

**Case 200802628: Midlothian Council**

**Summary of Investigation**

***Category***

Local government: Planning/Rights of way and public footpaths

***Overview***

The complaint centres on a property and campsite (the Property) situated in a country park (the Park) which is leased from Midlothian Council (the Council) by a young people's organisation (the Organisation). The Property, which lies approximately 800 metres from the Park main entrance, is accessed by a driveway through the Park. The Property is used mostly at weekends and has a small car park adjacent to it. Following a risk assessment conducted on 22 July 2008, the Council informed the Organisation that, due to complaints having been received, they would be enforcing an earlier amendment to the lease. This meant the Organisation would no longer be allowed vehicular use of the driveway. The Organisation's lease was amended again at a later date to allow them vehicular access on Friday evenings when children were being dropped off by parents/carers, but not on Sunday afternoons when they were being collected. The complaint was brought by a spokesperson for the Organisation, referred to as Mrs C. She complained about the Council's handling of the Organisation's complaints, representations and proposed solutions following the restrictions to their vehicular access.

***Specific complaint and conclusion***

The complaint which has been investigated is that following an amendment to the Organisation's lease in November 2007, the Council's administrative handling of their proposed solutions, representations and subsequent complaints was poor (*not upheld*).

**Redress and recommendations**

The Ombudsman recommends that the Council:

*Completion date*

- |  |                   |
|--|-------------------|
| (i) give the Organisation appropriate consideration in any future decisions concerning the Park and balance their particular needs with the needs of other park users; and | 30 September 2010 |
| (ii) record complaints received about any incidents in the Park involving vehicles and pedestrians; and  | 30 September 2010 |
| (iii) provide guidance to the Organisation on how they can improve their control of the use of the driveway.   | 30 September 2010 |

The Council have accepted the recommendations and will act on them accordingly.

## **Main Investigation Report**

### **Introduction**

1. The complaint centres on a property and campsite (the Property) situated in a country park (the Park) which is leased from Midlothian Council (the Council) by a young people's organisation (the Organisation). The Property, which lies approximately 800 metres from the Park main entrance, is accessed by a driveway through the Park. The Property is used mostly at weekends and has a small car park adjacent to it. Following a risk assessment conducted on 22 July 2008, the Council informed the Organisation that, due to complaints having been received, they would be enforcing an earlier amendment to the lease. This meant the Organisation would no longer be allowed vehicular use of the driveway. The Organisation's lease was amended again at a later date to allow them vehicular access on Friday evenings when children were being dropped off by parents/carers, but not on Sunday afternoons when they were being collected.

2. The complaint from Mrs C which I have investigated is that following an amendment to the Organisation's lease in November 2007, the Council's administrative handling of their proposed solutions, representations and subsequent complaints was poor.

3. The Organisation's complaint stemmed from, and was very closely intertwined with, the actions taken by the Council in enforcing a new clause in their lease. Schedule 4 7(1) of the Scottish Public Service Ombudsman Act 2002 (SPSO Act) prohibits me from investigating action taken in 'matters relating to contractual transactions'. Although Schedule 4 7(1) of the SPSO Act prohibits the Ombudsman from investigating action taken in 'matters relating to contractual transactions', Section (3) of the SPSO Act says that 'nothing in Schedule 4 prevents the Ombudsman from investigating action taken by a body in operating their complaints procedure'. Therefore, while the substance of the Organisation's complaint was about a contractual matter, the focus of this investigation has been firmly on whether there had been maladministration on the part of the Council in administering the lease and in communicating and interacting with the Organisation about the amendment to the lease. I did not consider the Council's decision to include, change or enforce any part of the lease signed by the Organisation.

### *Background*

4. Following the introduction of a payment parking scheme by way of a barrier (Barrier 1) at the entrance to the Park in June or July 2007 the Council found that individuals attempted to avoid paying for parking by driving down to the former stately home (the House) in the Park. The Council believed these individuals were causing problems and a council officer (Officer 1) reviewed car parking in the Park in a report dated 14 May 2008.

5. Prior to May 2008, the Organisation's vehicular access to the Property had been the subject of discussion and correspondence. It had been regularised by the introduction of a new clause in the Organisation's lease, Clause 26, which was signed in November 2007; the Organisation have told me they did not have the addition of Clause 26 to the lease checked by a lawyer prior to signing. Clause 26 said:

'Dropping off and collecting children will be permitted only at the Parking area located within the campsite designated area on the attached plan [the Organisation's car park next to the Property] and is subject to satisfactory vehicular use of the driveway. Control of the use of the driveway and parking by parents and guardians is the responsibility of the Organisation and this right will be withdrawn if found to be unsatisfactory,'

Separate arrangements were made for disabled users to be able to park at the House if there were no spaces available at the Property.

6. Following a risk assessment conducted on 22 July 2008, the Council informed the Organisation in a meeting that, due to complaints having been received, they would no longer be allowed vehicular use of the driveway. They were told that a new barrier (Barrier 2) would be installed at the top of the driveway later that month; this was installed in July or August 2008.

7. Negotiations with the Council ceased in October 2008 when the Council put up a hut in the staff car park for short-term storage purposes and supplied wheelbarrows for the children to use to barrow their belongings up and down the driveway, a distance of approximately 630 metres from the car park to the Property. The Organisation refused this on health and safety grounds. The Council later made some concessions on vehicular access, but parents and carers were still not permitted to drive down the driveway on Sundays to collect children from the Property. Mrs C believed that the Council failed to consider

the impact of restricted vehicular access on users with special needs or mobility issues.

8. Mrs C said that arrangements for access to the Property when Barrier 2 was first installed were dogged by problems which all had to be sorted out by the Organisation's leaders and communicated to parents and this proved to be very time-consuming and costly. Mrs C told me that the Organisation relied heavily on the income visiting groups generated and, should such groups decide not to visit because of access problems, this would have a serious effect on their ability to pay the lease. She also said that large events, some held in the evenings, might have to be curtailed as the Council now insisted that they be alerted in advance that there may be more than the normal number of visitors to the Park. Mrs C said the Organisation had been wrongly accused of not notifying the Council of these events, and of not paying for parking.

9. Clause 26 of the lease was later amended, on 9 April 2009, to read:  
'Dropping off by parents at the parking area located within the designated area beside the entrance to [the Property] is permitted only after 6 pm on Friday evenings, or on Monday before 12 noon or after 6 pm on condition that reasonable care is taken when using the driveway. At other times, parents/guardians may use the staff car park beside the wall [sic] garden for dropping off and collecting children if they intend to stay for a period of less than 1 hour. The Council reserves the right to review the foregoing arrangements if they become unsatisfactory.'

Mrs C complained that this amendment was made without discussion with the Organisation.

10. The current access arrangements (in place since July 2008) include 12 passes which are available at the golf starter's hut (located next to Barrier 2) which is used to service the golf course located in the Park. There is also a list of approximately 40 names of essential users who only need to give their name to the golf starter to gain access to the driveway; they do not need to have passes. Leaders arriving by minibus have vehicular access, as does the supermarket delivery van. Due to concerns about emergency access and egress, and earlier teething problems with Barrier 2, the Organisation have now been given a note of the code to open the barrier.

11. To help put things right, Mrs C told my complaints reviewer that she would like the Organisation to be able to use the former golfers' car park between 15:00 and 16:00 on Sundays to allow parents and carers to collect children at the end of their holiday.

### **Investigation**

12. As part of the investigation, my complaints reviewer made a visit to the Park in the company of Mrs C who pointed out the various areas of the Park mentioned in her complaint, the car park where the Council wanted parents to park and the hut and wheelbarrows. My complaints reviewer also met with Officer 1 and another Council Officer (Officer 2), who had been most closely involved in Mrs C's complaint.

13. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and the Council were given an opportunity to comment on a draft of this report.

### **Complaint: Following an amendment to the Organisation's lease in November 2007, the Council's administrative handling of their proposed solutions, representations and subsequent complaints was poor**

14. Mrs C complained about the Council's poor communication with the Organisation and I looked at whether the Council's decisions, explanations and justifications were communicated accurately, fairly and openly to them. I identified several specific areas of the Organisation's complaint where poor communication had been alleged. These were:

- the car parking review;
- the Council's risk assessment.
- complaints received by the Council about traffic using the driveway;
- revenue and/or safety implications;
- the Organisation's risk assessment;
- the hut and wheelbarrow solution;
- problems with Barrier 2; and
- correspondence and dealings with the Council.

#### *The car parking review*

15. In his car parking review, dated 14 May 2008, Officer 1 detailed what he saw as the increasing and uncontrollable car parking problems which were excessive traffic near the children's play area increasing the risk of a serious

accident occurring, complaints about cars going down the driveway, and the loss of revenue. Also mentioned was that people who were paying to park were being treated unfairly and the visual amenity of the House was being ruined by the parking alongside it. The report noted that a new barrier (Barrier 2) would be installed at the top of the driveway. Disabled users of the Park and golfers received a specific mention in the report but the Organisation was not mentioned. The only risk identified was possible resentment from disabled users who would have to pay for parking in future. Officer 1 said that it was essential that traffic on the driveway was reduced because there was a serious risk of an accident occurring and he considered a reduction would minimise the risk to children and families around the main play area. At the meeting with the Council officers, my complaints reviewer asked whether the Organisation should have been advised that the review was to take place and whether the officers considered it appropriate that the Organisation was not featured in it. In response, they said they saw no reason why the Organisation should have been specifically mentioned but that the circumstances of their parking would have been considered as part of the review.

#### *The Council's risk assessment*

16. At a meeting with the Council on 29 July 2008 the Organisation were told that, following a risk assessment, they would no longer be allowed to have vehicular access down the driveway to the Property. The Council had conducted a risk assessment earlier and concluded that there was 'a significant risk' of a collision between a pedestrian and a vehicle, resulting in a fatality. The main reasons for the decision to restrict vehicular access were:

- the risks identified in the assessment;
- three complaints had been received about traffic not adhering to the speed limit of 5 miles per hour;
- too many cars parking and using the café and playground in the Park;
- non-disabled drivers using the disabled car park.

17. Officer 1 told my complaints reviewer that when he conducted the risk assessment, he took three specific scenarios and risks into consideration. These were:

- both drivers and pedestrians used the 3.5 metre wide driveway to the house;
- pedestrians crossing the road at the busiest area of the Park between the House and the play area; and

- the exit and entry to the top car park.

18. Parents of the Organisation were considered to present the most uncontrolled risk, particularly as they drove past the busiest area of the Park and often at the busiest time of day on a Sunday. The hazard identified in all the scenarios was the possibility of a collision between a pedestrian and a vehicle. On the first two scenarios, Officer 1 determined the likelihood of a collision as being 'possible, could occur sometimes' and the severity as 'fatality'. He determined that the exit and entry to the main car park was controlled adequately but that the other two scenarios posed significant risks, which were not adequately controlled and required further action.

19. The Council did not provide the Organisation with a copy of the risk assessment at the meeting on 29 July 2008 and Mrs C said they had to obtain it using the Freedom of Information (Scotland) Act 2002 (FOI). My complaints reviewer asked Officer 1 and Officer 2 why the Organisation had had to resort to the FOI to obtain a copy of the risk assessment. Whilst acknowledging that they had not provided a copy of the risk assessment to the Organisation at the meeting, they said that, as far as they were aware, the Organisation had not actually asked for a copy afterwards and that they would have been quite happy to provide one; they said there had been no need for the Organisation to resort to using FOI to obtain it. Although I have seen no evidence in the case papers of a written request from the Organisation for a copy of the risk assessment (other than the FOI request), the Organisation's minutes of the meeting reflect that they had asked for a copy as they were not provided with one at the meeting; the Council do not have minutes of the meeting.

20. The Council revisited their risk assessment on 6 February 2009, following a meeting held with the Organisation on 3 February 2009, and considered how the risk would be affected by suggestions put forward by the Organisation for vehicular access down the driveway to drop off and pick up children at the former golfers' car park, mainly on Friday evenings and Sunday afternoons.

21. The Council concluded that, although the risk score reduced slightly, the overall risks remained 'significant', not adequately controlled and required further action. Officer 2 then wrote to the Organisation on 12 February 2009 to say that, after discussion, and taking account of the risk assessment, children could be dropped off on Friday nights after 18:00 and on condition that parents take all reasonable care when using the driveway. He said that access by



parents and carers would not be permitted at any other times and access on Sunday afternoons would not be permitted because the risk to all users of the Park, especially children, was too high and the Council had a duty to minimise any hazard that had been assessed, where it was possible to do so. He agreed to issue eight passes for the Organisation's leaders, who were required to be present at weekends, with the proviso that he would be provided with a list of who held the passes. Additional passes would be held by the golf starter to be issued to the Organisation's members and approved contractors, and these were to be returned to him on exit.

22. During my complaints reviewer's meeting with Officer 1 and Officer 2, they said that the driveway was not a public highway or adopted road, which restricted the level of control they had over it. They said that, having received complaints from the public that their children were at risk, they had a duty to act. They said the Council could be accused of negligence and, consequently, liable to court action.

23. As the Council had already acknowledged that the busiest area of the Park was around the play park, my complaints reviewer asked Officer 1 and Officer 2 if they would reconsider allowing access to the former golfers' car park on Sunday afternoons between 15:00 and 16:00. They both said there were still risks involved and they could not be sure that the Organisation's parents would in fact turn in at the former golfers' car park and not carry on down the driveway to the Property. Officer 2 said he was personally responsible for the safety of all users of the Park but he offered to have the Council's risk assessment findings looked at by the Health and Safety Executive (the Executive) and agreed to be bound by their findings. I was pleased to note that the Council had approached the Executive, however, in commenting on the proposed report they have advised that the Executive had decided not to comment on the risk assessment.

*Complaints received by the Council about traffic using the driveway*

24. Mrs C complained that the Council failed to give the Organisation the opportunity to investigate the claim that speeding vehicles reported to the Council belonged to parents of the Organisation. The Organisation asked for information about the complaints which had been received and were given very brief information about one alleged incident on 17 August 2008, reported by an Elected Member to Officer 2, about a speeding car which dropped off two young boys at the play park and then headed off in the direction of the Property. This

information was passed to the Organisation, but without the registration number of the car, they were unable to establish if it had in fact been travelling to the Property. At other times, Mrs C said they were not given any information and simply told they were in contravention of Clause 26 of the lease.

25. Mrs C said how frustrated the Organisation felt that the Council could not, or would not, provide specific examples of speeding traffic (other than the one incident described above). She said that it was even more difficult for them to control use of the driveway where groups from outwith the Organisation used the Property.

26. The Council said on 2 November 2009 that 'verbal complaints were considered by [Officer 2] in the report on the risks'. The Council have been unable to provide me with specific details about these alleged speeding incidents, ie when they occurred, who reported them and what action, if any, was taken by the Council to deal with the incidents.

27. I asked the Council what procedures they had in place for making a record of complaints and why these incidents were not recorded. In response, the Council said 'they saw no need to investigate the veracity of the initial verbal complaints'. When this was raised at my complaints reviewer's meeting with Officer 1 and Officer 2, they acknowledged that they did have a corporate complaints procedure and, with hindsight, it would have been better to have made a record of the complaints received. Officer 2 said that he had personally taken all three calls and had not recorded them because he received countless complaints calls during the day and dealt with them as and when they were received. This appears to contradict the information in the letter of 29 October 2008 from another Council Officer (Officer 3) that the incident which occurred on 17 August 2008 had been reported to the golf starter. Officer 3 also said in a letter dated 12 June 2009 to an MSP 'my staff were very clear in what they evidenced and I do not intend carrying out a police type investigation into every incident. If I am informed of incidents which compromise safety I require to take appropriate steps to ensure that the health and safety of all park users is not compromised'.

#### *The Organisation's risk assessment*

28. Mrs C complained that the Council failed to consider the risk assessment the Organisation themselves had carried out. The Council initially said the Organisation's risk assessment had been discussed with them at the meeting

on 29 July 2008 and had been fully considered, however, there is no record of that. In response to questions from this office, the Council said that the Organisation's risk assessment had been discussed with them at the meeting held on 3 February 2009, however, the minutes of that meeting simply say that the Council 'would carry out another risk assessment this week considering the impact on 7-10 year olds having to carry equipment and luggage down the drive'. Although the Council have said they considered and evaluated the Organisation's risk assessment, and I have no reason to believe that they did not do so, I have seen no evidence of that. The Council later said the Organisation's risk assessment was 'without foundation' and 'seriously flawed'. During my complaints reviewer's meeting with the Officer 1 and Officer 2 they said they were surprised that the Organisation would wish to compound the risk to pedestrians they themselves had identified by having uncontrolled vehicular access to the driveway for up to 40 cars.

29. This figure of up to 40 cars was also quoted in an internal Council report to Officer 3 dated 21 May 2009 which addressed the complaints received about access to the Property. The number of cars using the driveway was discussed at my complaints reviewer's meeting with Officer 1 and Officer 2 who believed that the Organisation themselves had quoted that figure to them as being an estimate of the number of cars using the driveway on a regular basis. It appears that the Organisation said during a discussion about the number of passes to be made available for drivers to go down the driveway that they had 40 essential users and this may have been where the misleading figure of 40 cars regularly using the driveway on a Sunday afternoon came from.

30. The Council have said the Organisation's suggestion of a path along the driveway was rejected on cost grounds and also because it would not have satisfied their requirement for vehicular access to the Property due to perceived risks within the Park.

*The Organisation's belief that the reason for restricting the use of the driveway was on the grounds of loss of revenue rather than safety*

31. Mrs C complained that if parents had to stay longer than one hour in the car park they had to pay for parking and she questioned whether the changes to the access arrangements were more to do with revenue for the Council rather than safety considerations. The issue of non-payment of parking by the Organisation's parents and carers who were dropping off and collecting their children was first mentioned in an internal Council email dated 27 June 2007.

In the email, Officer 1 said 'if parents are collecting children and staying for a period they must use the main car park and pay the parking'. Loss of revenue also featured in the car parking review report. Non-payment of parking fees was mentioned thereafter in many of the Council's letters to the Organisation during the period 22 May 2008 to 6 March 2009 and to the MSPs who had written to the Council on their behalf and at meetings with the Organisation.

32. In their initial response to my office's enquiries, the Council said parents should not be using the collection of their children as a means of visiting the café, using the play area or any other activity without paying to park. They felt it should only take a short period of time to collect a child from the Property and an hour provided sufficient flexibility if there was a delay. The Council said the limit was in response to the Organisation saying they were requesting access for one hour on Sunday afternoons. My complaints reviewer discussed this with Officer 1 and Officer 2, who said that the revenue gained from charging for parking was negligible and was not a consideration when introducing vehicle restrictions for the Organisation. The Council have stressed that while vehicle restrictions were not introduced to derive revenue, nevertheless, they believed it reasonable to expect the parents of the Organisation to pay for parking if they planned to spend time in the Park before or after picking up, or dropping off, their children.

#### *The hut and wheelbarrow solution*

33. At the meeting held on 29 July 2008 with the Organisation, where they were told they would no longer be allowed vehicular use of the driveway, the Council proposed a solution to the problem. The Council suggested that they put up a hut in the staff car park at the top of the driveway for short-term storage purposes and supply wheelbarrows for the children to use to barrow their belongings up and down the driveway. The Organisation refused this offer on the grounds of health and safety both at the meeting and again, in writing, on 31 July and 18 August 2008. Mrs C complained that the Council failed to discuss other possible options before imposing the hut and wheelbarrow solution and said that following the alleged incident on 17 August 2008, the Council wrote to her to say that this solution would be implemented as soon as possible.

34. When my complaints reviewer visited the Park with Mrs C, she was shown the hut and viewed the wheelbarrows through the window. The wheelbarrows are of fabric construction, collapsible, have wide handles, a very narrow wheel

and no upright supports. Mrs C said that small children would have great difficulty pushing the wheelbarrows.

35. At the meeting with Officer 1 and Officer 2, my complaints reviewer asked about the suitability of the wheelbarrows purchased and why the Council had gone ahead and installed this solution when the Organisation had categorically refused to use the wheelbarrows on the grounds of health and safety. Officer 2 said he was unaware that the Organisation found the wheelbarrows themselves unacceptable and, had he known this, he would have looked at conventional wheelbarrows. As far as he was concerned, it would be the parents pushing the wheelbarrows, and not the children, and he could not see the problem. Officer 2 explained that the Council had initially suggested other options, including the use of a trailer, but the Organisation had insisted the only acceptable solution was vehicular access. The Organisation said they had also offered to have their members direct traffic on the driveway but the Council had rejected that suggestion on health and safety grounds. Following the third complaint about speeding drivers (from the Elected Member), Officer 2 said he had decided to go ahead with the hut and wheelbarrow solution because it was a hazard reduction and also when Barrier 2 became operational the Council were keen to demonstrate that they had offered a solution.

#### *Problems with Barrier 2*

36. Having taken the decision to install Barrier 2 and prevent unrestricted access to the Property and the House Mrs C alleged, among other things, that the Council failed to put in place adequate or proper signage before imposing the restrictions on the Organisation's use of the driveway. The Organisation alleged that the Council had not thought through, or made proper arrangements, in advance of Barrier 2 being installed. As a result, she said this caused problems for the Organisation, and a disabled leader in particular. Mrs C said that arrangements for ensuring that the Organisation's essential users were able to access the Property when Barrier 2 was in operation were dogged by problems which all had to be sorted out by the Organisation's leaders and proved to be very time-consuming. I have seen that a member of the Organisation emailed the Council as early as 13 August 2008 to report a problem with access for a disabled child. It is clear from the Organisation's case papers that they also had to deal with complaints from users of the Property about problems with access (including the disabled leader), difficulties with the gatekeeper 'being less than welcoming' and payment for parking. In addition, the Organisation alleged that the Council failed to consider that groups

outwith the Organisation used the Property and campsite which made it difficult for them to control access to, and the use of, the driveway and parking by these other groups.

37. The Council acknowledged there were initially some teething problems with Barrier 2 but said that these had all been resolved and full information given to the Organisation about how to gain access to, and exit from, the Park in an emergency or when the barrier was down.

*Correspondence and dealings with the Council*

38. Mrs C complained that the Council failed to communicate with the Organisation in a constructive manner, failed to review their decisions properly when the Organisation complained and failed to communicate their decisions appropriately.

39. My complaints reviewer discussed the Council's correspondence with the Organisation with Officer 1 and Officer 2 during the meeting with them and they said they were frustrated by the sheer number of letters received during the period December 2008 and January 2009 in response to the Council's proposed hut and wheelbarrow solution. The officers said the Organisation had mobilised support for their cause by asking parents, MSPs and other interested parties to write to the Council on this matter and I have seen that all the letters were responded to.

40. I found no evidence that the Organisation were told about the Council's formal complaints process, indeed I saw that Mrs C used the Council's feedback form to make a formal complaint to the Chief Executive on 27 April 2009. This was responded to on 26 May 2009 by Officer 3 who failed to advise her of the next step in the Council's complaints process. Mrs C then wrote again on 8 July 2009 to the Chief Executive and this time received a response from the Acting Chief Executive who advised her of her right to bring her complaint to the SPSO. During the meeting with my complaints reviewer, Officer 2 said that it was difficult to tell at what point the Organisation made a formal complaint and he felt it would have been too bureaucratic to have referred the Organisation to the Chief Executive. He said that he was trying to propose solutions to resolve the complaint.

41. Mrs C complained that the Council failed to take minutes of a meeting and, later, relied on the minutes taken by the Organisation and reworded them to

reflect their own position. During the meeting with Officer 1 and Officer 2, they said that the Organisation had in fact volunteered to take the minutes and they had simply amended them to reflect more accurately their position and what had been said. While considering the documentation provided by the Council, I noted that there were very few minutes or notes of meetings in the Council's case papers and on one occasion, only a handwritten note of a meeting held on 5 October 2007; there was also no evidence of decisions having been recorded. Where minutes or notes were taken by both parties, there were sometimes discrepancies.

42. The Organisation were also unhappy that, after the meeting of 9 February 2009, Officer 2 wrote to say that four main issues had been discussed, including the terms of the lease to the Organisation. Mrs C wrote back to say that the terms of the lease had not been discussed at the meeting. In reply, on 6 March 2009, Officer 2 agreed that the lease had not been discussed specifically but that the conditions set out in his letter would have a bearing on the lease. He said that Clause 26 would be enforced should there be any breach of the conditions set out in his letter of 12 February 2009. If the provisions in his letter of 12 February 2009 were not adhered to, he said he would remove all rights of vehicular access with the exception of essential staff. Officer 2 said that, although parents would be permitted to use the staff car park (at the top of the driveway), they were to be made aware that they must not remain for longer than an hour in case the Park got busy in which case they would have no alternative but to pay the £1 fee. He set out details of alternative pick-up times (which were later included in the amendment to the lease on 9 April 2009) and asked for a list of the eight leaders required to be present at the Property at the weekends.

43. Mrs C wrote again, seeking clarification on whether Clause 26 of the lease was to be amended yet again and pointed out that the leaders changed from weekend to weekend as they came from all over the country and the Organisation did not have a team of leaders who attend all weekends. She pointed out that the passes provided were only valid to 1 November 2009 and the Property was open to December 2009. Mrs C also asked the Council to erect signs to remind parents of the speed limit on the driveway and to signpost the staff car park for those unfamiliar with the Park.

44. Clause 26 was amended accordingly and the Organisation notified on 9 April 2009. Prior to that, the Council had written to the Organisation to say

that the staff car park was already signposted and that extra speed restriction signs would be put in place. I note, however, that the Council later admitted on 13 May 2009 that the staff car park was not well signposted and agreed to another sign being put in place. In response to an email request for a trial period where the Organisation's volunteers directed traffic while wearing high visibility jackets, the Council said they could not allow non-Council staff to undertake traffic control.

45. An examination of the documentation provided by both parties showed that the arrangements for vehicular access for the Organisation changed several times. This meant that the Organisation had to notify all users of the Property and campsite of the constantly changing arrangements and ensure that this information was included in the relevant property booklet, leaflets and newsletters. An example was when Barrier 2 became operational in November 2008 but the Organisation were initially given until 1 April 2009 to comply. However, after a further complaint was received, the Organisation were told they had to comply by 31 October 2008, which was then extended to 30 November 2008, when they said they could not do so by that date. All of these changes meant the Organisation's leaders had to notify all users. However, I also note that some changes were as a result of the Council trying to respond to the Organisation's complaints and representations.

46. The Organisation told me that the Council had clouded the issue by referring to parking problems at large organised events but believed these had nothing to do with access on a Sunday. The Organisation have said that they are quite happy for parents to pay for parking at these events and for their parents and carers to use the public car parks on these occasions.

#### *Conclusion*

47. There is no evidence that the Organisation, who had used the Property for 40 years, was considered as part of the car parking review. Nor was there any evidence that any consideration was given to the impact on the Organisation of installing Barrier 2. The Organisation believed the focus of the review appeared to be on the need to stop people parking without paying.

48. I consider that the decision to restrict the Organisation's use of the driveway was taken after inadequate investigation of the complaints received. The Council's view that parents of the Organisation were considered to present the most uncontrolled risk was, in my view, unreasonable. I do agree, however,



that if the reports of speeding drivers were verified, irrespective of who the drivers were, then there was a risk to park users, including the children of the Organisation.

49. The Council has a corporate complaints process and can offer no explanation why incidents where parents reported 'near-miss' accidents were not dealt with appropriately by recording them or investigating them. As none of the alleged complaints have been recorded or investigated, it is unreasonable, in my view, for the Council to state categorically that the alleged speeding drivers were parents from the Organisation.

50. I acknowledge that there is no parking charge for parents who simply want to drop off and collect their children within the hour. While I have seen that the Council have said that safety, not revenue, was the driving factor on the decision to restrict vehicular access I can see how the constant references in meetings and correspondence to parents not paying would give rise to the Organisation's view that the vehicular restrictions were more to do with revenue than safety.

51. I agree with the Council's view that the Organisation undermined their own argument about the dangers to pedestrians using the driveway in the risk assessment they produced.

52. Despite the Organisation stating categorically that they would not allow the children to use the wheelbarrows, the Council proceeded to install the hut and wheelbarrows which only served to make an already difficult situation worse. The Council's choice of what the Organisation considered to be particularly unwieldy wheelbarrows only exacerbated what had by then become difficult relations with the Organisation.

53. The Council appeared to have unrealistic expectations of how much control the Organisation could have over users of the Property and I have seen little evidence that they gave the Organisation any guidance on what exactly they expected them to do in that regard.

54. I am satisfied that the teething problems with Barrier 2 have now been resolved and that the current arrangements of 12 passes for visiting groups should be adequate for the Organisation's needs.

55. This has been a difficult and complex complaint to consider as there are clearly strong views on both sides of this long running complaint and a difference of opinion as to the extent of the problems. In response to enquiries from this office, the Council said that the restrictions applied to all park users including staff, service vehicles, blue badge holders, contractors, golfers and tenants of the House. They said that the restrictions were a key control measure in their risk assessment along with the vehicle barrier and applied to all park users equitably. In my view, however, they failed to see that their decision had much more of an impact on the Organisation than other users of the Park who were only likely to be carrying a picnic basket, childrens' toys or a light rucksack at most. That said, having made the tough decision to restrict the Organisation's vehicular access with the insertion of Clause 26 in their lease, the Council were within their rights to deal firmly with the Organisation's questions about the arrangements. The Council had the legal authority to act as they did but their attempts to try to ameliorate the situation by amending the restrictions only led to further questions and complaints from the Organisation. In effect, they fell victim to their own attempts to accommodate the Organisation. With hindsight, it would have been in the Council's interests to signpost the Organisation through their complaints process earlier and to focus on the lease which the Organisation had signed and which gave the Council the right to withdraw the Organisation's use of the driveway. By focussing more on the lease, and their right to enforce it, the Council should have been able to avoid the long running correspondence they entered into with the Organisation and brought this complaint to a conclusion earlier.

56. Having signed the amendment to the lease, the Organisation were bound by its terms and any decision to amend the lease was a discretionary decision for the Council and one that they were entitled to take. Although in my view the Council could have handled the Organisation's complaints better, I cannot find evidence of maladministration. Accordingly, I do not uphold this complaint.

#### *Recommendations*

- |  |                        |
|--|------------------------|
| 57. I recommend that the Council;  | <i>Completion date</i> |
| (i) give the Organisation appropriate consideration in any future decisions concerning the Park and balance their particular needs with the needs of other park users; | 30 September 2010      |

- (ii) record complaints received about any incidents in the Park involving vehicles and pedestrians; and 30 September 2010
- (iii) provide guidance to the Organisation on how they can improve their control of the use of the driveway. 30 September 2010

58. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

**Explanation of abbreviations used**

The Property	A property and campsite leased from Midlothian Council by a young people's organisation
The Park	A country park in the Midlothian Council area
The Council	Midlothian Council
The Organisation	A young people's organisation based in the Midlothian Council area
Mrs C	The complainant, a spokesperson for the Organisation
SPSO Act	Scottish Public Services Ombudsman Act 2002
Barrier 1	A barrier located at the entrance to the main car park in the country park
The House	A former stately home located in the country park
Officer 1	A Council Officer in the Commercial Services Department
Barrier 2	A barrier located in the country park at the top of the driveway leading to the property
Officer 2	A Council Officer in the Commercial Services Department
The Executive	The Health and Safety Executive

FOI

Freedom Of Information

Officer 3

A Council Officer in the Commercial Services  
Department