

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Maidstone Borough Council
(reference number: 18 000 166)**

26 February 2019

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.

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 K	The complainant
Mrs K	His wife
L	His son

Report summary

Housing: Housing Allocations

Mr K complains about the Council's decision to refuse his application to join its housing register. As a result, he and his family continue to live in accommodation unsuitable for his disabilities.

Finding

Fault causing injustice and recommendations made.

Recommendations

To remedy the injustice caused, we recommend the Council take the following action.

- Provide a written apology to Mr K for:
 - not considering the failures of the Independent Medical Advisor's assessment;
 - not considering his evidence properly when assessing his application;
 - the failures with the decision letter;
 - wrongly asking him to pay £75 for a review; and
 - failing to tell him about the Independent Medical Advisor's involvement and assessment at the time of the decision.
- Carry out a review of Mr K's application at no cost to him.
- Should the outcome of this review accept his application, the Council will check its records to see if any bid he might have made for a suitable property, in his preferred areas, would have succeeded. If he would have succeeded, the Council will: offer him the next suitable property that becomes available; pay him £150 a month from the date his bid could have succeeded to the date his new tenancy starts. This payment recognises Mr K and his family living in unsuitable accommodation for longer than needed.
- Carry out a review of its allocation policy and the lawfulness of its provision about charging for a second medical assessment.
- Check its records and consider whether any other applicant may have been similarly affected by the charge. It will pay refunds where applicants were charged. It will also consider carrying out reviews of decisions where applicants did not proceed with their review request after they were told about the charge.
- Carry out training to ensure relevant officers are fully aware of the review procedure and can properly advise applicants about it.
- Carry out training to ensure relevant officers deciding applications are aware of the need to properly consider and evaluate evidence from an applicant and the Independent Medical Advisor and give applicants full reasons for their decisions.
- Make a payment of £250 to Mr K for the distress the fault caused. This payment includes recognition of his uncertainty that the outcome of his application might have been different but for the fault identified. It also includes recognition of his lost opportunity to have a review of the decision in addition to the stress, inconvenience, and frustration caused.

The complaint

1. Mr K complains about the Council's decision to refuse his application to join its housing register. As a result, he and his family continue to live in accommodation unsuitable for his disabilities.

Legal and administrative background

The Ombudsman's role

2. We investigate 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), as amended*)

Housing Act 1996 (as amended)

3. Every local authority in England must have a scheme for determining priorities and the procedure to be followed in allocating housing accommodation (their 'allocation scheme'). (*Housing Act 1996, section 166A(1)*)
4. An allocation scheme must give reasonable preference to applicants in the following categories:
 - homeless people;
 - people in insanitary, overcrowded, or unsatisfactory housing;
 - people who need to move on medical or welfare grounds; and
 - people who need to move to avoid hardship to themselves or others.(*Housing Act 1996, section 166A (3)*)
5. Councils must notify applicants in writing of the following decisions and give reasons:
 - that the applicant is not eligible for an allocation;
 - that the applicant is not a qualifying person;
 - a decision not to award the applicant reasonable preference because of their unacceptable behaviour.
6. The council must also notify the applicant of the right to request a review of these decisions. (*Housing Act 1996, section 166A(9)*)

Localism Act 2011

7. Local authorities in England have a general power of competence. This gives a local authority the power to do anything individuals generally may do. (*Localism Act 2011, section 1(1)*)
8. Where a local authority provides a service to a person other than for a commercial purpose, and providing the service to the person is done, or could be done, in the exercise of the general power, the general power confers power to charge the person. (*Localism Act 2011, section 3(1) and 3(2)*)
9. The general power to charge is limited. It only applies if the service is not one a statutory provision requires the local authority to provide to the person. (*Localism Act 2011, section 3(2)(a)*)

Council Allocation Scheme

10. Maidstone Borough Council keeps a housing register of people who want to be considered for social housing. Its allocation scheme, which it introduced in April 2013, operates in accordance with the statutory provisions contained in the Housing Act 1996 (as amended). (*Maidstone Borough Council Allocation Scheme, Section 2.1*)
11. All applicants bid for properties through Kent Homechoice which is a partnership of local authorities and housing associations providing social and affordable housing in Kent.
12. Applicants have a statutory right to request a review of a decision about their application. Where an applicant wants to introduce a medical issue not previously considered under the original application, the applicant must follow the procedure set out in Section 10 (Medical Grounds). It also refers to Appendix B which lists subjects on which applicants can request a review. All requests must be made in writing. (*Maidstone Borough Council Allocation Scheme, Section 7.1*)
13. To get accepted onto the register, all applicants must meet the two qualifying criteria; these are local connection (Section 9) and housing need (Section 10). (*Maidstone Borough Council Allocation Scheme, Section 8.2*)
14. Applicants must be in housing need to access the register and must qualify for one of the reasonable preference criteria as set out in section 167 (2) of the Housing Act 1996. (*Maidstone Borough Council Allocation Scheme, Section 10.1*)
15. To qualify on medical grounds, applicants must show their current accommodation is unsuitable for their household's needs due to a medical condition. This includes those with a physical disability, mobility needs, mental illness, or learning disabilities. (*Maidstone Borough Council Allocation Scheme, Section 10.2.1*)
16. Applicants must satisfy a Homechoice officer that their current accommodation is not suitable. Documentation to support an application must be provided from an NHS medical professional, or an equivalent external agency. (*Maidstone Borough Council Allocation Scheme, Section 10.2.2*)
17. Where the Homechoice officer cannot decide if an applicant qualifies, all details are sent to an Independent Medical Advisor who assesses the application. The Independent Medical Advisor's assessment forms part of the information used to decide if an applicant qualifies on medical grounds. (*Maidstone Borough Council Allocation Scheme, Section 10.2.3*)
18. Applicants have one medical assessment for each member of the household moving with them at no cost. Further medical assessments must be paid for in full by the applicant unless there has been a significant change in the medical condition of an applicant or someone in the household. (*Maidstone Borough Council Allocation Scheme, Section 10.2.4*)
19. The fee for a medical assessment is £75. (*Maidstone Borough Council Allocation Scheme, Section 10.2.5*)
20. The Homechoice and Strategy Manager reviews whether a free medical assessment is appropriate. (*Maidstone Borough Council Allocation Scheme, Section 10.2.6*)
21. Appendix B sets out a table showing the 12 subjects that can be reviewed, the level of officer carrying it out, the time limits within which the request must be made, and the response time. The time limit for sending a review request is, with

one exception, 14 days from the decision date. (*Maidstone Borough Council Allocation Scheme*)

Statutory guidance

22. The government issued statutory guidance on housing allocations in June 2012 (*'Allocation of accommodation: guidance for local housing authorities in England'*). This states review procedures should be clearly set out and must accord with the principles of transparency and fairness. (*paragraph 5.19*)
23. It gives the following general principles of good administrative practice.
 - Applicants should be told of the timescale within which they must request a review. Twenty-one days from the date the applicant was notified of the decision is well-established as a reasonable timescale. A housing authority should retain the discretion to extend this time limit in exceptional circumstances.
 - Applicants should be told their request should be in writing, that a representative can send it on their behalf, and what information they should send with the request.
 - Authorities should consider whether to advise that provision can be made for verbal representations as well.
 - Applicants must be notified in writing of the outcome of the review which sets out the reasons for the decision.

How we considered this complaint

24. We have produced this report after making enquiries and examining relevant documents.
25. We gave Mr K and the Council a confidential draft of this report and invited them to comment. We took the comments into account before finalising the report.

What we found

What happened

26. Mr and Mrs K lived in an unadapted 2-bedroom housing association property they rented with their son L. They are both on benefits.
27. In 2015, Mr K applied to join the Council's housing register. Mr K recalls the Council accepting it on medical grounds. He bid for a 2-bedroom housing association bungalow advertised on the Kent Homechoice website in September. When he accepted the offer of the property, Mr K had a medical operation arranged which would leave him with a permanent mobility disability.
28. In November, Mr K and his family moved in and the Council removed him from the housing register.
29. After the operation in December, Mr K realised the property was not suitable for his needs. He now used a wheelchair.
30. When using the wheelchair at home, he found:
 - he struggled to access rooms because of narrow door widths which caused him to scrape his knuckles;
 - he could not completely turn around in the kitchen without removing an anti-roll bar to the rear of the wheelchair. When he removed it, he toppled backwards;

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- while he can access the decked area in the garden, he cannot get to the rest of it because of steps. He worries about escaping through the back door in an emergency, such as a fire for example, as the decked area is not large enough to move any great distance from the house;
 - the spy hole in the front door is too high; and
 - it is difficult to use the kitchen because there is no knee space under the units. He struggles to reach the units above the worktop.
31. Mr K had several falls from his bed, breaking bones in his finger and arm. He jumps awake during the night because of pain. Mrs K started to sleep on the sofa because Mr K needed to sleep in the middle of the bed to remain safe. When Mr K woke with pain, he disturbed her sleep. Mrs K suffers from panic attacks which are made worse by lack of sleep.
32. In October 2017, Mr and Mrs K applied to join the Council's housing register. In his email to the Council, Mr K explained they needed a 3-bedroom property for medical reasons. He told the Council about the falls, his wife sleeping on the sofa, her worsening panic attacks, and the lack of space in the property for an extra bed.
33. On his application form, Mr K repeated these problems and added the garden was too dangerous for him as it sloped.
34. Later the same month, the occupational therapist issued a report which said:
- door widths in the property were suitable for indoor wheelchair use;
 - the circulation space in the property was suitable;
 - Mr K was significantly worse at night and suffered from pain;
 - he was receiving counselling for psychological distress; and
 - there was no room to put an additional bed in their bedroom because of its size and lack of space.
35. The occupational therapist fully supported Mr K's application for rehousing to a property meeting his needs which would improve his health, wellbeing, and safety. Mr K sent the Council a copy of the report.
36. In November, Mr K's doctor wrote in support of his application. This confirmed Mr K:
- has problems with recurrent accidental falls while asleep in bed;
 - suffered from pain and gave details of the type he now suffered; and
 - suffered from depression and anxiety.
37. The doctor also noted Mrs K slept in the living room as there was no space in their bedroom for an additional bed.
38. In February 2018, the Homechoice officer sent all the information Mr and Mrs K provided in support of their application to an Independent Medical Advisor. The Independent Medical Advisor works for a company providing medical advice for housing services. Its website states it charges up to £35 plus VAT per case for full advice with reasons in an individual report or £50 plus VAT for complex cases or for advice from its psychiatrists.
39. The Independent Medical Advisor assessed Mr K as not having medical priority. The case notes record of the assessment stated Mr K already lived in a

self-contained adapted bungalow with access to all normal facilities. The assessment recommended he use cot sides if he was falling out of bed and/or two single beds in their bedroom. Cot sides are raised sides fitted to a bed to stop a person falling out. The note concluded an extra bedroom was not medically essential in this case. Medical priority did not apply.

40. The Council emailed Mr K and told him he was not eligible to join its housing register. It acknowledged his medical issues but found no evidence to show he needed an additional bedroom on medical grounds.
41. On 15 February, Mr K told the Council he disagreed with its decision. He said he wanted to appeal and have it considered again. He asked for details about what he needed to do to appeal it.
42. The records show the Council received a call from Mr K four days later. An officer noted,
'I have advised that an extra bedroom isn't medically essential to this case. As per note below'.
43. The note it referred to is the case note recording the Independent Medical Advisor's assessment.
44. The Council replied to Mr K's email the following month. It explained if he wanted to ask for a review of the medical decision, he needed to do so in writing. He needed to set out the reasons why he wanted the decision reviewed and provide any further supporting evidence. It added:
'Please note that a review of this medical decision will cost £75. This is in line with the allocation policy which states:
10.2 MEDICAL
10.2.5 The fee for a medical assessment will be £75. This will be reviewed annually by the Homechoice and Strategy Manager.
If you wish to proceed with a Medical assessment review, please let us know'.
45. When Mr K complained to us, he confirmed he did not proceed with his request for an appeal because *'We are on benefits and don't have 2 ha'pennies to rub together'.*
46. Mr K also explained why he disagreed with the Independent Medical Advisor's assessment and the Homechoice officer's decision. Cot sides on a single bed are not suitable for him. This is because touching them would trigger the type of pain he now suffers from. They would also prevent him accessing his wheelchair from bed.
47. He also explained why two single beds would not help. This is because when he jumps awake with the pain, he would still disturb Mrs K. Mr K confirmed he was not visited or contacted by the Independent Medical Advisor or the Homechoice officer before the Council decided he was not eligible to join its housing register.
48. The Council relies on the Localism Act 2011 General Powers of Competency to charge a fee for a second medical assessment. It explained how it calculated the £75 fee. The Independent Medical Advisor charges £25. To this, the Council adds the time a senior officer spends preparing the case for the Independent Medical Advisor, the time taken to evaluate the assessment it receives back, and the time taken to reach a decision. It estimates the total officer time spent is an hour and a half which amounts to £57.20.

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49. The Council provided a copy of a report which sets out the reasons why it decided to make this charge. The 'Report of Head of Housing and Community Services' (20 December 2012) noted (paragraph 1.3.15):
- 'There has been a proliferation of medical applications in recent years (as applicants chase additional points) and repeated requests to review the outcome of medical assessments. This is both costly to the council as each assessment may require an independent medical officer's adjudication (for which a fee is paid) but it is also time consuming for officers dealing with repeated appeals that have no impact on the allocated points. It is proposed under the new Scheme to charge applicants who make repeated requests for medical assessments where there has been no change in circumstances based on the cost to the council'.*
50. Attached to the report was a document, 'Stage 1: Equality Impact Assessment'. This concluded the new Allocation Scheme would not:
- contribute to inequality; and
 - be discriminatory.
51. The Council argued there is no statutory requirement for a local authority to get the view of an Independent Medical Advisor when deciding a housing register application. It believes it best practice to do so which is why it does not charge for the first assessment.

Conclusions

Application assessment

52. It was for the Council to decide whether Mr K's home does not meet his needs because of his medical condition. The Council could take account of the Independent Medical Advisor's assessment, which it chose to get, but also had to take account of all the medical evidence Mr K sent.
53. When the Council reached its decision, there was no evidence it took account of the Independent Medical Advisor's failure to:
- properly consider the evidence Mr K sent about what triggered his pain when accepting the assessment's conclusion he could use narrower single beds and cot sides;
 - examine or speak to Mr K about what triggered his pain. This would have revealed touch as a trigger which a narrower single bed and cot sides would make worse; and
 - explore the size of his bedroom.
54. The Homechoice officer also failed to consider these issues. The officer also failed to weigh the evidence from Mr K against that from the Independent Medical Advisor when reaching a decision. There is no evidence the officer considered the occupational therapist report. The officer relied solely on the Independent Medical Advisor's assessment.
55. The Council's letter setting out the decision to Mr K did not:
- explain why it decided there was no evidence showing he needed an extra bedroom on medical grounds;
 - refer to the evidence he provided or how it considered it;

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- explain the Council had obtained an assessment from the Independent Medical Advisor;
 - explain the outcome of the assessment; or
 - give details about how he could review the decision.
56. There was poor communication by the Council. It failed to tell Mr K about the involvement of, and the assessment by, the Independent Medical Advisor until a telephone call 12 days after sending him its decision.
57. These failures are fault causing Mr K injustice. The injustice to Mr K is not having his medical evidence and application properly considered. The failures caused him uncertainty as he did not know whether the Council would have accepted him on to the housing register if it had properly considered his application.

Review request

58. The Council's allocation scheme states:
- applicants have a statutory right to request a review of a decision about their application;
 - only where an applicant wants to introduce a medical issue not considered before in the original application must he or she follow the procedure set out about medical grounds; and
 - the procedure about medical grounds states a further medical assessment costs £75 unless there was a significant change in the medical condition of the applicant or discretion is exercised to waive it. A further assessment is done where the Homechoice officer cannot decide if the applicant qualifies.
59. When Mr K emailed the Council to say he wanted to appeal, he was told he had to pay £75 to have a review of this '*medical decision*'. What he wanted was to challenge the Homechoice officer's decision which was based on the assessment of the Independent Medical Advisor.
60. At this point, the officer replying to his email had no information the procedure about medical grounds applied. This was because Mr K's email says nothing about him wanting to introduce a medical issue not previously considered.
61. It was fault, therefore, for the officer to ask him to pay £75. The request was premature and did not follow Council policy. The officer sending the email failed to explain the appeal procedure properly. Due to fault by this officer, Mr K lost the right to have the decision reviewed at no cost to him.
62. The officer also failed to consider whether Mr K wanted to challenge the decision on the ground both the Independent Medical Advisor and the Homechoice officer failed to properly consider his evidence. This would include, for example, a failure to consider what his GP said about his pain triggers which make the suggestion of a single bed and cot sides unfeasible.
63. This ground would not involve Mr K introducing new medical evidence. It would simply argue the evidence available was not properly considered. Under the allocation scheme, this type of challenge would not attract a new medical assessment. As such, Mr K was not required to pay a fee. This failure is fault.
64. If the Council routinely asks applicants to pay this fee on any decision where an Independent Medical Advisor gave an assessment, applicants are potentially losing their right to ask for a review at no cost. They are also potentially discouraged by the fee from pursuing their appeal further.

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65. Under the allocation scheme, all applicants get one medical assessment for each member of the household moving with them at no cost. Any further medical assessment costs £75 unless there has been a significant change in the medical condition of the applicant or someone in the household.
 66. The charge for a second assessment is likely to only affect those wishing to review an Independent Medical Advisor's assessment. This is because they would have already had a free medical assessment. Making a charge in these circumstances is the equivalent of making a charge for a review.
 67. The law states the Council must ensure its allocation scheme provides an applicant with the right to request a review of a decision about whether to allocate housing accommodation or not. It makes no mention of charging for doing so.
 68. The Council argued it can ask applicants to pay £75 in these circumstances because of the general power to charge given to it by the Localism Act 2011.
 69. The Council had to provide the review under the Housing Act 1996, not under a general power. As the review is required by statute, which makes no mention of a council charging to cover its cost, the general power does not override this duty. This means the Council had no power to charge Mr K for the second assessment in these circumstances as this amounted to charging him for a review.
 70. By making this charge, the Council is restricting applicants' rights to have a review. This is because the right becomes available only to those who can afford to pay it. This is fault.

Review process

71. The Council's allocation scheme does not comply with the statutory guidance about review procedures which requires them to be clear, transparent, and fair.
72. The allocation scheme fails to:
 - allow 21 days from the date of a decision to send a request for a review;
 - advise about the use of representatives;
 - say what information needs sending with the request; and
 - allow for verbal representations.
73. In response to the draft report, the Council made the following points.
 - The guidance does not place the same legal obligation on it as statutory regulations, for example. This is correct but there are examples of good administrative practice councils should aim for.
 - It reviewed what was a 'reasonable' period when providing a decision to an applicant. It noted the postal delivery times when considering the 21-day period. It decided its increasing use of text and email meant the timescale could be reduced to 14 days. While the Council may well have moved towards increasing its use of text and emails, this does not mean applicants have. It fails to acknowledge that applicants may have restricted access to the internet, for example, or may prefer to rely on the post.
 - It noted advice about the use of representatives was not 'conditional' and the law required an applicant to put their request in writing. It has no objection to applicants using representatives and is happy to amend its decision letters to make this clearer.

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- The guidance does not require it to allow verbal representations as part of the review process. It considered allowing verbal representations but decided it unnecessary as it would delay the decision-making process. Nor does it have the resources to enable it. While the Council stated it considered allowing verbal representations, and why it decided not to allow them, it failed to show it considered whether there were any circumstances where it was reasonable to make an exception and allow an applicant to make verbal representations.
74. We note what the Council said in its response but remain satisfied the failure to follow good administrative practice in these circumstances amounts to fault.

Recommendations

75. To remedy the injustice caused, we recommend the Council take the following action.
- Provide a written apology to Mr K for:
 - not considering the failures of the Independent Medical Advisor's assessment;
 - not considering his evidence properly when assessing his application;
 - the failures with the decision letter;
 - wrongly asking him to pay £75 for a review; and
 - failing to tell him about the Independent Medical Advisor's involvement and assessment at the time of the decision.
 - Carry out a review of Mr K's application at no cost to him.
 - Should the outcome of this review accept his application, the Council will check its records to see if any bid he might have made for a suitable property, in his preferred areas, would have succeeded. If he would have succeeded, the Council will: offer him the next suitable property that becomes available; pay him £150 a month from the date his bid could have succeeded to the date his new tenancy starts. This payment recognises Mr K and his family living in unsuitable accommodation for longer than needed.
 - Carry out a review of its allocation policy and the lawfulness of its provision about charging for a second medical assessment.
 - Check its records and consider whether any other applicant may have been similarly affected by the charge. It will pay refunds where applicants were charged. It will also consider carrying out reviews of decisions where applicants did not proceed with their review request after they were told about the charge.
 - Carry out training to ensure relevant officers are fully aware of the review procedure and can properly advise applicants about it.
 - Carry out training to ensure relevant officers deciding applications are aware of the need to properly consider and evaluate evidence from an applicant and the Independent Medical Advisor and give applicants full reasons for their decisions.
 - Make a payment of £250 to Mr K for the distress the fault caused. This payment includes recognition of his uncertainty that the outcome of his application might have been different but for the fault identified. It also includes recognition of his lost opportunity to have a review of the decision in addition to the stress, inconvenience, and frustration caused.

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76. In response to the draft report, the Council:
- agreed to provide a written apology to Mr K;
 - carried out a review of his application at no cost to Mr K. It accepted his application which it backdated to 23 November 2017. It told Mr K of this decision and he can now bid for properties;
 - reviewed 3 bedroom properties that were available from 23 November 2017 and took account of the occupational therapist's recommendations. Of the seven that became vacant, one did not meet these recommendations. All were offered to applicants with an older priority date than Mr K; and
 - to consider this report as part of the annual review of its allocation policy which was due to be completed by the end of December 2018.
77. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet, or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

78. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mr K. The Council should take the action identified in paragraphs 75 and 76 to remedy that injustice.