25 February 2016

Complaint reference:
14 018 444

Complaint against:
North Tyneside Metropolitan Borough Council

Local Government OMBUDSMAN

The Ombudsman's final decision

Summary: Although there was no option but for the Council to seek alternative accommodation for Mr A, communication about the move was poor. Once it became clear that Mr A's advocate was unable to attend, the Council should have involved an IMCA in the Best Interests decision meeting after Mr A was deemed to lack capacity. The failure to do so meant that Mr A did not have an opportunity to be properly represented. The Council's failure to properly manage the move and to ensure Mr A had proper representation caused him considerable injustice. The Council has agreed to acknowledge the injustice caused to Mr A by a payment of £2000.

The complaint

1. An advocate (whom I shall call Ms X) complains on behalf of her client Mr A about the way the Council managed his move from his long-term accommodation to a new placement. She says the news of the move was given to him in a visit when he was unaccompanied by an advocate. The Council did not consult an IMCA in the assessment of Mr A's mental capacity to make a decision about his accommodation.

The Ombudsman's role and powers

2. The Ombudsman investigates complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. She must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, she may suggest a remedy. ***(Local Government Act 1974, sections 26(1) and 26A(1))***

How I considered this complaint

3. I considered the written information provided by Ms X and the Council. I spoke to Ms X. Both Ms X (on behalf of Mr A) and the Council had an opportunity to consider an earlier draft of this statement. I amended the statement after consideration of their comments and before reaching a final decision. I amended the statement further after more comments from the Council.

What I found

Relevant law and guidance

4. The Mental Capacity Act 2005 came into force in October 2007 and is the legal framework for acting and making decisions on behalf of people who lack the mental capacity to make particular decisions for themselves.

5. The council must assess someone's ability to make a decision, when a person's capacity is in doubt. The action needed to assess capacity may vary depending on the complexity of the decision.

6. The purpose of the Independent Mental Capacity Advocacy (IMCA) service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. IMCAs will work with and support people who lack capacity, and represent their views to those who are working out their best interests. The Code of Practice which accompanies the Mental Capacity Act says "*An IMCA must be instructed, and then consulted, for people lacking capacity who have no-one else to support them (other than paid staff),whenever:*

   – an NHS body or local authority is proposing to arrange accommodation

   (or a change of accommodation) in hospital or a care home, and

   – the person will stay in hospital longer than 28 days, or

   – they will stay in the care home for more than eight weeks."

   The Code of Practice explains that IMCAs have a different role from other advocates. They also

   • "*are instructed to support and represent people who lack capacity to make decisions on specific issues*

   • *have a right to meet in private the person they are supporting*

   • *are allowed access to relevant healthcare records and social care records*

   • *provide support and representation specifically while the decision is being made, and*

   • *act quickly so their report can form part of decision-making"*.

7. People should be assessed on whether they have the ability to make a particular decision at a particular time. When assessing somebody's capacity, the assessor needs to find out:

   - Does the person have a general understanding of what decision they need to make and why they need to make it?
   - Does the person have a general understanding of the likely consequences of making, or not making, this decision?
   - Is the person able to understand, retain, use, and weigh up the information relevant to this decision?
   - Can the person communicate their decision?

8. A key principle of the Mental Capacity Act 2005 is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person's best interests.

9. Section 4 of the Act provides a checklist of steps that decision makers must follow to determine what is in a person's best interests. The decision maker also has to consider if there is a less restrictive option available that can achieve the same outcome.

10. The Deprivation of Liberty Safeguards (DOLS) is an amendment to the Mental Capacity Act 2005 and came into force on 1 April 2009. The safeguards provide legal protection for individuals lack mental capacity to consent to care or treatment and live in a care home, hospital or supported living accommodation. The DOLS protect people from being deprived of their liberty, unless it is in their best interests and there is no other less restrictive alternative. The legislation sets out the procedure to follow to obtain authorisation to deprive an individual of their liberty. Without the authorisation, the deprivation of liberty is unlawful. It is the responsibility of the care home or hospital to ensure that any deprivation of liberty is lawful.

What happened

11. Mr A is a man in his 40s who has a learning disability and suffers from anxiety. Ms X has been his citizen's advocate (working from an independent advocacy agency) for 13 years: Mr A has only sporadic contact with his family. Until August 2014, Mr A lived in a block of flat which the Council describes as being part of a communal hub where several people with learning disabilities could learn to live as independently as possible in the community. Mr A had 25 hours a week support from a care agency and his care was supervised by the Community Learning Disability Team (CLDT).

12. The other blocks of flats were occupied by young mothers in safe accommodation. The Council says tensions arose between the young mothers and some of the clients with learning disabilities, to the extent that it was considered in the best interests of the service users with learning disabilities to move them sooner to different accommodation for their own safety. The Council says that tensions escalated because of the number of false fire alarms due to one of the service users setting off the fire alarm deliberately. In addition a fire risk assessment raised concerns.

13. Unfortunately someone (the Council says it does not know who) told the service users, including Mr A, about the impending move before social work staff were able to meet them and explain the matter in a structured way. The Council says once the social work team knew that tenants had heard about the move, they took steps to meet them quickly and that visit, in August, was unannounced.

The news of the move

14. The care provider's case recording shows that Mr A was badly affected by the news of the impending move right from the start. The deputy manager emailed the CLDT to say she had tried to call to let them know of Mr A's distress. She said his anxiety levels had reached a point where he was hyperventilating and he was not sleeping. He wanted to move with two other service users but had been told this was not possible. She said she had never seen him so anxious before. A few days later Mr A suffered a seizure and was taken to hospital, but no physical cause was found. He was diagnosed with a severe panic attack and prescribed tranquillisers. He had a further seizure the night he was discharged from hospital. The deputy manager emailed the social worker again to ask someone to see Mr A as soon as possible to reassure him that he would be involved in the decisions about the move. She said he was very emotional: *"(Mr A) took one of my hands*

in both of his and asked me to let him move with his friends. Again a clear indicator of what the proposed move is doing to (Mr A) emotionally".

15. Ms X says she was told of the impending move by some of the care provider's staff. She also contacted the care provider and the CLDT with her concerns about Mr A.

16. Regular tenants' meetings (to which Ms X says she was not invited) began to discuss possible moves and where tenants would like to live. Mr A (who missed the first meeting as he was attending a GP appointment due to his anxiety) expressed his anxieties about being able to live near his (named) friends and was also anxious to know his new house number. A property was identified, which was already occupied by one male service user, and Mr A agreed to visit it.

17. Ms X says she was contacted by a member of the CDLT staff who asked if she would like to accompany Mr A to see the property. She says this flat was not in the area close to Mr A's friends. The notes of the first visit show that Mr A was very quiet at the visit but said he would like to go back and see it again. Ms X says in fact Mr A had a mild panic attack while he was there. The care provider staff told the CLDT that if Mr A liked the property, it would be best if he moved quickly as his anxieties were increasing. Unfortunately the existing tenant said he did not want to live with Mr A, who he felt was too quiet.

Mr A's deterioration

18. Mr A's anxieties increased with the delay in finding alternative accommodation. By mid-September the support workers reported that Mr A was refusing to eat and had thrown a glass at one support worker. A GP was called to assess Mr A's mental health. The GP said she did not think his mental health had deteriorated but she said Mr A needed extra support during the period of uncertainty and anxiety. She suggested respite care. Mr A's social worker arranged for an Approved Mental Health Practitioner (AMHP) to assess Mr A as well to see whether respite care or more support in his current accommodation would be better. The AMHP was called away on an emergency and so Mr A was not assessed. After a further period where Mr A did not eat or drink for two days and was suffering abdominal pain, the GP arranged a hospital admission.

19. Mr A was diagnosed with a suspected gallbladder infection but refused to take the prescribed antibiotics. In view of the concerns about Mr A's mental health, his social worker contacted the hospital ward to suggest a psychiatric assessment before discharge. A pre-discharge ward meeting was held because of the concerns about Mr A. The ward staff said they could not ask for a psychiatric referral because it was a surgical ward but they agreed to ask the doctor to refer to Mr A's GP for another mental health assessment, as Mr A had been refusing to eat drink or take medication.

20. On discharge from hospital Mr A would not come out of his room or let support workers come in and they did not know whether he was eating, drinking or taking medication. An urgent appointment was made to see a psychiatrist. In the meantime Mr A's social worker recorded that he made a '*best interests'* decision to enter Mr A's flat. Mr A indicated that he refused to see the psychiatrist. The social worker agreed that support workers would be able to enter Mr A's flat without his permission so that they could persuade him to eat, drink and take his medication. The social worker received a message from the psychiatrist that she would make a home visit in a week's time. Ms X says she was not made aware of the '*best interests'* decision. She says she was not informed of, nor involved with, the mental capacity assessment that would have preceded this decision

21. The following day the social worker emailed the hospital discharge social worker about Mr A. She said she had emphasised at the pre-discharge meeting how concerned she was about Mr A's mental health and asked for a psychiatric referral. She explained she had been told the ward could not arrange a referral but the junior doctor would advise Mr A's GP to do so. She said that did not appear to have happened. She explained that due to Mr A's continued refusal to eat and drink, he might be readmitted to hospital for physical health reasons before a mental health assessment could be completed.

22. Later that week a support worker called out the GP to Mr A. He was refusing to dress, lying inside his duvet cover in a foetal position and his skin had a yellow tinge. The GP arranged a hospital admission and advised that he shouldn't be discharged until after a mental health assessment had been carried out. Although Mr A refused to go with the paramedics who arrived, a carer persuaded him to go into hospital by agreeing to accompany him. Once in hospital Mr A was reported to have "*lashed out"* at staff and ran off the ward.

23. A psychiatrist assessed Mr A in hospital. He said Mr A's physical needs were being met, it was not appropriate to admit him to a psychiatric ward and he would refer him to the community mental health services. He said the deterioration in Mr A's mental health was due to the forthcoming change in his home environment and asked the Council to consider whether Mr A could remain in his current accommodation. The social worker explained that Mr A was already under the care of the community mental health services. Mr A was discharged from hospital again.

The decision about Mr A's future accommodation

24. A multi-disciplinary meeting was held on 9 October to make a decision about Mr A's future accommodation. Ms X was unable to attend the meeting. She says she does not believe the Council made sufficient efforts to enable her to attend (she was unable to arrange childcare and the Council would not allow her small children to come with her). Ms X says she contacted CLDT by telephone on a number of occasions, to try and make suitable arrangements to attend the meeting. She asked if she could dial-in to the meeting, or speak to someone on the telephone before or during the meeting. She says these suggestions did not receive the promised return telephone call.

25. The notes of the meeting say, "*Advocate not present, however consulted by phone*". Ms X had told the social worker that Mr A had refused to visit another suggested property and though she had taken photographs to show him, he said he did not want to live there. The meeting took a "*best interests"* decision that Mr A would move into another property shared with two female service users (he would be on a separate floor). The care provider would recruit staff familiar to Mr A. Ms X says her phone calls to the meeting were *not* pre-arranged and, in her view, could not be considered a 'consultation'. She says she contacted the CLDT in her on-going role as Mr A's advocate, in order to relay information about Mr A's preferences for his future housing, including his wish not to move to the previously identified property. She says she was not aware that the MDT meeting had been changed to a '*best interests'* meeting.

26. The Council undertook an assessment of Mr A's capacity to make a decision about this future accommodation. The assessment concluded Mr A did not have capacity to make the decision. The Council also documented the way in which it undertook to make a "*best interests*" decision for Mr A. The record indicates that where the Council or the NHS intends to move someone to accommodation for

longer than 8 weeks, it must instruct an IMCA. The Council did not instruct an IMCA. It recorded "*Mr A has an independent advocate who has known him for 13 years. She has been part of the decision making process and has acted in (Mr A's) best interests*". The Council recorded its decision that it was in Mr A's best interests to move into a selected property close to his friends, in a quiet area as he had said he preferred. Under the section of the formal document entitled, "*What has been done to encourage the person to take part, or improve their opportunity to take part?"*, the Council recorded, "*Ms X has liaised with services on (Mr A's) behalf and has put forward his views and wishes*".

27. Ms X says she was not aware of the mental capacity assessment that concluded Mr A did not have the capacity to make decisions about his future accommodation. She says she was not aware that a '*best interests*' meeting was to take place with a view to making a decision about Mr A's future accommodation. She did not know about the property the Council had now identified and was therefore never in a position to put forward Mr A's views about this property. She says she was not asked by the CLDT about Mr A's thoughts with regard to this property. She says as far as she knows, Mr A had no knowledge of the property prior to the '*best interests'* decision being taken.

The move to interim care

28. Pending the move, the meeting also took a "*best interests*" decision that because of his anxiety levels, Mr A should move into an interim care placement until the property was ready, to enable 24 hour support. The meeting recognised that it was not ideal for him to move twice, but felt he needed the additional support.

29. Mr A refused to go into the interim care placement. He started urinating in his bed, neglecting his personal care, tipping over his breakfast tray and so on. His social worker, a member of the CLDT and the deputy manager of the care provider visited him on 14 October to explain their concerns. Mr A had not eaten for 8 days, he was not dressed, he remained inside his duvet cover during their visit and would not respond verbally. The social worker told Mr A he had to go into the interim care placement until he moved to his new home, and could not stay at his current accommodation. Mr A did not respond. The case notes record that another member of CLDT staff arrived and it was decided this member of staff should take a firm line with Mr A to see if he would respond. Mr A responded by throwing things at the member of staff. A mental health assessment was arranged with a view to detaining Mr A under a section of the Mental Health Act, but the notes record that when he realised what was happening, Mr A agreed to go into the interim care placement although he was very anxious on the way there. He told the social workers and deputy manager who took him that he thought he was going to "*blow into the sea*" if he got out of the car.

30. Mr A continued to refuse to eat and drink but then also refused to leave to move to his new accommodation. The home manager made an application for a DOLS authorisation for Mr A. The application did not specify the care and treatment Mr A would receive, or the mental disorder he was suffering from, nor did it explain the reasons for the deprivation of liberty. The Council says however that this would have been available to the Best Interests assessor at the time.

31. A Best Interests assessor visited Mr A on 21 October to assess him in connection with the application for a DOLS authorisation. He noted Mr A's extreme distress at his situation. The care home manager said the home was unable to care for Mr A and the placement was not appropriate for him. The assessor said the interim placement was not suitable for Mr A and was not in his best interests. He said it

was in Mr A's best interests to move into his new accommodation soon (he expected the same day) and with substantial support. He said the continuation of the placement would risk a further decline in Mr A's mental and physical health.

32. The Council says this was always intended to be a short term placement and Mr A moved six days later. The Council says this was on advice from a behavioural therapist who suggested Mr A should be shown photographs of the new accommodation and allowed a few days to give him more choice and control over the move. The Council points out that the urgent DOLS authorisation was due to expire on the day Mr A actually moved so he was never deprived of his liberty without authorisation.

The new accommodation and Mr A's readmission to hospital

33. Mr A's social worker and the care provider's deputy manager took him to his new accommodation as planned, although not without difficulty. Although the case recording notes that Mr A was happy and settled in his new home when the social worker left, within days, by 31 October, there was a repeat of previous problems of refusing to eat, drink or bathe, and sleeping on the sofa. He urinated on the sofa and refused to dress. One of the female occupants of the flat had gone back to her parents' house as she said she was afraid of Mr A.

34. Mr A was soon readmitted to hospital complaining of abdominal pain again. The social worker arranged another multi-disciplinary meeting. It was agreed that Mr A could not return to his new accommodation at the moment as it was not possible to safeguard the two female occupants and Mr A's own needs were not being met. A further mental health assessment was arranged.

35. The case recording reports that following the assessment, Mr A was detained under section 2 of the Mental Health Act (a section detaining someone in hospital for compulsory assessment). The assessment had revealed that Mr A was suffering a psychotic episode and had heard voices telling him not to eat or drink. By the beginning of December, Mr A's heath had deteriorated further and he was detained under section 3 for treatment.

36. Mr A remains in hospital. He is now a voluntary patient.

The complaint

37. At the start of December 2014, Ms X wrote to the Council to complain about the way Mr A's care had been managed. She said prior to August 2014, Mr A had been living a "*rich, happy and healthy*" life in his own flat. He had a longstanding position at a voluntary shop and enjoyed trips out to the beach and to cafes and museums. She said the blunt announcement of the move had caused an alarming deterioration in his health and within three months, he had been detained under the Mental Health Act. She pointed out that in the 13 years she had known him, he had moved home twice without such trauma and had no previous history of mental illness.

38. Ms X said she believed the Council's failure to communicate properly, its failure to respond to his wishes for his future accommodation in a particular area near his friends, or to respond quickly to his failing health, had resulted in this devastating change.

39. A senior manager from the Council met Ms X and then responded in writing to her. She said she had consulted with Community Health colleagues who were of the view that staff had been as "*tight*" as they could be during this process. She acknowledged that the way the move had been communicated to service users

was "*not as we would have wanted it to be*", and said the way Ms X had been told by the care provider was inappropriate. She said the social worker should have known the news would cause Mr A anxiety and should have told Ms X about it. She said the CLDT had been reminded of the importance of advocacy and the need for the service-users views to be properly represented.

40. Ms X was dissatisfied with the outcome of her complaint and complained to the Ombudsman. She said she was not reassured by the manager's response. She said she had been led to believe at the complaints meeting that Mr A had been moved to respite care as the result of a "*best interests*" decision and yet the DOLS authorisation was not given, and she questioned the disparity. She was concerned that neither she nor an IMCA had been involved during the mental capacity assessment or the "*best interests*" decision and nor had Mr A's family and therefore she did not believe the Council had followed the appropriate procedures. She said as far as she knew, Mr A had neither been taken to see nor shown photographs of the accommodation where the Council decided he should live.

The Council's response

41. The Council says there were problems with communication about the move and one unannounced visit was made to occupants when it became clear that they had already been told of the impending move. It says that in view of Mr A's previous anxieties, when the move had to be brought forward it involved health colleagues (in terms of Mr A's GP, allocation of a community liaison nurse, and a psychiatric review).

42. In terms of the appointment of an IMCA, the Council says it was advised that a person only requires referral to an IMCA for a decision about change of accommodation if he or she has a paid advocate. It says that because Ms X had been Mr A's unpaid advocate for many years it considered it was "*totally appropriate"* for her to represent Mr A in terms of his need for alternative accommodation. It says Ms X uses her home address, not a business address, for correspondence and has never said she was unwilling to represent Mr A about his future accommodation.

43. The Council says even if the news about the move had been communicated better, the nature of Mr A's condition meant that any move could have resulted in the decline in his mental health.

44. Following receipt of the draft decision, the Council asked the Best Interests assessor to consider the view that there may have been flaws in the original 'best interests' decision to move Mr A to the interim placement. The Best Interests assessor commented that if there had not been an active plan in place to move Mr A to his new (permanent) accommodation, he would have recommended a Deprivation of Liberty authorisation for a short period of time to maintain Mr A in that interim placement to avoid, in particular, moving Mr A into hospital which would have been a more restrictive option.

45. The Council describes Mr A as a man with Autistic Spectrum Disorder. Ms X says that although this has become common currency, in fact at the time of the move Mr A had never had a formal diagnosis of ASD.

46. Ms X says the Council never discussed with her whether she was willing or able (given her parental commitments) to represent Mr A during discussions about his future housing. She says when she was invited to attend the MDT meeting on 9 October 2014, the Council was not able to facilitate any of her suggestions to

allow her to attend the meeting, nor suggest any alternatives. She says once the Council knew she was unlikely to attend the meeting, it would have been appropriate to appoint an IMCA, particularly in view of the fact that the meeting turned into a *Best Interests* meeting. She adds that during discussions in advance of a previous accommodation move, Mr A had representation from both an IMCA and from Ms X herself.

Analysis

47. It was not the Council's fault that the move had to take place. But the Council should have had in place a communication strategy which avoided the possibility that the news was leaked early to the service users before the proper means of communication, in a supported way, could be put into action. It was clear there was a volatile situation developing: it was unfair that the people whose lives would be most affected by the move were not able to be told, in a structured way with suitable representation, before the news was given to them informally.

48. The decision to make an unannounced visit to Mr A was triggered by the initial unofficial breaking of the news. But I do not see how the unannounced visit helped Mr A. The Council knew Ms X was Mr A's advocate, and had been for many years. It acknowledged in its complaint response to Ms X that the social worker should have realised the situation would trigger Mr A's anxiety and should have told Ms X about it. On balance it was fault on the Council's part not to arrange to visit when Mr A was properly represented and supported.

49. The Council says that Mr A was a capacitated adult at the start of the process and it was not therefore necessary to appoint an IMCA. It points out that Ms X was his longstanding advocate who could represent his views. However by the time of the MDT on 9 October, which then became a Best Interests meeting, Mr A had been assessed as lacking capacity. Ms X was not made aware of that. She was *not* involved in the "*best interests*" decision about his move to respite care and the choice of his future accommodation. The reference in the assessment documents and the notes of the meeting to the extent of her involvement seems to be misleading: they give the impression Ms X was aware of all the factors surrounding the move, and had represented Mr A on that basis, when she was not. She did not know the meeting would be a "*best interests*" meeting. She was not consulted on a pre-arranged basis as the Council's notes imply. The role an IMCA would have played in these circumstances might have made a significant difference to Mr A's representation. My view remains that the actions of the Council deprived Mr A of the opportunity to be properly represented.

50. Ms X not unreasonably disputes the Council's view that any move might have resulted in a decline in Mr A's mental health. She points out that he has moved twice in the 13 years she has known him without the devastating effect this move had. It appears that the precipitate information about the move and the failure to allay Mr A's fears about his future accommodation has at the very least caused him considerable distress.

51. In its response to the draft decision statement in which there was a recommendation for better access to advocacy, the Council says it has undertaken a range of training workshops and presentations for staff as part of its introduction to the Care Act 2014 and new advocacy regulations. It says it is also working towards appointing advocates with a range of functions (IMCA, IMHA and Care Act) to support people like Mr A, whose circumstances in the legislative framework change.

Agreed action

52. Currently Mr A remains in hospital where he now has an IMHA (following his detention under the Mental Health Act) as well as representation from Ms X. Once Mr A is able to leave hospital, the Council should (with the aid of the IMHA and Ms X) thoroughly review the arrangements for his future accommodation.

53. The Council has agreed to make a payment of £2000 to Mr A in recognition of the distress he suffered as a result of the failings identified in paragraphs 47-50 above. It agrees to consult with Ms X about the most beneficial way for Mr A to receive the payment.

Final decision

54. There was fault on the part of the Council which caused injustice to Mr A.

Investigator's decision on behalf of the Ombudsman