

Case 200905042: East Lothian Council

Summary of Investigation

Category

Local government: Social Work; Complaints Review Committee

Overview

The complainant, a Citizens Advice advocacy worker (Mr C), raised a number of complaints on behalf of his client (Mrs A) about the financial assessment carried out by East Lothian Council (the Council) in respect of her mother (Mrs B) and the way the Council's Complaints Review Committee (CRC) dealt with the complaints.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) there were shortcomings in the information provided to Mrs A by the Council at the time of the initial financial assessment of Mrs B (*upheld*);
- (b) the CRC failed fully to explain the reasoning behind their decision not to uphold the complaint (*upheld*);
- (c) the Council dealt with the matter in terms of a blanket policy and failed to consider the case on its own merits (*not upheld*); and
- (d) the Council acted unreasonably in not agreeing to convene a new CRC hearing to consider a salient piece of information (*not upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

Completion date

- (i) in consultation with the Chair and other members of the CRC, revisit their decision with a view to providing a full and adequate explanation based on the merits of Mr C's case; and 22 March 2011
- (ii) in consultation with the Chair and other members of the CRC, assess the significance of the minute of the agreement to the merits of Mr C's case. 22 March 2011

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

Main Investigation Report

Introduction

1. The complaint was made by an advocacy worker at a Citizens Advice office (Mr C), on behalf of a lady (Mrs A) whose mother (Mrs B) required to go into care in May 2009. Mrs B unfortunately died on 20 May 2010 after the complaint was made to the Scottish Public Services Ombudsman (SPSO). Prior to entering care, Mrs B had resided in an ex-Council house which Mrs A and her brother (Mr D) had purchased some years earlier. As a result of their financial assessment, East Lothian Council (the Council) considered that Mrs B should fund the cost of the care home herself. Mrs A and her brother disputed this. That dispute was dealt with as a complaint which, after response by officers, was considered by the Council's Social Work Complaints Review Committee (the CRC) on 11 December 2009. A detailed submission was prepared by Mr C. The outcome of the CRC was reported to the Council's Appeals Sub-Committee on 4 February 2010.

2. The complaints from Mr C which I have investigated are that:
- (a) there were shortcomings in the information provided to Mrs A by the Council at the time of the initial financial assessment of Mrs B;
 - (b) the CRC failed fully to explain the reasoning behind their decision not to uphold the complaint;
 - (c) the Council dealt with the matter in terms of a blanket policy and failed to consider the case on its own merits; and
 - (d) the Council acted unreasonably in not agreeing to convene a new CRC hearing to consider a salient piece of information.

Investigation

3. Correspondence obtained from Mr C, together with information obtained as a result of enquiry of the Council, was considered. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

4. Mr C made the complaint to the SPSO on behalf of Mrs A. Mrs A is the daughter of the late Mrs B (who died on 20 May 2010 at the age of 92 years). Mrs B formerly lived in a four in a block flat in a block built by a predecessor Council. That property was purchased in December 1994 from the predecessor Council for £9825 with a 60 percent discount. Mrs B entered into a minute of

agreement with Mr D and Mrs A on 23 December 1994 which provided that, on the expiry of a three year period after the sale, the property should pass at no cost to them and that they would pay the mortgage and be responsible for maintenance. Mr D and Mrs A arranged an interest only mortgage with a building society.

5. Mrs B developed osteoporosis and was referred in August and October 1997 to the Council's Social Work Service for assistance with bathing and for limited home help. (According to Mrs A, Mrs B's need for more home help visits only increased in December 2008.)

6. On 22 December 2004, when Mr D's wife received a windfall, Mr D and Mrs A decided to pay off the mortgage and had Mrs B's home legally transferred to their ownership. Mrs B continued to reside at the property with no payment of rent to her children. Mrs A obtained power of attorney for her mother from 27 March 2008.

7. Mrs B was hospitalised in March 2009 and it was decided that she would require to enter a care home. The process of financial assessment by the Council's Community Care Finance Unit (the CCFU) commenced in advance and a form was completed on 30 April 2009. On 14 May 2009, Mrs B was admitted to a nursing home (the Nursing Home).

8. In considering the matter of transfer of ownership in December 2004, the CCFU determined, in respect of their consideration of the Charging for Residential Accommodation Guidelines (CRAG), that that transfer amounted to deprivation of capital. In view of that assessment, the CCFU determined that Mrs B required to contribute the full cost of her placement at the Nursing Home. An administrative assistant in the CCFU (Officer 1) wrote to Mrs A on 22 May 2009 in standard form. She requested that Mrs A provide to the Council all documentation relating to the sale/transfer of the property, in order that the Council could make an informed decision on whether or not deliberate deprivation had occurred. That information was supplied by Mrs A on 28 May 2009. On 1 July 2009, Officer 1 wrote again to Mrs A, stating the Council's view that there had been a deprivation of 60 percent of the value of Mrs B's home at the date the title had transferred to Mr D and Mrs A.

9. In the meantime, the bulk of the £540 per week gross cost of the first 12 weeks of Mrs B's placement from 14 May 2009 at the Nursing Home was

paid for by the Council with Mrs B, through Mrs A, contributing £125.26 weekly. From 6 August 2009, Mrs B's net contribution was set to increase to £318.10. (This was not paid by Mrs A pending the outcome of the CRC but a payment in retrospect of £7,927.92 was paid by Mrs A in January 2010 for the period up to the CRC on 11 December 2009). From 11 December 2009, Mrs A met the self-funding fee for Mrs B's fees at the home less the nursing element - £222 per week to March and £227 after 5 April 2010.)

10. On receiving a letter from the Council dated 3 July 2009 setting out these arrangements, Mrs A sought assistance from Mr C at her local Citizens Advice office. On 14 July 2009, Mr C submitted a letter of appeal to the Chief Executive of the Council, in which he set out Mrs B's assets (an ISA) and income. Mr C stated that neither Mrs A nor Mr D were able or willing to pay for Mrs B's care home fees, nor to release the capital derived from the sale of the house, which was lawfully theirs. They did not accept that Mrs B had deliberately deprived herself of capital. Four and a half years had elapsed since the transfer and the transfer had occurred when Mrs B, then aged 87 years, had been fit and healthy and not thinking of a care home.

11. Mr D and Mrs A sold Mrs B's former home and the sale (for £95,000) was registered in the Registers of Scotland on 13 September 2009.

12. On 23 September 2009, the Council's Finance Support Manager (Officer 2) responded to Mr C. He referred to the CRAG guidelines. He stated that there was a need for the Council to consider the question of deprivation of a capital asset; detailed the then £22,500 threshold; and referred to case law which he claimed supported the Council's position (*Yule v South Lanarkshire Council*). Officer 2 stated that the intent of Mrs B was not a relevant consideration. Officer 2 offered Mr C the opportunity of taking his client's case to a CRC if she was not satisfied.

13. A case was prepared by Mr C on 12 November 2009, for submission to the CRC which convened on 11 December 2009. Mrs B had developed dementia by the time of the CRC on 11 December 2009 and was unable to attend.

14. On 14 December 2009, a senior solicitor who had advised the CRC (Officer 3) wrote directly to Mrs A, in advance of the minute being prepared, conveying the outcome of the meeting not to uphold the complaint.

15. The minute of the CRC was compiled in January 2010 and a copy was sent to Mr C on 15 January 2010. He was informed that the decision was not final but would go forward in the form of a recommendation to the Appeals Sub-Committee on 4 February 2010.

16. On 26 January 2010, after Mrs A discovered a minute of agreement dating from 1994 among her mother's papers (see paragraphs 46 to 59), Mr C emailed a copy to the CRC clerk and also spoke to Officer 3. Mr C anticipated that the evidence would be considered internally in the first instance.

17. The decision of the Appeals Sub-Committee on 4 February 2010 was to accept the recommendation of the CRC. The Council's Head of Law and Licensing (Officer 4) wrote to Mr C on 4 February 2010, stating that the decision of the Council to regard Mrs B as a self funding client with effect from 6 August 2009 had been upheld and the Social Work complaints procedure had been exhausted. Officer 4 made no mention of the new evidence.

18. Mr C then wrote to the Executive Director of Community Services on 9 February 2010, providing her with a copy of a 1994 minute of agreement which, he maintained, provided compelling evidence that Mrs B intended as early as 1994 that her home should pass at no cost to her son and daughter.

19. After consideration internally, Community Service's decision on Mrs B's contribution toward the cost of her residential care remained unchanged and their Complaints Officer (Officer 5) wrote to Mr C on 1 March 2010, informing Mr C of his ability to pursue the matter further with the SPSO.

20. Mr C submitted a complaint to the SPSO on Mrs B's behalf on 23 March 2010.

(a) There were shortcomings in the information provided to Mrs A by the Council at the time of the initial financial assessment of Mrs B

21. Prior to Mrs B entering hospital in April 2009, she had had a care package totalling 14.5 hours. Social workers identified on 16 April 2009 that Mrs B was unable to cope at home and that a nursing home place was required. A home visit was paid to Mrs A and Mr D on 27 April 2009 by a social worker (Officer 6) to discuss Mrs A's care options. Officer 6 left Mrs A and Mr D with a Financial Circumstances Form. The form requested answers to various questions,

including disposals of property in the prior six month period. It did not refer to the Council's recently adopted policy of treating clients as self-funding when a property transfer had taken place within the previous seven years. Mrs A and Mr D completed and returned this form to the Council on 30 April 2009.

22. Mrs A recalled that, at the meeting on 27 April 2009, Officer 6 had asked her if Mrs B owned any property. Mrs A had stated that her mother originally bought the house and that it had been transferred to Mr D and herself in 2004. Officer 6 had not informed her that the Council had a policy of treating clients as being self-funding when a property transfer had occurred within a period of the previous seven years. Mrs A stated that, had he done so, she would have selected a less expensive and more conveniently located care home for her mother.

23. The Council informed me that their file contained no detailed record of what was discussed at the home visit on 27 April 2009, but that it was usual practice for some discussion to take place about the charges for residential care, as well as an opportunity to ask questions. The Council said that the form had been returned quickly, suggesting that there were no difficulties on Mrs A and Mr D's part in their understanding of what information was required.

24. The form, completed and signed by Mrs A and Mr D on 30 April 2009, stated that Mrs B was not an owner of her house and had never owned other property. The Council said that, where a client has stated that there are no property issues within the financial assessment, understandably issues relating to capital and possible deprivation of capital are not discussed. It was only later, after Mrs B had entered the care home, that enquiries by the Council uncovered that Mrs B had owned the house but had transferred ownership less than seven years before being admitted.

25. The Council informed me that while questions on the financial assessment form relate to a six month period regarding disposal of assets, this was because the Council could recover the costs of the accommodation from a person who benefited from the transfer (rather than the client) and did not mean that assets being transferred more than six months previously would be disregarded. The Council stated that they were in the process of reviewing and updating the financial assessment form and associated notes to ensure that these issues were more clearly explained.

26. The Council accepted that improvements could be made to the information they provided as well as to their internal processes, in order that the Council could demonstrate that it was providing clear and consistent information to clients and their families on the potential financial implications of requiring residential or non-residential care. The active steps they were taking included the production of new information leaflets; revising their financial assessment form and updating the accompanying guidance notes; restructuring their Community Care Finance Unit; implementing a new social work information system (which would allow systematic recording of discussion on finance matters); and conducting briefing sessions with social workers to update them on policies and procedures, including the Council's seven year policy regarding the disposal of assets.

(a) Conclusion

27. This particular complaint was not one that was considered by the CRC but, for the sake of completeness, it has been included in this investigation report. I do not consider that there is sufficient evidence to suggest that Officer 1 deliberately failed to disclose the Council's policy at his meeting with Mrs A and Mr D on 27 April 2009. However, it does not appear that Mrs A and Mr D were provided with information on the Council's policy, introduced eight months earlier, and how the Council, in implementing the CRAG guidelines, might treat a disposal of property. Mrs A and Mr D consider that they took a course of action in agreeing to Mrs B's entry to the Nursing Home when, if they knew that she was to be considered to be self-funding, they would have opted for a cheaper care home, more conveniently situated. I do not consider Mrs A's desire to have been provided with clear and detailed information in writing at the outset of the assessment to be unreasonable. I view the absence of that information to have been a failing and I uphold the complaint. I note that the Council have effected, and are in process of effecting, improvements which will hopefully increase the amount and quality of information available to clients and their families at what is understandably a difficult period when care options require to be discussed. In light of the fact that the Council have the matter in hand, I have no specific recommendation to make.

(b) The CRC failed fully to explain the reasoning behind their decision not to uphold the complaint

28. In his reply of 23 September 2009 to the complaint of 14 July 2009, Officer 2 offered the opportunity for the complaint to be progressed to a CRC (see paragraph 12).

29. On 12 November 2009, Mr C prepared a detailed statement for the CRC on 11 December 2009. He relied on an English case (*Beeson v Dorset County Council*). He maintained that there had been no deliberate deprivation of capital by Mrs B four and a half years earlier, when her health had been good and she had not foreseen the need for moving to a care home. The transfer in December 2004 had come at a natural time, when Mr D and Mrs A had been able to pay off the mortgage they had obtained ten years earlier. Mr D and Mrs A did not accept the Council's view of the 60:40 split in equity. Mr C stated that Mrs B was currently unable to fund her care. Mr C also maintained that the Council were not in a position to recoup the capital value of Mrs B's former home under section 21 of the Health and Social Services and Social Security Adjudications Act 1983 (as amended by the National Health Service and Community Care Act 1990), since more than six months had elapsed since the transfer. Mr C, additionally, provided statements to the CRC from acquaintances and neighbours of Mrs B as to her state of health at the time of transfer of title in 2004.

30. The Council's submission to the CRC was compiled by Officer 2, who also provided evidence of Mrs B's contact with Community Services.

31. The CRC on 11 December 2009 was attended by an independent social work advisor in the person of a service manager from a neighbouring authority and the Council's Legal Advisor, a senior solicitor (Officer 3). In summing up, Officer 3 stated that the Council required to satisfy the test of it being reasonable for them to make the adverse inference of reasons for the transfer having taken place. The minute extended to eight pages. It detailed those participating, set out the Chair's introductory remarks, Mr C's submission on behalf of Mrs A, the submission on the part of the Council by Officer 2, the summing up for the complainant, the summing up for the Council, the consideration given by the CRC in closed session with their legal advisor and the independent social work advisor, and culminated with the CRC's decision.

32. In that regard, the minute recorded that the CRC found their decision difficult, and that they had reached a majority decision. The CRC:

'... came to the view that, having regard to the evidence put forward by both parties, and the fact that the [property] was in the ownership of [Mrs B] in 2004 and was then transferred by her to her children, then, notwithstanding any motive or intention which may have been put forward

as the main reason for the said transfer, it was still reasonable for the Council to make the assumption that the question of future care home fees would have been a significant factor in the mind of the transferor at the time of transfer and the transferor would still be deemed to be beneficially entitled to the 60% of the value of the property representing the discount on the purchase price from which she benefited when the property was originally purchased from the local authority.'

33. After complaining to the SPSO, Mr C expanded in an email of 13 April 2010 as to what he considered was remiss in the Council's failure to give reasons for regarding the evidence in his submission defective. In summary, the Council had not explained: a) why they had rejected the argument in the submission to the CRC that Mrs B had disposed the property to Mrs A and Mr D in 2004 because the purchase was fully funded by them and Mrs B considered that it was 'theirs'; b) the reinforcement of the evidence by witnesses that Mrs B was in comparatively good health at the time of the disposal, was only in receipt of limited home help and was positively hostile to the idea of living in a care home; and had failed to demonstrate, or provide evidence that in terms of CRAG guidance, the avoidance of care home fees had been a significant motive in the disposing of Mrs B's assets. They had not explained why they preferred the Council's evidence to his.

34. The Council informed me that the membership of that particular CRC met the requirements of the Social Work (Representations Procedure) (Scotland) Directions 1996, in being made up of three independent external persons drawn from a panel of persons appointed by the local authority. The CRC members had appropriate knowledge of social work matters and the conduct of proceedings before a review body or tribunal. A solicitor from the Council's legal section was present to give legal advice to the CRC. An independent social work advisor from another local authority was present in case the members of the CRC had any questions or wished to compare practice in another local authority area.

35. The Council stated that it was the usual practice for the Chair of the CRC to give reasons orally for their findings at the end of the hearing. It was then given in a letter issued by the Council's legal section following the hearing. The CRC's findings appeared in the relevant section of the report which is put to the Social Work Appeals Sub-Committee.

36. The Council, while appreciating that Mr C would have liked a detailed response to each point raised on appeal, informed me that they are only required to provide written notification of the decision reached. The decision did not go individually through each ground of appeal raised and provide reasons for rejecting it. The Council maintained that a CRC hearing is a quasi-judicial process and the decision is drawn up in a style similar to that adopted for a court hearing. The CRC is, in effect preferring the evidence of one side to the other and giving a decision accordingly. In this particular case, having considered carefully the arguments from both sides, the CRC was of the view that it was reasonable for Council officers to have made the assessment they did.

(b) Conclusion

37. In terms of subsection 7 (1) of the Scottish Public Services Ombudsman Act 2002, the Ombudsman is not entitled to question the merits of a decision taken without maladministration by, or on behalf of, a listed authority in the exercise of a discretion vested in that authority. Section 7(8) (c) of the 2002 Act states that the Ombudsman must not investigate any matter in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law, unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the remedy.

38. Mr C, in his submission to the CRC, certainly questioned the merits of the decision by Community Services to take into account the value of Mrs B's house, the ownership of which she transferred in December 2004, in the assessment of her financial circumstances. This particular complaint, however, centres on the alleged shortcomings in the explanation for the CRC's decision and how the CRC dealt in their decision with the evidence that had been presented to them.

39. The current advice to councils regarding CRCs dates from March 1996 and was augmented by a letter of 15 April 2007 from the then Scottish Office, which was itself informed by a publication of an advice note issued by a predecessor Ombudsman to the SPSO in conjunction with the Convention of Scottish Local Authorities. Despite the years that have passed, the message of providing an adequate explanation to complainants, when their complaints are not considered justified, remains no less cogent today (see Annex 2).

40. I am satisfied that the procedure of the hearing appears to have been fair and to have been conducted in accordance with natural justice save in one respect. What has been challenged is the paucity of explanation as to how the CRC founded their conclusion that it was reasonable for the Council to make the assumption that the question of future care home fees would have been a significant factor in the mind of Mrs B at the time of transfer in December 2004. I share Mr C's view that it was remiss for the CRC not to have provided a fuller explanation of why the CRC were not able to accept the argument presented by him. I take the view that, notwithstanding the detailed minute of the meeting which summarises the arguments and explanations put forward by both sides, the explanation provided in not upholding the complaint was not sufficient. On balance, I uphold the complaint and make the following recommendation.

(b) Recommendation

41. I recommend that the Council:	<i>Completion date</i>
(i) in consultation with the Chair and other members of the CRC, revisit their decision with a view to providing a full and adequate explanation based on the merits of Mr C's case.	22 March 2011

(c) The Council dealt with the matter in terms of a blanket policy and failed to consider the case on its own merits

42. Mr C stated that, while he was unable to provide direct evidence that the Council were applying a blanket seven year rule policy because he was only aware of the case of Mrs B and the transfer to Mrs A and Mr D, he considered it a reasonable inference to make, that the approach of the CRC, in failing to give proper consideration to the specific evidence presented may be indicative that it was adopting a blanket approach rather than considering each case on its individual merits.

43. The Council provided me with a copy of the report presented to their Cabinet on 9 September 2008 (see Annex 3), when their present policy decision was adopted. (That followed criticism of the Council by my predecessor in upholding a previous complaint (200603087) in November 2007.) The Council informed me that the seven year rule was introduced to provide greater clarity and consistency of approach. They maintained that, in making decisions about contributions towards the cost of residential care, a local authority was required to take account of the CRAG guidelines. Under these regulations, a local authority was duty bound to take into consideration all of the material facts and

circumstances available in each individual case for the purposes of determining whether a resident has deprived him or herself of a capital asset in order to reduce his or her accommodation charge in terms of the CRAG guidelines. They drew my attention to paragraph 7 of the report reproduced in Annex 3.

(c) Conclusion

44. I am satisfied that Council officers, in considering the circumstances, and the CRC, in considering the appeal against their decision, took account of more than just the date of transfer, they also considered motive (see paragraph 32). Moreover, for me to find that the Council were adopting a blanket policy would require examination of all cases determined by the Council since the adoption of the new policy in September 2008 where the date of transfer was an issue. For a blanket policy to apply, then all cases where the transfer took place more than seven years earlier (even those where the transfer may have been made with avoiding future care home costs in mind) would be exempt, and any transfer occurring within the seven year period prior to the assessment would invariably be regarded as having been executed to avoid care home fees. That is a task which is, I believe, outside the scope of the present investigation and, as stated above, I am satisfied that the CRC took into account more than just the date of transfer in this case.

45. In the circumstances, I have not seen evidence to uphold this complaint. The adoption of a seven year rule by the Council, while it meets part of the criticism made by my predecessor, brings the Council policy in line with inheritance law and is fairer and more transparent than delving back to transfers of earlier vintage, it nonetheless has an element of arbitrariness. The issues of differences between authorities, in this regard, apparently remain and, in the interests of good governance, should be addressed. While in the wake of her report my predecessor drew the attention of the then Scottish Government to what might be described as a 'post code' lottery, the problem persists.

(d) The Council acted unreasonably in not agreeing to convene a new CRC hearing to consider a salient piece of information

46. On 23 December 1994, at the time her home was purchased with the assistance of Mrs A and Mr D, Mrs B entered into a minute of agreement with Mrs A and Mr D. In effect it agreed that after a period of three years, by 23 December 1997, Mrs A and Mr D would be entitled to have the title of Mrs B's home transferred to them. They did not avail themselves of that opportunity until December 2004.

47. Mr C informed me that the minute of agreement was retained by Mrs B. When her house was cleared in June or July 2009 after she went into the Nursing Home, Mrs B's papers were bundled together and stored in Mrs A's garage without examination. The minute of agreement was simply forgotten about and had not formed any part of the submission put to the CRC. It came to light, however, in early 2010.

48. On 26 January 2010 after this 'new evidence' came to light, Mr C emailed a copy to the CRC clerk and also spoke to Officer 3. Mr C anticipated that the evidence would be considered internally in the first instance.

49. The decision of the Appeals Sub-Committee on 4 February 2010 was to accept the recommendation of the CRC. Officer 4 wrote to Mr C on the same day, stating that the decision of the Council to regard Mrs B as a self funding client with effect from 6 August 2009 had been upheld and the Social Work complaints procedure had been exhausted. Officer 4, however, made no mention of the minute of agreement.

50. Mr C then wrote to the Executive Director of Community Services on 9 February 2010, providing her with a copy of the minute of agreement. He maintained that this provided compelling evidence that Mrs B intended as early as 1994 that her home should pass at no cost to Mrs A and Mr D. Mrs A and Mr D chose not to enforce the minute until 2004 but Mrs B had been under a legal obligation from 1994 to transfer the property to Mrs A and Mr D from 1997.

51. After consideration internally, Community Service's decision on Mrs B's contribution toward the cost of her residential care remained unchanged. In her letter of 1 March 2010, Officer 5 stated:

'... Although we note there was an agreement between the parties regarding ownership of the property at ... dating from 1994, it was not enacted until 2004. This means that the transfer of ownership took place within 7 years of [Mrs B]'s subsequent admission to a care home, which brings the property within the scope of the Council's policy on disposal of assets. Therefore, this agreement is not considered to have any bearing on the original decision taken in this case.'

52. In responding to this complaint, the Council informed me that prior to a CRC being convened, both parties are asked to provide a written statement and

copies of any evidence/witness statements that they wish to be considered by the CRC. The Council stated that although there is usually a 28 day time limit for a CRC hearing to be convened, Mr C had specifically requested a period of at least six weeks before the hearing took place and the Council had agreed to the request. The Council did not consider that it would be appropriate to bring the existence of the minute of agreement to the attention of the Appeals Sub-Committee on 4 February 2010, as its remit was to consider the recommendation of the CRC. The information was then passed back to Community Services for consideration. After carefully considering the matter Community Services took the view that, had the information been presented earlier, it would not have altered their position. They then considered whether it would be appropriate to reconvene a CRC. In the absence of precedent, a view was taken that both parties had had a reasonable amount of time to gather all information they wished to be considered and the document in question was not an unknown piece of private correspondence, it was a document formally registered in a public deeds register. They wrote to Mr C explaining why the additional information did not alter Community Services' view and advised Mr C of his right to refer the matter to the SPSO.

53. The Council anticipated that I might have a different view on whether a CRC should, in the circumstances, have been reconvened. The Council stated that they would have no objection to reconvening a hearing of the CRC if I felt it to be appropriate, but the sole purpose of that hearing would be to consider whether the additional document would have changed the CRC's original decision and not to re-consider the arguments already heard.

54. My complaints reviewer shared the Council's response with Mr C. After discussing the matter with Mrs A, he informed me by letter of 29 July 2010 that Mrs A accepted in principle the purpose of the re-referral to consider the new evidence which came to light after the original CRC meeting and not to rehearse the original complaint. Mr C, however, foresaw practical difficulty in this, would not agree to the Council censoring his written submission, and felt that it should be a differently constituted CRC.

(d) Conclusion

55. This is an unusual set of circumstances and, in determining this issue, I am essentially being required to adjudicate on the material significance of the minute of agreement document and on whether a CRC should be reconvened and, if so, with what remit.

56. Had the fault rested with the Council's administrative processing of the appeal to the CRC then I would have less difficulty in suggesting that a CRC should be reconvened. The omission does not, however, lie with the Council. I do not, therefore, uphold the complaint.

57. The document itself is interesting, in that had Mrs A and Mr D exercised their entitlement in the minute after December 1997 to have the title of Mrs B's home transferred to them then, with the change in policy occasioned by the Council's response to the previous adverse report, the transfer would not have fallen foul of the Council's adoption in September 2008 of the seven year rule.

58. Notwithstanding the difficulty now presented of examining the significance of the document in isolation, I consider that, in light of my recommendation at paragraph 41, the matter now be considered by the Council and the Chair and other members of the CRC.

(d) Recommendation

59. I recommend that the Council:	<i>Completion date</i>
(i) in consultation with the Chair and other members of the CRC, assess the significance of the minute of the agreement to the merits of Mr C's case.	22 March 2011

60. Finally, in placing this and other similar reports to the Scottish Parliament, I will emphasise the need to ensure consistency in decision making based on the CRAG national guidance on financial eligibility for public funding, initially by officers and, on review, by CRCs.

61. 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

Mr C	The complainant, a Citizens Advice advocacy worker
Mrs A	Mr C's client
The Council	East Lothian Council
Mrs B	Mrs A's late mother
Mr D	Mrs A's brother, Mrs B's son
The CRC	The Council's Social Work Complaints Review Committee
The Nursing Home	The nursing home where Mrs B resided from 14 May 2009 until her death on 20 May 2010
The CCFU	The Council's Community Care Finance Unit
CRAG	The Charging for Residential Accommodation Guidelines
Officer 1	An administrative assistant in the CCFU
Officer 2	The Council's CCFU Finance Support Manager
Officer 3	The Council Senior Solicitor who was legal advisor to the CRC on 11 December 2009
Officer 4	The Council's Head of Law and Licensing
Officer 5	The Council's Complaints Manager, Community Services, now Customer

Feedback Manager

Officer 6

The Council social worker who met with Mrs A
and Mr D on 27 April 2009

Social Work Complaints Procedures

A statutory social work complaints procedure in Scotland was provided by Section 52 of the National Health Service and Community Care Act 1990 which inserted section 5B into the Social Work (Scotland) Act 1968. Relevant updated guidance was issued by the Scottish Office Social Work Services Group in Circular 5/1996 of March 1996 which was issued on the eve of local government reorganisation on 1 April 1996. The role and status of Complaints Review Committees is set out in paragraphs 38-41 of Annex B to the Circular.

Paragraph 38 states that the role of CRC is to examine objectively and independently the facts as presented by the complainant and by the local authority, then to make a recommendation to the appropriate local authority committee. In doing this the CRC should be aware of local authority policies, priorities and resources and should recognise where professional judgement has been exercised. The CRC may express disagreement with any of these in a case under review.

The guidance in paragraph 39 is that CRCs must be conducted formally and have regard to generally accepted procedures which accord with natural justice but should not develop a degree of formality or inflexibility that may inhibit the objective of facilitating a resolution.

A year later, on 15 April 1997, the Social Work Services Group sent a letter to local authority chief executives and senior social work officers repeating the objectives of CRCs and drawing attention to a Good Practice Guide issued in 1993 by the Commissioner for Local Administration in Scotland in conjunction with the Convention of Scottish Local Authorities entitled Setting Up A Complaints System. That document identified one of two key factors in measuring the effectiveness of a complaint procedure as being to provide an adequate explanation to complainants when their complaints are not considered justified. The letter pointed out that failure to provide a written record of the reasons for CRC decisions may be regarded as grounds for findings of maladministration by the Ombudsman.

The Council's Policy Decision on the Timescale for the Disposition of Financial Assets

On 19 August 2008, following a previous SPSO case upheld against the Council in on 21 November 2007 (200603087) , the Council's Executive Director of Community Services reported to the Council's Cabinet on 9 September 2008. She recommended, in the absence of definitive legislation or guidance at national level, that the Council disregard the disposition of financial assets after a period of seven years, when calculating financial contributions for care home fees. The background to her recommendation was:

1 The amount of financial disregard before care costs are recoverable is £21,500 set in 2008. Where financial assets are disposed to family (such as transferring property or savings) there is no agreed, established length of time after which any subsequent care home costs can be disregarded.

2 The seven year rule already applies to Inheritance Tax and some local authorities in the United Kingdom infer that seven years is a reasonable period of time for consideration of liability for care costs. However, practice in Scotland and elsewhere does significantly differ, with some authorities (eg, Fife Council) disregarding after two years any disposition of assets and others, like East Lothian Council, taking a much tougher stance.

3 A number of such cases in this authority have been the subject of complaints to the Scottish Public Services Ombudsman and last year one such complaint was upheld against the authority. Part of the reason for that judgement was that East Lothian Council, whilst acting lawfully in its interpretation given the lack of guidance, had sought to retain costs following disposition of the asset 11 years earlier. The SPSO regard this as unreasonable.

4 In discussion with the SPSO, it was clear that there are attempts nationally to form a definitive view on the length of time for disposition of assets but many other local authorities used either three or five years as the designated period to disregard these assets, rather than the open ended position this authority has pursued until now.

5 The SPSO advice was that to continue without definitive policy was to 'invite' the possibility of further complaints and further potentially critical findings against the authority, neither of which would assist our wish to have an open, clear and transparent relationship with our customers, which is based on fair and stated principles of reasonableness.

6 In addition, referrals to an Independent Complaints Review Panel from complainants on this subject has increased over the past few months and with many more home owners requiring care home placements, it is expected that these requests will increase in the future. Complaints to Review Panels require detailed submissions to be prepared, involving staff from Community Care Finance and Legal services in very time consuming and detailed work. An independent adviser from another local authority is also required to provide expert advice to the Panel. However the Panel are asked to make a judgement on the disposition of assets without any clear guidance being available either nationally or locally

7 Having taken legal advice on this matter and also considered the professional responsibilities for fair and equitable charging of care costs, it is recommended that the Council approve the proposal to adopt a policy position to disregard the disposal of assets after seven years when considering care home fees. After this time, no care costs would be sought from any disposition unless there was clear, demonstrable evidence that there had been a deliberate attempt to avoid care home costs. For example, if a person was already in receipt of a substantial package of care and had a degenerative condition that would inevitably require substantial care services for many years and they sought to minimise any real or potential costs by disposing of assets, the seven-year limit would not apply. In many situations where property or cash has been transferred to a family member, the motivation will be assumed to be benign and a private matter.

8 This will enable a clear time frame to assist finance and social care staff to manage the financial relationships involving the provision of care in a fair and transparent way.