed to act in accordance with the Mental Capacity Act. It did not conduct adequate mental capacity assessments or properly consider best interests.

The Council did not fulfil its obligations under the Choice of Accommodation Directions.

### Finding

Fault found causing injustice and recommendations made.

### Recommendations

Within three months of the issue of this report, the Council should:

- i. Apologise to Mrs N for the failures outlined in this report. That apology should accept responsibility for the faults, and acknowledge the impact these had on her. It should also include an assurance that the same faults will not happen again, and explain what steps have been taken to ensure this.
- ii. Set a timetable for refresher training for social care staff on mental capacity assessments, best interest decisions, deprivation of liberty and the role of the Court of Protection and how to advise the public on their rights. This may involve the Council reviewing the current status of residents who may be deprived of their liberty without proper authorisation.
- iii. Pay Mrs N £750 in recognition of the distress caused by the failings identified and the time and trouble she has expended in making her complaint.

## Introduction

1. Mrs N complains that the Council moved her husband into a residential home against both his and her wishes. Mrs N says she was forced to accept this course of action and the Council failed to properly consider her preference of care home.

## Legal and administrative background

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this report, we have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1)*)
3. The Mental Capacity Act 2005 (the Act) is the legal framework for acting and making decisions on behalf of people who lack the mental capacity to make particular decisions for themselves.
4. The Act and the accompanying Code of Practice 2007 (the Code) describe the steps a person should take when dealing with someone who may lack capacity to make a decision for themselves. The Code describes when a person's capacity to make a decision should be assessed, how to do this, and how to make a decision on behalf of somebody who is unable to make the decision themselves.
5. A key principle of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person's best interests.
6. Any reference to a person's capacity or lack of capacity refers specifically to their capacity to make a particular decision at the time it needs to be made.
7. Section 4 of the Act provides a checklist of steps that decision makers must follow to decide what is in a person's best interests. The decision maker also has to consider if there is a less restrictive alternative available that can achieve the same outcome.
8. If there is a conflict about what is in a person's best interests, and all attempts to resolve the dispute have failed, the Court of Protection might need to decide what is in the person's best interests.
9. The Deprivation of Liberty Safeguards (DoLS) are part of the Act. They provide legal protection for individuals who lack mental capacity to consent to care/treatment or particular accommodation. The safeguards protect people from being deprived of their liberty, unless it is in their best interests and there is no other less restrictive alternative. The legislation sets out the procedure to follow to obtain authorisation to deprive an individual of their liberty. Without the authorisation, the deprivation of liberty is unlawful. It is the responsibility of the care home or hospital to ensure that any deprivation of liberty is lawful.

10. The government issued the DoLS Code of Practice in 2008 (the DoLS Code), which is statutory guidance on how DoLS should be applied in practice.

On 19 March 2014, the Supreme Court gave judgement in the landmark case of *P v Cheshire West and Chester Council and another and P and Q v Surrey County Council* ([2014] UKSC 19). It found that deprivation of liberty occurs when: *"The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements"*.

11. Prior to this judgement, the Court of Appeal had held that when considering whether someone was deprived of their liberty, consideration should be given to the 'relative normality' of the person's situation i.e. their circumstances should be compared to other people of their age and characteristics.
12. If there is a conflict about an (un)authorised deprivation of liberty, and all attempts to resolve this have failed, the case can be referred to the Court of Protection.
13. The government has issued guidance to councils about placements in care homes. It sets out what individuals should expect from a council when it arranges a care home place for them. It says that *"as with all aspects of service provision, there should be a general presumption in favour of individuals being able to exercise reasonable choice over the service they receive"*. (*Local Authority Circular LAC (2004) 20*)
14. A council has to arrange accommodation for a client in a care home of his or her choice, provided:
  - the preferred accommodation is suitable for the individual's assessed needs;
  - to do so would not cost the council more than it would usually expect to pay for accommodation for someone with the individual's assessed needs, i.e. its 'usual rate';
  - the accommodation is available; and
  - the care home is willing to provide the care subject to the council's usual terms and conditions.

**(Statutory Guidance on National Assistance Act 1948 (Choice of Accommodation) Directions 1992)**

15. Where, for any reason, a council decides not to arrange a place for someone in their preferred accommodation it must have clear and reasonable justification for the decision. Councils should provide a full explanation, in writing, of their reasons for refusing an individual's preferred accommodation. (*ibid*)
16. The guidance says that if an individual requests it, a council must also arrange for care in accommodation more expensive than it would usually fund, provided a third party or, in certain circumstances, the resident, is willing and able to pay the difference (to 'top up') between the cost the council's usual rate and the actual cost of the accommodation.

## How we considered this complaint

17. This report has been produced following the examination of relevant files and documents provided by the Council and after speaking to Mrs N.

## Investigation

### Background

18. Mr N is an elderly gentleman. He was diagnosed with dementia in 2011. Until April 2013 he lived with his wife in the marital home and attended a day centre one day a week.

### What happened

19. At the beginning of 2013, his needs started to increase and he began 'wandering'. The police were called on several occasions about this. Mrs N contacted the Council in April 2013 to ask if Mr N could attend the day centre for an extra day each week.
20. The social worker (Officer A) visited Mr and Mrs N at home on 10 June 2013. Their daughter, Mrs O was also present. The purpose of the visit was to carry out a social care assessment. The Council's notes from the visit say that Mr N *"is prone to leave the house in a confused state"* and Mrs N was *"interested in weekend sitting services via direct payments"*.
21. The Council's later notes say it was initially considering providing services to support Mrs N to continue her caring role. This Council said Mrs N and her daughter were *"not entirely honest about the extent that Mr N was wandering away from his home"*.
22. There was a telephone call between Officer A and Mrs N on 17 June 2013. Mrs N said she was not interested in respite care but would like to extend Mr N's attendance at the day centre by another day.
23. Officer A completed an assessment dated 17 June. The assessment form says a 'contributing to your personal budget' leaflet and directory was left with Mr and Mrs N and one or both of them gave consent to share information. However, neither of these sections is signed by Mr or Mrs N. The assessment records that Mr N *"would like to remain in his home with his wife"*.
24. Officer A visited Mr and Mrs N at home with his manager, a senior social worker (Officer B) on 18 June 2013. The Council's notes say the purpose of the visit was to *"explore the relationship between (Mr and Mrs N) and assess safety issues"*. The Council's notes say that Mrs N *"seemed to accept that she cannot (on her own) look after (Mr N) in an appropriate way and that they will both benefit from a period of respite"*. Mrs N said she would want her husband placed in a home close by due to 'transport issues'.
25. There is no reference on the assessment dated 17 June 2013 or the case notes from 18 June 2013 to Mr N lacking capacity or to a best interests decision.

26. On 19 June 2013, Officer A telephoned Mrs N to say he had provisionally booked respite at a care home 14 miles away (Sandpiper House). Mrs N said that she did not want to travel that far. The Council's telephone notes refer to Mrs N saying Mr N was "*OK today*" and she did not want him to go into respite. She said she wanted her son, Mr P to be part of the decision making process and asked Officer A to telephone her again later that day.
27. When Officer A telephoned again as agreed, Mrs N 'flatly refused' to agree with the respite placement. The notes say Officer A 'assured' Mrs N he would try to place Mr N closer to the marital home when a vacancy became available.
28. Officer A then contacted the Community Mental Health Team (CMHT), who had no record of Mr N. However, it became apparent Mr N's GP had referred him to CMHT the day before. CMHT considered the referral non-urgent at that point, but a representative from the Alzheimer's Society was due to visit Mr N on 21 June 2013. A judgement about the urgency of the situation was to be made then. CMHT is recorded as agreeing to put on record that Officer A's assessment concluded the situation was urgent.
29. Officer A telephoned Mr P on the evening of 19 June 2013 to "*enlist his support in persuading his mother to accept respite for her husband*". Officer A recorded telling Mr P of his grave concerns for the safety of Mr N should he remain at home. Officer A recorded assuring Mr P that the move would only be temporary and he intended to move Mr N closer to the marital home as soon as there was availability.
30. The Council notes say Officer A made telephone calls to two other care homes. One was at the request of Mrs N. The notes record the call was "*to see if they accepted our benchmark*" (the standard weekly rate the Council pays for residential care). Mrs N's preferred home, Primrose Lodge (100m away) confirmed they did not. Buxton Hall (four miles away) had a place and asked the Council to invite Mrs N to visit. There is no evidence the Council did this.
31. On 21 June 2013, the manager of Sandpiper House visited Mr N at home to carry out an assessment. Officer B records a telephone call from that manager, who had concluded that Mrs N "*did not wish her husband to go there for respite*". Mrs N had reportedly told the manager there was a vacancy at Primrose Lodge and she would prefer her husband to go there. Officer B recorded in the notes that Mrs N was aware Primrose Lodge did not accept the Council's fees and that "*a top up could not be made for respite, even if (Mrs N) agreed to pay it which would be unlikely*". This information is wrong; top ups can be made for respite placements. The Council acknowledged this in its response to our enquiries. The Council also acknowledged and apologised it had not consulted the family about their ability to pay a top up at this stage.
32. One of the five statutory principles of the Act says that before an act is done, or a decision is made, regard must be had to whether the purpose of the act or decision can be achieved as effectively, in a less restrictive way. Clearly a placement at Primrose Lodge would have been less restrictive, as it was close to the marital home, in Mr N's local area. It appears the Council gave no consideration to this option once it became clear the home did not accept the Council's benchmark. This was despite the Council viewing the



situation with Mr N as 'urgent'. Furthermore, no action was taken in respect of the other home, four miles away.

33. We have seen a copy of the assessment by the manager of Sandpiper House, though it is neither signed nor dated. There is an entry about Mrs N wanting Primrose Lodge as it was in the local area and "*wife unable to travel??*". The manager has noted "*no capacity to make decisions*". The manager has selected options that state Mr N appears to lack capacity; no two stage MCA (mental capacity assessment) has been completed; and no self interest care plan has been formulated.
34. This is the first reference to Mr N's capacity.
35. Notes made by Officer B on 21 June 2013 record the following.
  - A manager from the Alzheimer's Society had spoken with Mrs N who had said that "*as everyone thought her husband should go into respite she wanted to know when he was going*".
  - An officer from the Older People Mental Health team (OPMHT) telephoned Officer B to report she had received contact from Mrs N who sounded "very distressed".
  - A conversation with the GP. Officer B told the GP about her concerns and suggested Mr N either be detained in hospital under the Mental Health Act (be 'sectioned') or he enter Sandpiper House.
  - A telephone conversation with the manager of Sandpiper House "*to alert her that it may be possible that the GP will be in contact regarding placement of (Mr N) this evening. Should this not happen...he may be admitted into hospital and will likely take up the placement from there*".
36. Mr N entered Sandpiper House on 22 June 2013.
37. Notes made by Sandpiper House on 23 June 2013 say "*this care plan was written based on observation, medical history and information given by family. (Mr N) has some cognitive impairment which means he is unable to absorb, retain and process information to make decisions regarding his care and treatment...a 'best interest decision' will need to be made on his behalf*". This is the first reference to any best interests decisions being required.
38. Case notes from 24 June 2013 record Mrs O (Mrs N's daughter) being angry and upset that she had not been contacted and told about the situation before Mr N went into Sandpiper House. Officer B said Mrs N had declined for them to contact the family. There is no evidence of the Council asking Mrs N about contact in any previous recording, or of any refusal by her. The only references we have seen to family members are Mrs N's request that the Council involve her son in the decision making on 19 June 2013 and the presence of Mrs O at the visit on 10 June 2013.

39. Officer B said the ultimate responsibility for entry to home lay with the GP. We do not have the authority to investigate the actions of the GP. However, it is clear from the information we have seen that:

- the Council 'provisionally booked' a place for Mr N at Sandpiper House
- Officer A tried to 'enlist' Mr and Mrs N's son's support for the move
- the Council approached Sandpiper House and arranged for the manager to carry out an assessment, and
- the Council approached the GP about Mr N going to the home.

In these circumstances, it is clear the Council was responsible for arranging the placement.

40. On 24 June 2013, Mrs O again raised the issue of the distance to Sandpiper House. Mrs O said she was going to remove Mr N from Sandpiper House. Officer B records that she told Mrs O *"she was free to do this if she assured me that she was going to remain at her parent's house and that she would ensure that she provided 24 hour care and supervision to her father"*. Officer B records *"I further informed her (Mrs O) that as her father lacked capacity, that should she try to remove him from the home, that I would ask the home manager to ring the police"*. It is unclear why Mr N needed nursing care, if 24 hour supervision by family would have been sufficient.
41. Despite Officer B telling Mrs O that Mr N lacked capacity, a capacity assessment had still not been carried out.
42. Further notes on 24 June 2013 record that Mrs N *"was informed that she could not remove her husband from the home and should she try to do so, the police would be called"*. There is also a reference to a visit the previous day. Mr N's brother had asked to take Mr N out with him and Mrs N *"but the home manager informed them that this would not be possible and should they try to remove him they were requested to call the police"*.
43. Care home notes dated 25 June 2013 state Mr N's *"outer doors were locked cause (sic) (Mr N) has been found by the police in the street...staff to check and be aware that all doors that go out from unit are locked"*.
44. The care notes from 28 June 2013 record Mrs N being angry they she could not take Mr N out. Mr N had packed a bag and was described as unsettled. There is a note that a *"further capacity assessment carried out with (Mr N) with his grand-daughter present. It was evident that (Mr N) lacks capacity in all areas"*. We have not seen or been provided with a copy of this assessment despite asking for all such assessments.
45. The Council's notes of 1 July 2013 show that Mr P raised his concern about the distance of Sandpiper House from the marital home. Mr P commented that his mother had to take two buses to visit her husband. Mr P asked Officer A to explore the possibility of a home in Mrs N's local area. Officer A telephoned four homes. The notes say one was not registered for nursing care and the other three did not have vacancies for nursing care at that time. Officer A recorded that he telephoned Mr P on 2 July 2013 and told him *"I periodically contact them to check bed availability"*. There is no evidence of this in Mr N's case notes. There is no evidence Mr N was put on any waiting list despite repeated

assurances from Officer A that the move to Sandpiper House would be temporary and he would be moved back to his local area as soon as a bed was available.

46. We have seen a copy of a 'Mental Capacity and Best Interest Decision Record' (the Record) dated 2 July 2013. This is the only record of any mental capacity assessment or best interest decision we have seen. Under the heading 'Details of decision required', it says *"the purpose of this assessment is to determine whether (Mr N) is able to retain and weigh basic information to enable him to make informed decisions about the most appropriate accommodation for his safety"*.
47. The Record states that Mr N had said *"that he wanted to remain at home"* and Mrs N *"has strong objections to his placement in Sandpiper House which was arranged by Mr N's GP"*. It also notes that Mr N *"would like to return to his home...(Mrs N) object (sic) to her husband's current placement, and would like him to return to their family home"*.
48. The Record requires the person completing it to record:
- when and where the 'supportive meeting' took place and how long it lasted
  - in detail how the person was supported to understand the nature of the decision
  - the options that could be offered
  - the likely consequences of those options, and
  - where possible, the person's own words or response.

The completed record addressed only the first of these requirements.

49. The Record goes on to record that Mr N could not understand the relevant information, could not retain it long enough to make a decision, could not use or weigh the relevant information and could not communicate the decision. The basis for these conclusions is recorded as *"Mr N seemed unable to retain basic information or recall recent conversations to enable him to make informed decisions. Mr N struggled to understand what was being said and he seemed to have difficulty formulating coherent sentences"*. This is inadequate detail or reasoning.
50. The record states that a referral would be made to the Independent Mental Capacity Advocate (IMCA) service.
51. The Council's record of a conversation between Mrs N and Officer B on 3 July 2013 says Mrs N told Officer B there was a bed available at Carlton Court, a home a mile and a half away from the marital home. Officer B said Officer A had rung homes again that day and no nursing beds were available. Mrs N said she had been to see the bed so knew it was available. Officer B said Mr N needed a nursing bed, and maybe the one she had seen wasn't. Officer B checked the Council's internal booking system which showed there were no beds. Again, there is no record of calls to homes by Officer A. Mrs N referred to the Council *"keeping her husband in prison"*.
52. There is an undated entry made by Officer A of a telephone call from an IMCA who was gathering information about Mr N and who was to try and visit Mr N 'that week'. The care home notes show the IMCA visited on 4 July 2013. The IMCA recorded that he *"visited*

*the views of somebody who has been consulted while working out the person's best interests".*

65. The record keeping to support the Council's decision and actions in this case do not comply with these principles, as set out in the Code.
66. We therefore find the Council failed to conduct an adequate capacity assessment at the appropriate time, in line with and as required by the Act. Furthermore, the Council failed to properly make best interests decisions or convene meetings or conferences as prescribed by the Act and the Code.
67. The Council says that when someone says their preference is to remain at home, arrangements for a placement in residential care would still go ahead if the social worker thought it appropriate. The Council would be acting unlawfully if it did this for someone who had capacity. If the person in question lacked capacity to decide where to live, the decision to move them can only lawfully be taken if a proper mental capacity assessment and best interest decision have been carried out, in accordance with the Act.
68. The Council says the care home would be told of the person's preference to return to their own home. If the individual continued to state their preference after they had been placed, the home should then contact the Council's Deprivation of Liberty (DoL) team. The Council says the DoL team should have been consulted in this case, but it was not at any time. This is a serious failing.
69. We therefore find the Council failed to properly consider whether Mr N's placement amounted to a deprivation of liberty. We note the Council's comment that it was the care home's responsibility. However, under s25(7) of the Local Government Act 1974, any action taken by the home is considered to be taken on behalf of the Council and in the exercise of its functions. Furthermore, the DoL Code is clear that *"if a healthcare or social care professional thinks that an authorisation is needed, they should inform the managing authority"* In this case, the Council was acutely aware of the circumstances of and objections to the placement.
70. The Code says that if someone wants to challenge a decision-maker's conclusions, there are several options.
  - Involve an advocate to act on behalf of the person who lacks capacity to make the decision.
  - Get a second opinion.
  - Hold a formal or informal 'best interests' case conference.
71. Mrs N was not given any information about any of these options, despite her repeated objections to her husband's placement at Sandpiper House.
72. We asked the Council what consideration it gave to referring this matter to the Court of Protection. The Council said that in light of Mrs N's agreement on 18 June 2013 to her husband going into respite care and the agreement that he would be referred to an

independent advocate, it did not consider this course of action. It is clear from the Council's own records that Mrs N objected strongly to her husband being placed at Sandpiper House and made that objection clear as early as 19 and 21 June 2013.

73. The Court of Protection found in the well-known case of London Borough of Hillingdon v Steven Neary and ors, ([2011] EWHC 1377 (COP)) that that Council had breached Steven Neary's rights under Article 5(4) by, amongst other things, failing to bring the dispute to court. The judge criticised the Council for the burden being on Mr Neary to take the matter to court if he wished to challenge what was happening. The judge referred to another case (Re S), which "*rightly observes that the practical and evidential burden is on a local authority to demonstrate that its arrangements are better than those that can be achieved within the family*". He said a local authority "*will discharge the practical burden by ensuring that there is a proper forum for decision. It will not do so by allowing the situation it has brought about to continue by default. Nor is it an answer to say, as Hillingdon has done, that Mr Neary could always have gone to court himself, and that it had told him so... local authorities have the advantage over individuals both in terms of experience and, even nowadays, depth of pocket. The fact that an individual does not bring a matter to court does not relieve the local authority of the obligation to act, it redoubles it*".
74. The Council agrees it should have given Mrs N information and advice about the Court of Protection and there is no evidence she was. The Council says it will address this issue by arranging specific training for social care staff. This should already have been in place.
75. We therefore find fault in the Council's failure to signpost Mrs N to ways in which she could challenge the decisions made against her will about her husband.
76. Notwithstanding the Council's view that Mr N's need for respite was 'urgent', it failed to consider a placement at Primrose Lodge in accordance with Mrs N's preference when it discovered it cost more than the Council's usual rate. The Council then recorded incorrect information about top ups for respite, which it has acknowledged. The Council has apologised for not asking the family about a top up at the time.
77. The Council failed to provide reasons in writing for refusing Mrs N's preferred option, as required by Choice of Accommodation Directions
78. The Council was at fault in not consulting Mrs N about a top up for Primrose Lodge or the vacancy at Buxton Hall.
79. There have been numerous failures to comply with the Act and Code. In particular, there was no formal assessment of need or capacity and no formal best interests meeting.
80. The Council gave insufficient consideration to the alternative, closer placements, despite the need under both the Act (less restrictive option) and the Choice of Accommodation Directions. No written reasons were provided to Mrs N. The Council rejected the alternatives due to cost, despite it classifying the case as 'urgent'.

## Decision

81. Fault found causing injustice to Mr and Mrs N. Mrs N suffered the injustice of being excluded from a proper decision making process as is her right under the Act.
82. If the Council had told Mrs N about the place at Buxton Hall (four miles away), she would have had the option of agreeing to this and therefore saved herself significant expense and inconvenience in travelling 14 miles on two buses each day to Sandpiper House.
83. If the Council had told Mrs N and her children Mr N could move to Primrose Lodge (100m away) if they could pay a top up, they would have had the option to make such arrangements. We note they did agree to pay a top up at Carlton Court.
84. A formal best interests meeting with appropriate attendees may have provided an opportunity to consider all the relevant information and helped reach a decision more acceptable to all parties.
85. Mr N may have suffered the injustice of being unlawfully deprived of his liberty, as no consideration was given to this.
86. The Council did not give Mrs N any information about how to formally challenge the decisions of the Council. This might have helped resolve matters earlier. The Council did not consider referring the case to the Court of Protection.
87. Mrs N suffered anxiety and distress throughout the entire process of Mr N moving into respite care, being admitted to Sandpiper House and her being refused permission to take him out.

## Recommendations

88. To remedy the injustice caused, we recommend the Council:
  - apologise to Mrs N for the failures outlined in this report. That apology should accept responsibility for the faults, and acknowledge the impact these had on her. It should also include an assurance that the same faults will not happen again, and explain what steps have been taken to ensure this.
  - set a timetable for refresher training for social care staff on mental capacity assessments, best interest decisions, deprivation of liberty and the role of the Court of Protection and how to advise the public on their rights. This may involve the Council reviewing the current status of residents who may be deprived of their liberty without proper authorisation.
  - pay Mrs N £750 in recognition of the distress caused by the failings identified and the time and trouble she has expended in making her complaint.

The Council is required to confirm the action above has been taken within three months of the date of this report.