

**OMBUDSMAN REPORT – REPORT NO 07/C/03447**

***Executive Summary***

***This report outlines the background to the Local Government Ombudsman’s (“the Ombudsman”) report regarding Mr H and his child S. The Ombudsman has made a finding of maladministration and injustice against the council***

**1.0 Background**

1.1 The Ombudsman’s report was issued on 10 April 2008. The Council had previously had the opportunity to comment on a draft report in January 2008. The Council had made a number of comments on the draft report, which are considered further below.

1.2 A copy of the Ombudsman’s report is attached as Appendix 1 to this report. Mr H’s son S has special education needs. In 2006 the Council prepared a statement of special education needs naming a specialist secondary school as the proposed school for S. This was not Mr H’s preferred school. He preferred S to attend a mainstream secondary school. Mr H appealed to the Special Education Needs Tribunal (“the SENT”). In November 2006 the SENT determined that S’s statement should name the secondary school preferred by Mr H. A statement was duly prepared.

1.3 The statement was issued in December 2006. At around that time officers in my department became suspicious that Mr H was not living in the Wirral area. He also owned a home in North Wales. My officers contacted the Council Tax Section in the Finance Department which confirmed that Mr H had been claiming a discount on the Council Tax for his property in Wirral since 2005, on the basis that he was not living in it.

1.4 On 8 December 2006 my officer spoke to Mr H and stated that he did not believe Mr H was living in Wirral. On the same date I wrote to Mr H stating that as he was not resident in Wirral,

*You will need to contact [the Welsh authority] to make arrangement for [S’s] education. I will be forwarding the appropriate documentation to them as they are the responsible body.*

1.5 Mr H did not respond to that letter. However, he did contact the Council Tax section on 11 December 2006 indicating that he no longer wished to claim the discount on his Wirral Home. He subsequently completed a “Council Tax Sole/Main Residence Questionnaire”, which he returned on 14 December 2006. On this form he stated that the length he had stayed at the Wirral address had been “variable up to 8<sup>th</sup> Dec [2006]. From 8<sup>th</sup> December [2006] permanently”. Members will note that the date

upon which Mr H stated that he began to reside permanently once more in Wirral is the date of his conversation with my officer. Mr H also stated on the questionnaire that he had begun to live at his address in Wales in "Spring 2005." He also stated that his occupation of the Welsh property had been, "Variable but permanently from spring 2005 – Autumn 2006ish. Then mainly until Dec 8<sup>th</sup> 2006." Members will note that the time Mr H says that his permanent residency in Wales ceased coincided with the timing of the SENT hearing. He did not mention his residency in Wales previously to my officers or in the proceedings before the SENT. In the questionnaire Mr H referred to building work having been carried out at his property in Wirral. However, no evidence of building work has ever been supplied to the Council. My officers did attempt to make contact with Mr H during this period by visiting the property and never saw any evidence of building work being carried out.

1.6 Mr H also wrote to the Head of Legal and Member Services on 11 January 2007 alleging that my officer's contact with the Council Tax section amounted to a breach of the Data Protection Act. On 29 January 2007 and 26 April 2007 the Head of Legal and Member Services wrote to Mr H asking him to provide evidence to support his residency. He did not respond to either of those letters.

1.7 On 2 August 2007 the Ombudsman wrote to the Council stating that it had received a complaint from Mr H. The normal practice of the Ombudsman is not to consider a complaint unless the complainant has sought to use the Council's own complaints procedure and exhausted that avenue. Mr H has never made a complaint using the Council's complaints procedure. The Council responded to the Ombudsman on 21 August 2007.

1.8 On 20 September 2007 the Council received an e-mail from the Ombudsman's Investigator which stated:

*I have sent the Complainant my provisional view which explains why I consider that the complaint should not be investigated any further. I have asked him to send me any comments he wishes to make on this letter within the next two weeks.*

*However, I do think the Council should now take some action to end the impasse that has been reached. Perhaps the Council ought to reach a final decision about whether it is responsible for [S's] statement or should cease to maintain it. Perhaps the Council could consider the possibility of some form of mediation or dispute resolution to move matters on or even take action against the complainant by way of a school attendance order, for example.*

Frequently, though not in all cases, the Ombudsman will send the Council a copy of her provisional view letter. In this case she did not do so. The Council has never been provided with a copy of the provisional view letter or the reasons why at that stage the Ombudsman was not minded to proceed with the investigation nor why she subsequently changed her mind.

1.9 On 2 October 2007 the Council e-mailed the Ombudsman's Investigator stating;

*Arrangements have been made for a Senior Education Social Welfare Officer to visit Mr H and Children's Services are also going to liaise with [the Welsh authority] to try and establish where Mr H is currently residing. [an officer for Children's Services] has also made a referral to the Merseyside Mediation Service, however, Mr H has not indicated at present whether or not he will engage with mediation. I trust this information will be of assistance and I will keep you informed of developments."*

- 1.10 My Officers met with Mr H on 8 November 2007 and it was agreed that S would start at the school named in his statement. The Headteacher of the school agreed to meet with Mr H on 22 November. The Council advised the Ombudsman of the progress by e-mail on 19 November. On 6 December 2007 the Council advised the Ombudsman that Mr H had refused to meet with the Headteacher on 22 November but the meeting had taken place on 28 November 2007 and S had started that day at the school.
- 1.11 The Ombudsman's Investigator subsequently advised the Council that he had been instructed to revise his provisional view that the complaint should not be further investigated. On 3 January 2008 the Ombudsman issued a draft report to the Council. The Ombudsman indicated that the Council should make any response within 21 calendar days.
- 1.12 On 24 January 2008 the Council set out in a lengthy response to the Ombudsman's a number of significant concerns about the contents of the draft report. These included;
- The fact that the Ombudsman has re-opened the complaint after indicating that it would not be pursued without seeking any further comment from the Council;
  - The Ombudsman criticised the Council for a delay in issuing the statement of special education needs, despite the fact that this was requested by Mr H;
  - The conclusion that there was evidence that Mr H was living at the Wirral property from 8 December 2006 simply because he had ceased to claim Council Tax rebate was flawed;
  - The Council believed that it did have a basis for stating that it was not responsible for S's education whilst Mr H failed to provide to it any evidence of residency;
  - Querying the validity of some of the recommendations (this is considered further below)
- 1.13 On 4 April 2008 the Ombudsman wrote to the Council stating that she would be issuing her report. She addressed some of the points raised in the Council's letter of 24 January but failed to properly address many. On 10 April 2008 the report was issued.

## 2.0 Findings

- 2.1 The report makes the following findings;

*The complainant provided full information about his circumstances and living arrangements to the Council Tax Service which accepted that the family were using their Wirral Property as their main residence. When the Council's Legal Department subsequently made enquiries of the complainant he declined to send it the information but twice directed it to the Council Tax Section. The legal department did not contact the Council Tax Section and the Education Service continued to refuse to take responsibility for the boy's education.*

*The Council would not accept responsibility for the boy and did not comply with the law until the Ombudsman began her enquiries. As a result the boy lost almost a year of education at the school as specified in the Statement of Special Educational Needs, his parents paid for private tuition and experienced stress and anxiety in trying to resolve the issue.*

The Ombudsman also states that the Council's failure to complete the statement within 8 weeks amounted to maladministration.

## 2.2 Comments on the Findings

- 2.2.1 *The complainant provided full information about his circumstances and living arrangements to the Council Tax Service which accepted that the family were using their Wirral Property as their main residence.*

The details provided by the complainant to the Council Tax section are set out in paragraph 1.5 above. This response was initiated the day that my officer made contact with Mr H. Mr H did not provide any evidence for the building work that he states was being carried out at the Wirral property, indeed the Council has still never seen any evidence to support such work despite raising this with Ombudsman. Mr H stated that he no longer wished to claim Council Tax relief from 8 December 2006. The fact that the Council Tax Section stopped relief from that date cannot be taken as a decision by the Council that for all purposes it was accepted that he was resident in the Borough. The test to be applied in relation to entitlement to special education needs provision is not the same as for Council Tax.

- 2.2.2 *When the Council's Legal Department subsequently made enquiries of the complainant he declined to send it the information but twice directed it to the Council Tax Section.*

I believe that this is factually inaccurate. Mr H was requested in the letters to provide relatively simple factual information and evidence. He did not respond to those letters. The Ombudsman states that he directed the legal department to contact the Council Tax section. The Legal Department has no record of any contact made by Mr H. The Ombudsman has not set out any details of when Mr H is said to have contacted the Legal Department to direct it to Council Tax records nor the manner in which he is said to have done so.

- 2.2.3 *The legal department did not contact the Council Tax Section and the Education Service continued to refuse to take responsibility for the boy's education.*

I believe that this again is inaccurate. The Legal Department did obtain information from the Council Tax Section but did not conclude that the information provided was sufficient evidence to establish residence.

- 2.2.4 *The Council would not accept responsibility for the boy and did not comply with the law until the Ombudsman began her enquiries. As a result the boy lost almost a year of education at the school as specified in the Statement of Special Educational Needs, his parents paid for private tuition and experienced stress and anxiety in trying to resolve the issue.*

The Council's position was made clear in my letter to Mr H on 8 December 2006. He made no attempts to respond to that letter or respond to the 2 letters from the Head of Legal and Member Services requesting information and evidence which would have been relatively straightforward for him to do. The Ombudsman does acknowledge in her report that;

*It is unfortunate that he chose not to respond to the legal department's subsequent request to confirm that dates that he had lived at the property and for evidence that*

*the property in Wirral had been his main or principal home. If he had engaged constructively with the Council the issues may have been resolved sooner.*

It is of course important to concentrate on the need to ensure that S receives appropriate education. However, the Ombudsman focuses the blame entirely on the Council and does not acknowledge that had Mr H properly responded, or responded at all, to the letters of 8 December 2006, 29 January 2007 or 26 April 2007 then S's educational provision could have been resolved. The Ombudsman's conclusions are not balanced and appear to be based on incorrect facts.

The Council has not seen any evidence to support the private tuition fees referred to in the report nor any details of when this took place or what it involved.

*2.2.5 The failure to provide the statement within eight weeks was maladministration that caused injustice to Mr H (and to S)...*

The delay in finalising S's statement occurred as a result of Mr H's specific request not to finalise it until he had been given the opportunity to supply further information. This was pointed out to the Ombudsman in response to her draft report but she fails to even acknowledge this fact in her final report.

### **3.0 Recommendations**

3.1 The Ombudsman makes 5 recommendations. She states that the Council should:

- Accept that it has no justification for its claim not to be responsible for S;
- Discuss and agree with the school and S's parents whether there is any additional provision that could be made to help S "catch up" on the year's schooling that he has missed;
- Reserve a sum of money equivalent to the cost of educating S at the school for a year in a fund until he has completed year 11 and then deploy the fund on any additional educational provision that the school and an educational psychologist recommend as being beneficial;
- Pay £1,000 to Mr H in recognition of the anxiety, stress, time and trouble caused to him; and
- Make a payment of £655 to Mr H to reimburse what he paid for private tutoring for S during 2007.

3.2 Comments on the Recommendations

*3.2.1 Accept that it has no justification for its claim not to be responsible for S.*

The Council has accepted since November 2007 that it is responsible for S's education. Therefore, on the basis of the wording of the recommendation the Council can have no difficulty in accepting it. The Council is not claiming that it is not responsible for S. Clearly, on the basis of the questionnaire submitted by Mr H to the Council Tax Section in December 2006, from Spring 2005 to "Autumnish" 2006 the Council should not have been responsible for his education. The Council did make provision during that period (including £9,000 for one terms fees at a residential school.) There is clearly some level of dispute as to the Council's responsibility between Autumn 2006 and November 2007. The Ombudsman does not make specific reference to this period in her recommendation.

- 3.2.2 *Discuss and agree with the school and S's parents whether there is any additional provision that could be made to help S "catch up" on the year's schooling that he has missed*

The Council has already done this and in the response to the Ombudsman on 24 January 2008 stated:

*The Council has agreed with staff at the school extra support for S and training for staff. The Council will continue to respond positively to any requests from the school for extra assistance. S is, however, already receiving the maximum amount of additional support in the form of a one to one Teaching Assistant.*

- 3.2.3 *Reserve a sum of money equivalent to the cost of educating S at the school for a year in a fund until he has completed year 11 and then deploy the fund on any additional educational provision that the school and an educational psychologist recommend as being beneficial*

The Council's response to this recommendation in the Ombudsman's draft report was as follows:

*The Council does not see the rationale for this recommendation. S is entitled to have his educational needs met in accordance with his statement until he reaches the age of 19 years. It would be an irrational and inappropriate use of resources to tie up a sum of money for a number of years which may or may not be needed in the future.*

My view on this recommendation has not changed. However, whilst setting this money aside as the Ombudsman suggests is clearly an ineffective use of resources and a pointless exercise, the sum involved is relatively small (£3,989).

- 3.2.4 *Pay £1,000 to Mr H in recognition of the anxiety, stress, time and trouble caused to him*

My opinion remains that had Mr H been open and honest in his dealings with the Council then much, if not all, of the stress, anxiety and time and trouble could have been avoided.

- 3.2.5 *Make a payment of £655 to Mr H to reimburse what he paid for private tutoring for S during 2007*

This recommendation was not contained within the draft report. Therefore, the Council did not have an opportunity to comment on this proposal prior to the report being published. The Council has not received any details of the form this training took, who provided it or any evidence of it being incurred.

## **4.0 Options**

- 4.1 The Local Government Act 1974 requires the authority to take certain action following the publication of a report by the Ombudsman. A notice must be published in at least 2 newspapers circulating in the area. The authority must specify in the notice that the report is available for inspection at an office of the authority. In respect of this report notices have been placed in the Wirral Globe and Daily Post and the report has been available on deposit at Wallasey Town Hall.

- 4.2 The Council must advise the Ombudsman's within 3 months of receipt of her report what action it proposes to take in response to it. The Council's Constitution states that this Committee is the relevant body to consider a response to any report of the Ombudsman. The Committee must consider what response the Council makes to the Ombudsman's report.
- 4.3 The options available to the Council are:
- 1) accept the Ombudsman's recommendations;
  - 2) respond to the Ombudsman stating that it will not accept her recommendations;
  - 3) challenge the Ombudsman's report by way of judicial review in the Administrative Court.
- 4.4 As a result of the concerns over the Ombudsman's approach in this case referred to in paragraphs 2 and 3 of this report the Acting Monitoring Officer and Proper Officer has sought counsel's opinion on whether there are grounds for seeking judicial review of the Ombudsman's report in this matter.
- 4.5 Counsel has provided a written opinion. The opinion is subject to legal professional privilege and is exempt from publication under the Access to Information Rules. A copy of the advice will be provided separately to members. Counsel states:
- On the basis of the information presently available to me, most of the factual determinations contained within the Defendant's [Ombudsman's] Report are fundamentally flawed.*
- He concludes:
- Further to the conclusions drawn above, I am firmly of the opinion that the merits of the proposed claim [challenge by judicial review] are good on both a procedural and substantive basis.*
- 4.6 A significant amount of time of officers within my Department and the Legal and Member Services Section has been spent in dealing with this case. A further significant amount of time will be involved in preparing a challenge to the Ombudsman by way of Judicial Review. Whilst Counsel's advice is that the prospects of succeeding are good the outcome of litigation can never be guaranteed. The Council's costs in bringing such action are likely to be in the region of £5-15,000. If the Council is successful then it may recover its legal costs from the Ombudsman. If the Council were unsuccessful then it could be ordered to pay the costs of the Ombudsman in defending the claim and possibly Mr H's costs as well, if he chose to be involved in the proceedings. Therefore, there is a potential risk in taking the action that the Council could be exposed to a financial obligation of up to approximately £40-50,000.
- 4.7 I believe that, whilst the Ombudsman's report in this case is flawed for a number of reasons, the resources available to the Council should be deployed to improve educational provision for S and other children in the Borough rather than on legal action. If action were successful then the likely outcome would be that the Ombudsman's Report would be quashed and a different Ombudsman invited to investigate. That would involve further officer time being spent on this process, diverting officers away from other tasks. My main concern in this case is that S is now being educated at the school specified in his statement.

4.8 It would be open to the Council to respond to the Ombudsman stating that it is not going to implement her recommendations. This would be an unusual but not unique approach, for example recently Sefton Council resolved not to implement the Ombudsman's recommendations in a report she issued concerning it. If the Ombudsman is not satisfied with the authority's response then she can issue a further report within 3 months and there is a requirement to publish a further notice. This would simply prolong the situation and require further officer time to be spent on preparing reports. There is also some case law which suggests that Councils should either accept the recommendations of an Ombudsman or challenge them by way of judicial review.

#### 4.9 Conclusions

It is ultimately a decision for the committee which of these options is taken. I am concerned at the approach adopted by the Ombudsman in this case and believe that her conclusions are flawed. I am advised that the prospects of succeeding on a challenge by way of Judicial Review are good. However, my concern is that the resources available to the Council are utilised to improve the education of children and not on legal proceedings. S is now being educated in accordance with his statement. The costs of implementing the Ombudsman's recommendations are relatively small, £1,655 in compensation and the setting aside of £3,989 which may or not be used in the future. When this is set against the risk and cost involved in legal action my recommendation is that the Council accepts the Ombudsman's recommendations. It can be seen from the comments in paragraph 3.2 that accepting the Ombudsman's recommendations would not significantly prejudice the Council's position.

4.10 The Ombudsman has asked to meet with me. That meeting has not yet taken place but is in the process of being arranged. I will be raising with her my concerns over this case when I meet with her.

### **5.0 Financial and Staffing Implications**

These are set in paragraphs 4.6 and 4.9 of this report.

### **6.0 Equal Opportunities Implications**

S has special education needs. The Council has a statutory responsibility to assess the needs of children that reside within its area to assess any special education needs and arrange provision to meet those needs.

### **7.0 Human Rights Implications**

The names of the complainant, the children and other adults mentioned in the report are pseudonyms as under the Local Government Act 1974, the Ombudsman shall not use the real names of people in the report nor publish information likely to identify them and the family's right to privacy is respected. There has been widespread media reporting of the Ombudsman's findings but the family have not been identified.

### **8.0 Local Agenda 21 Implications**

None



## **9.0 Community Safety Implications**

None

## **10.0 Planning Implications**

None

## **11.0 Local Member Support Implications**

None

## **12.0 Background Papers**

12.1 The Ombudsman's report was used in preparing this report as were documents on the Education, Legal and Council Tax files.

## **13.0 RECOMMENDATIONS**

It is recommended that the committee:

- 12.1 Note the findings from the Ombudsman's report and the concerns expressed in this report about the Ombudsman's approach in this case; and
- 12.2 Authorise the Acting Monitoring Officer and Proper Officer to respond to the Ombudsman stating that the Council will implement the recommendations contained in her report.

**Howard Cooper**  
**Director of Children's Services**