

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

**Investigation into a complaint about
London Borough of Ealing
(reference number: 21 013 463)**

5 January 2023

The Ombudsman's role

For more than 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

Mrs X The complainant

Report summary

Education and Children's Services – statutory complaint procedure

Mrs X complained about the Council's decision to remove two foster children from her care. The Council has been unable to complete the statutory complaint procedure in this case. The Council claimed the fostering agency commissioned to place the children says it cannot provide all the information requested. This has caused Mrs X and her family injustice due to uncertainty and frustration at the lack of an outcome to their complaints.

Finding

Fault found causing injustice and recommendations made. The Council has failed to apply itself fully to obtaining information from the fostering agency and taking a robust approach to completing the statutory complaints process.

Recommendations

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*)

To remedy the injustice caused, we recommend the Council:

- apologises to Mrs X for the delay in responding to her complaints;
- pays Mrs X £500 to recognise the distress, time, trouble and frustration caused by the delay;
- arranges to obtain the outstanding information from the National Fostering Agency and the Independent Review Mechanism Panel to enable investigation of Mrs X's stage two complaints without further delay; and
- review its information sharing arrangements with the NFA and other fostering agencies about unfettered access to personal data relating to children it has placed in foster care. The Council should take whatever formal steps it can to encourage the organisation responsible to make any appropriate changes to the cross-borough independent foster care contract the Council uses to strengthen the information sharing clauses.

The Council has accepted our recommendations.

The complaint

1. Mrs X complained about the Council's handling of her concerns about its decision to remove two foster children from her care. The Council has failed to complete its stage two investigation under the statutory complaint process and Mrs X believes this is due to the fostering agency involved. The fostering agency has not provided the Council with the information needed to complete its investigation. The lack of conclusion and delay in progressing Mrs X's complaint has caused her and her family significant distress and uncertainty.

Legal and administrative background

The Ombudsman's role and powers

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*)
3. We investigate complaints about councils and certain other bodies. We cannot investigate the actions of bodies such as The National Fostering Agency. (*Local Government Act 1974, sections 25 and 34A, as amended*)
4. Under the information sharing agreement between the Local Government and Social Care Ombudsman and the Office for Standards in Education, Children's Services and Skills (Ofsted), we will share this decision with Ofsted.

Children's Social Care Complaints

5. Section 26(3) of the Children Act 1989 says all functions of the local authority under Part 3 of the Act may form the subject of a complaint under the statutory complaints procedure.
6. The law sets out a three-stage procedure for councils to follow when looking at complaints about children's social care services. The accompanying statutory guidance (the guidance), '*Getting the best from complaints*', explains councils' responsibilities in more detail.
7. The first stage of the procedure is local resolution. Councils have up to 20 working days to respond.
8. If a complainant is not happy with a council's stage one response, they can ask that it is considered at stage two. At this stage of the procedure, councils appoint an investigator and an independent person who is responsible for overseeing the investigation. Councils have up to 65 working days to complete stage two of the process from the date of request.
9. If a complainant is unhappy with the outcome of the stage two investigation, they can ask for a stage three review by an independent panel. The council must hold the panel within 30 days of the date of request, and then issue a final response within 20 days of the panel hearing.
10. The guidance says once a complaint has entered stage one, the council must ensure the complaint continues to stages two and three if the complainant wishes apart from in very limited circumstances when the council can make an early

referral to us after stage two. (*Department for Education, Statutory guidance for local authority children's services on representations and complaints procedures, 2006*)

11. The guidance lists who may complain using the statutory procedure. The council does not need consent from the child or young person to investigate a complaint from a person on this list. However, it may need consent from the child or young person to disclose information about them to the person making a complaint.
12. Section 24D of the Children Act 1989 states that a local authority foster carer, including those caring for children placed through independent fostering agencies, is eligible to complain under the Children Act statutory process.
13. The guidance also states that:

“Section 119 of the Health and Social Care (Community Health and Standards) Act 2003, makes an amendment relevant to the complaints functions to Section 31 of the Data Protection Act 1998. This is that people charged under the regulations with consideration of complaints are exempt from the subject information provisions of the Data Protection Act 1998 to the extent to which application of these provisions would prejudice considering the complaint. The subject information provisions of the Data Protection Act allow for individuals to obtain information which is held on them by others. Section 31 of the Data Protection Act provides an exemption from these provisions by reference to a number of different categories of regulatory function exercised by public bodies...”

and,

“The Complaints Manager should arrange for a full and considered investigation of the complaint to take place without delay. He may also request (in writing) any person or body to produce information or documents to facilitate investigation, and consideration should be given to matters of disclosure and confidentiality. Consideration of the complaint at Stage 2 should be fair, thorough and transparent with clear and logical outcomes...”
14. While guidance refers to the Data Protection Act 1998, this has since been replaced by the Data Protection Act 2018 and the sections relevant to this case can now be found in Schedule 2, Part 2, paragraph 10(2) of the Data Protection Act 2018 (function of considering complaints under ss.24D and 26 of the Children Act 1989).

How we considered this complaint

15. We produced this report after speaking to the complainant and examining relevant documents from the Council and the National Fostering Agency.
16. The National Fostering Agency (NFA) is a third party to this investigation and, while we have chosen to name it in this report given the wider public interest, we are clear any fault we have found is attributable solely to the Council.
17. Mrs X, the Council and the NFA all had an opportunity to comment on our draft report. We considered any comments made before issuing this final report.

What we found

What happened

18. Mrs X and her husband were registered as foster carers by the NFA since 2010. In March 2015, two children were placed with them by the Council. These children

were removed from Mrs X's care in December 2019 following a safeguarding referral.

19. Mrs X complained to the Council in June 2020 about its decision to remove the foster children from her care and the lack of support she had received from NFA while fostering. The Council responded under stage one of the statutory complaints process and explained it could not investigate any complaints Mrs X had about the actions of NFA.
20. Following further correspondence with the Council, Mrs X eventually brought her concerns to us at the end of 2020, when the Council declined to take Mrs X's concerns through the rest of the statutory complaints process.
21. In April 2021, we upheld Mrs X's complaint (case reference [20 009 341](#)). We asked the Council to finish considering Mrs X's complaints under stage two and if requested by the complainant, consider it under stage three of the statutory procedure. We asked the Council to also consider the impact of the delay in progressing Mrs X's complaints and to provide an appropriate remedy to her for this.
22. In early May 2021, the Council appointed an Investigating Officer (IO) and Independent Person (IP) to complete the stage two complaint investigation of Mrs X's concerns. The IO and IP spoke by telephone with Mrs X and her husband at the end of May 2021 and obtained an agreed statement of complaint from them on 12 July 2021. On the same date, the IO submitted a list of information they needed from the Council and NFA to complete their investigation.
23. On 20 July 2021, the Council contacted NFA to request the information the IO had asked for. On 6 August 2021, NFA told the Council it could not provide the information requested without consent from Mrs X and her husband. The Council and NFA had further correspondence during August 2021 about obtaining Mrs X and her husband's consent. Mrs X and her husband gave their consent to NFA on 18 August 2021.
24. There was further correspondence between the Council and NFA following this because the Council required unredacted information from NFA. NFA told the Council it was processing the request for information as a subject access request under the General Data Protection Regulations. As a result, NFA said it could not disclose third party personal data to the Council without consent or an explicit lawful basis for disclosure. NFA also advised the Council that some of the information it had requested was held by the Independent Review Mechanism (IRM) Panel that reviewed decisions relating to Mrs X and her husband's status as foster carers.
25. The Council's contact with NFA to obtain the information needed for the stage two complaint investigation concluded on 1 November 2021. The Council referred Mrs X's complaint back to us because it claimed it was unable to complete the statutory complaint process as it could not access the necessary information from NFA.

Our enquiries

26. We made enquiries with the Council and NFA about their respective handling. The Council told us it made repeated unsuccessful requests to NFA for the information needed before referring the matter back to us.
27. NFA explained in its response to our enquiries that it had received legal advice which prevents it from disclosing unredacted material about the two foster

children to the Council without having a lawful basis to do so. It maintains the view that Mrs X and her husband cannot give valid legal consent as they did not have parental responsibility for the two children placed in foster care with them in March 2015.

28. NFA also says the Council has not provided an explicit lawful basis to enable disclosure of the information it has requested. NFA states it believes the Council had received copies of all the information it had originally requested in unredacted form. NFA has also confirmed that it has not sought guidance from the Information Commissioner's Office (ICO) during its handling of the Council's requests.

Conclusions

29. There is a clear and explicit statutory basis under which councils should investigate complaints under the Children Act 1989. Consequently, processing of relevant personal data is permitted under articles 6(1)(c) (legal obligation of data controller) or 6(1)(e) (performance of a public task) of the General Data Protection Regulations and Schedule 2 Part 2 paragraph 10(2) of the Data Protection Act 2018. Foster carers are covered by this statutory guidance and as such are entitled to complain to the Council about its handling. This would in our view include investigating any complaints relating to the handling of any services the Council commissions another organisation to undertake on its behalf, such as NFA in this case. This statutory basis is separate to any subject access right the Council may also be able to exercise to the extent that it holds parental responsibility for a child.
30. NFA states Mrs X and her husband did not hold parental responsibility for the children in question and as such cannot provide valid consent for the disclosure of their personal data. While this is correct, the children are the subject of a care order which meant parental responsibility for them was shared by the Council and their birth parents. We do however note that NFA was not made aware of the care order when the Council made its requests.
31. Given the Council holds shared parental responsibility, it could and had provided valid consent to access information about the children from NFA when it originally made its request. It is unclear why the Council have not been alert to this. In any event, parental responsibility would only be relevant if the Council was making a subject access request. Consent is not relevant to the Council's contractual and/or statutory rights and obligations to investigate complaints under the Children Act 1989 and wider duties.
32. It is equally unclear why the Council appears not to have made requests for information from the IRM Panel when NFA advised it that some of the information it had asked for was held elsewhere. This was fault by the Council as it has not pursued all available avenues for obtaining information the IO had requested.
33. The protracted and ultimately fruitless interaction between the Council and NFA has meant Mrs X has been left in a situation where her complaints have still not been fully investigated by the Council. Mrs X has been waiting since July 2020 for the Council to consider her complaints under stage two (and if needed stage three) of the statutory complaint procedure; a process which at stage two should take a maximum of 65 working days to complete.
34. The significant delay in progressing this complaint has caused distress, uncertainty and frustration for Mrs X and her family. This was fault by the Council,

as was its failure to robustly, promptly and effectively deal with the difficulties it encountered with obtaining information from NFA, including its inability to consider its own contractual and/or statutory rights to the information.

35. As there appears no valid reason for NFA to withhold the information the Council has requested, our recommendations below seek to address this to enable swift progression of Mrs X's stage two complaints.

Recommendations

36. 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*)
37. In addition to the requirements set out above, the Council has agreed to take the following action to remedy the injustice identified in this report:
- apologise to Mrs X for the delay in responding to her complaints;
 - pay Mrs X £500 to recognise the distress, time, trouble and frustration caused by the delay;
 - arrange to obtain the outstanding information from NFA and the IRM Panel to enable investigation of Mrs X's stage two complaints without further delay; and
 - review its information sharing arrangements with the NFA and other fostering agencies about unfettered access to personal data relating to children it has placed in foster care. The Council should take whatever formal steps it can to encourage the organisation responsible to make any appropriate changes to the cross-borough independent foster care contract the Council uses to strengthen the information sharing clauses.

Decision

38. We find fault with the Council, which has caused Mrs X significant injustice. We have completed our investigation as the Council has agreed to take action to remedy that injustice.