

Case 200500239: Midlothian Council

Summary of Investigation

Category

Local government: Housing

Overview

The complainant (Mr C) claimed that the Council failed to take appropriate action in response to complaints made by him and his wife (Mrs C) regarding the anti-social behaviour of two local residents and failed to consider witness statements and video evidence.

Specific complaint and conclusion

The complaint which has been investigated is that the Council failed to take appropriate action in response to complaints made by Mr and Mrs C regarding the anti-social behaviour of two local residents including the consideration of witness statements and video evidence (*partially upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) apologise to Mr and Mrs C for failing to formalise their complaint into the Council's Feedback Procedure at the correct time;
- (ii) ensure any future complaints by Mr and Mrs C are dealt with in accordance with current procedural requirements; and
- (iii) ensure that staff involved with complaints of the same or a similar type are adequately trained in current Council procedures.

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

Main Investigation Report

Introduction

1. On 28 September 2005 the Ombudsman received a complaint from a member of the public (Mr C) against Midlothian Council (the Council) alleging that the Council had failed to take appropriate action in response to complaints made by Mr C and his wife (Mrs C) regarding the anti-social behaviour of two local residents (Mr D and Mr E) and to consider witness statements and video evidence. Mr and Mrs C are owner-occupiers, Mr D is a Council tenant and Mr E is an owner-occupier.

2. The complaint which I have investigated is that the Council failed to take appropriate action in response to complaints made by Mr and Mrs C regarding the anti-social behaviour of two local residents including the consideration of witness statements and video evidence.

Investigation

3. I feel that it is important to make it clear at the outset that it has not been my role to assess the individual complaints of neighbour nuisance and anti-social behaviour brought by Mr and Mrs C but to judge whether the Council have fulfilled their duties and responsibilities in dealing with the complaints. To determine what those duties and responsibilities are, I have clarified the relationships between the parties involved in the complaints and considered the policies and procedures which the Council are obliged to apply. These are 'Midlothian Council, Dealing with Neighbour Complaints, Housing Officer's Guidebook' (the Guidebook), 'Midlothian Council Standard Tenancy Agreement' (the Tenancy Agreement) and 'Midlothian Council Feedback Procedure'. The Council also supplied a copy of a 'Draft Anti-social Behaviour Protocol for Adults Midlothian' which they initially advised me would apply when dealing with complaints related to owners and private tenants. The application of the protocol was not considered as part of my investigation of this complaint because the document only came into being in November 2005, two months after Mr C brought his complaint to the attention of this office.

4. I have, however, had some difficulty in obtaining a clear picture from the Council on the full extent of their duties and responsibilities to Mr and Mrs C. As well as making repeated enquiries of the Council in this area, I have done considerable research and have considered the following legislation: The Housing (Scotland) Act 2001, The Crime and Disorder Act 1998, The Criminal

Justice (Scotland) Act 2003 and The Anti-social Behaviour, etc. (Scotland) Act 2004. I have also studied the Scottish Executive document on 'The Crime and Disorder Act 1998 (as amended): Guidance on Interim Anti-social Behaviour Orders (ASBOs) and Power to Apply for ASBOs extended to Registered Social Landlords'. I have also made an enquiry of the Scottish Executive's Anti-social Behaviour Unit.

5. My investigation of this complaint has involved examination of the documentation provided by Mr C, making enquiries of the Council and assessing the responses and documentary evidence provided by the Council, including the records of complaints made by Mr and Mrs C.

6. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. I have, however, set out below a fairly detailed chronology of events. This has been necessary because it is essential to justify my subsequent conclusions and recommendations.

Background

7. Both the Council and Mr and Mrs C agree there had been complaints about alleged anti-social behaviour, involving various residents, in the area around Mr and Mrs C's home for some time prior to Mr and Mrs C raising their concerns about the conduct of two particular residents, Mr D and Mr E.

8. In October 2004 Mr and Mrs C first contacted the Council to complain about the conduct of Mr D and to ask the Council to provide Mr C with a disabled parking bay. Mr C claimed that Mr D was parking his car in a manner which prevented him from getting parked near his home.

9. The Council records state that, on 26 October 2004, a Council Housing Officer (Officer 1) and an Anti-social Behaviour Officer, (Officer 2) visited Mr C and another local resident to discuss the complaint. They state Officer 1 explained to Mr C that he did not have exclusive right to a parking bay but that as he had a disabled badge, Officer 1 said he would assist Mr C in an application for a disabled space. Officer 1 concluded that Mr C should be advised that there was insufficient evidence to merit speaking to Mr D but that he would continue to monitor the situation. In his comments, Mr C disputed this version of events, claiming that he has no recollection of being told that he did not have an exclusive right to a parking bay or being offered assistance in obtaining a disability parking bay. He said that at the time in question there

were no parking bays in his street.

10. The Council later provided Mr C with a disabled parking space.

11. On 3 November 2004 Mrs C wrote a letter of complaint to Officer 1 about 'the ongoing intimidation and snide remarks targeted at myself and my husband by [Mr D]'. She claimed '[Mr D] seems to have waged a campaign of fear, intimidation and bullying against us ... '. The letter was signed by her husband and a neighbour, Mrs F, as witnesses to the events.

12. Council records show that on the same day Officer 2 visited Mr C. There is disagreement between Mr C and the Council about the purpose of this visit. Although the Council were unable to provide any contemporaneous notes (notes taken at the time or as close to the time of the event as possible) on the details of the visit, they provided a statement by Officer 2 in which he claimed that he and Officer 1 discussed a complaint against a neighbour about disposal of rubbish with Mr C. Mr C, on the other hand, claimed that Officers 1 and 2 visited that day to discuss his anti-social behaviour complaint but did acknowledge that the issue of disposal of rubbish was briefly touched upon.

13. Council records appear to show that Officer 2 visited residents in Mr C's street on 3 and 17 November 2004, 1 and 14 December 2004 and 19 January 2005. The Council have confirmed that only the visits in November 2004 and January 2005 related to Mr C's complaint.

14. On 7 December 2004 Mrs C wrote another letter of complaint to Officer 1 about Mr D's behaviour towards herself and her husband. She said 'taken individually these incidents may not seem like much, but collectively I believe they contribute to a climate of intimidation'. The letter was signed by her husband and three neighbours.

15. Mr C claimed that on around 16 December 2004 Officers 1 and 2 visited his home to advise that there was insufficient corroboration for his complaints to be taken further and that he and his wife should ignore the intimidation for four or five months to allow the alleged perpetrators to grow tired of their activities.

16. On 4 February 2005 Mrs C sent a Feedback form to the Council in which she claimed that Mr D was intimidating herself and her husband. She stated that there were witnesses to these events.

17. On 21 February 2005 the Housing Manager at the Council (Officer 4) wrote to Mrs C in response to her complaint. He stated 'It appears to me that council staff have responded on each occasion that a report has been received and have provided advice and assistance where necessary. Unfortunately, to date there has been no corroboration of the complaints and it has not been possible, therefore, to take any further action'.

18. In response to the letter Mrs C says she telephoned Officer 4 two days later and explained there was corroboration of the alleged anti-social behaviour. She claimed she was asked to send in copies of all the corroborated complaints which had been made.

19. The next day Mrs C wrote to the Chief Executive of the Council and enclosed copies of the corroborated complaints which she and her husband had previously sent to the Council. She explained in her letter that some of the complaints had been made by her neighbours but that she had been assured by Officer 1 that because the complaints were of the same nature then they would automatically corroborate each other. Mrs C provided details of further incidents of alleged anti-social behaviour towards herself and her husband in her letter and enclosed statements of corroboration. She stated that she had a closed circuit television (CCTV) camera outside her home which was focused on her house and her garden and that 'many of the above incidents, together with earlier ones, have been recorded on video tape by this camera should further corroboration be the problem'.

20. On 28 February 2005 the Chief Executive of the Council wrote to Mrs C to advise her that her complaint had been passed on to Officer 4 to investigate.

21. On 21 March 2005 the Council's Anti-social Behaviour Liaison Officer (Officer 3) wrote to Mr C to arrange to visit him to discuss his 'neighbour complaint'.

22. On 5 April 2005 Officer 3 visited Mr C at his home and discussed his complaint. Mr C provided me with a transcript which he had prepared of the conversation between himself, his wife and Officer 3. It stated that Mrs C again advised Officer 3 that she possessed signed witness statements of the alleged anti-social behaviour by Mr D and Mr E and that some of the events were recorded on camera. Mr C's transcript stated that Officer 3 explained that in

order for an ASBO to be applied for by the Council Solicitor the events would have to be corroborated, preferably by two independent people outside Mr and Mrs Cs' household. According to the transcript, Officer 3 indicated that, if the Council solicitor gave the go-ahead, steps would be taken to take legal action against Mr D and that if that did not happen then he would probably speak to Mr D and Mr E about their behaviour. The transcript stated that Officer 3 offered to come back if Mr and Mrs C could provide him with a copy of the relevant documentation. Mr C later confirmed that he had shown Officer 3 witness statements during this meeting and that Officer 3 made notes from the documents.

23. On 19 April 2005 Officer 4 wrote to Mrs C in response to her anti-social behaviour complaint to the Chief Executive of the Council. He advised 'in order to resolve the matter the Council's Appeals Panel recently agreed to seek alternative housing for [the F family] and it is hoped that it will be possible to provide this in the near future'.

24. On 22 April 2005 Mrs C wrote to Officer 4. She stated 'I find your response to my two appeals totally unacceptable. In the first instance you stated that there was no corroboration and now say that [the F family] are to be moved in order to resolve matters. The complaints which I have made have nothing to do with [the F family]'. She went on to explain that she had been 'harassed and intimidated for eight months, and the Council has done nothing about it'. She asked Officer 4 to confirm if the Council did not understand what she was saying or if they had chosen to ignore the situation.

25. Mr C claimed that on 26 April 2005 (some three weeks after Officer 3's visit, and two months after Mrs C wrote informing the Council of the availability of her CCTV footage) Mr C received a phone call from Officer 3 to make arrangements to collect evidence. Mr C claimed Officer 3 visited his home on 3 May 2005, where Mr C explained to Officer 3 that he had delivered the evidence to the local police station on 26 April 2005. Mr C claimed that Officer 3 said he had spoken to Mrs F, who Mr C said was a witness to events and had been subject to the same treatment from Mr D as his wife, as part of his investigation of Mr C's complaint. Mr C said that Officer 3 indicated that he would present the information to the Council Solicitor. Mr C claimed that he later spoke to Mrs F and was advised that Officer 3 had not made contact with her.

26. On 22 May 2005 Mr C wrote to the Chief Executive of the Council regarding his wife's complaint. He summarised the details of his wife's correspondence with the Council. He stated that 'on 5 April 2005, [Officer 3] a liaison officer with the Council, reviewed our evidence. He informed us that he would contact ..., a Council solicitor, to see if legal action was possible. In the meantime my wife is still being subjected to harassment and intimidation'. He added 'my wife awaits [Officer 4's] reply to her third appeal. Please grant it the urgency which it warrants'.

27. The Council provided me with a copy of an undated, handwritten file note by Officer 1 which appeared to have been written in June 2005. In the note Officer 1 commented on Mr and Mrs C's letters of 22 May and 22 June 2005. He stated that he had not received any complaints from Mr C since November 2004, that he had 'visited [Mrs F] as part of investigation. No corroboration. [Mr C] advised of this and that no action would be taken'. He also stated 'I met with police in May 2005 who are checking possibility of taking action against [Mr C] for wasting their time. Meeting again end June, when will decide what to do'.

28. On 3 June 2005 Mr C wrote to the Chief Executive of the Council to again complain about the Council's handling of his complaint. He claimed that Mr D and Mr E 'have persistently behaved in a threatening manner towards [Mrs C]. Their conduct has caused her alarm and distress together with psychological damage'. Mr C stated in his letter that he had included copies of witness statements and corroborated letters of complaint. At the bottom of the letter Mr C listed the dates of three corroborated letters of complaint and 26 independent witness statements. He also made reference to a sequence of incidents recorded on video tape. On 6 June the Council acknowledged receipt of the letter.

29. On 10 June 2005 Mr C wrote to the Chief Executive to complain about the on-going harassment of his wife and the Council's failure to address the matter. On 13 June 2005 the Council acknowledged receipt of Mr C's letter and indicated that it would be passed to Officer 4 'for his records'.

30. On 24 June 2005 Mr C's MSP wrote to the Chief Executive asking him to investigate Mr C's complaint. The letter was acknowledged on 28 June and passed to Officer 4 'to investigate this matter and reply directly to you as soon as possible'.

31. On 28 June 2005 Mr C wrote to the Chief Executive. He provided details of recent events which he felt were of an anti-social nature. He stated 'I am sure that the constant harassment and intimidation which we are being subject to is designed to drive us from our home ... Everyday something else is done by [Mr D] and [Mr E], and his cronies, to keep up the pressure on us. This is having a detrimental affect on our health and our quality of life. With respect I feel that the Council has a responsibility to protect us from any further acts of this nature'. Mr C enclosed corroborated statements for five separate incidents with the letter and stated 'there have been over forty incidents of this activity recorded from a fixed security camera outside our home'.

32. On 29 June 2005 the Council wrote to Mr C to acknowledge receipt of his letter and indicated that it would be passed to Officer 4 'for his records'.

33. On 3 July 2005 Mr C wrote to Officer 1. He claimed that the local residents, including Mr D and Mr E, had made it extremely difficult for him to use his disability parking bay and provided details of examples of this. He stated 'this inconsiderate parking is just another aspect of the anti-social behaviour which my wife and myself are being subjected to every day. We have been harassed and intimidated for months now. I have amassed considerable evidence of this which has been corroborated by independent witnesses ... Not only do I have signed statements from independent witnesses who have observed this activity but I also have over forty incidents recorded on video tape from a fixed security camera on the front of my home'. Mr C copied this letter to the Chief Executive.

34. The Council records show that on 4 July 2005 Mr C contacted the Council and reported incidents where he alleged that Mr E and another neighbour prevented him from using his disabled parking space. These reported incidents which appeared to take the form of two phone calls and the letter referred to in the previous paragraph, were detailed in the Council's 'Estate Management System Reports'. The report showed that the Council contacted the police for advice on the use of disabled parking spaces and were advised that the spaces were courtesy spaces and 'no action could be taken if refused to move'. In all three cases there was no completion date on the reports and two of the reports had the date of the reported incident falling after the date on which the Council received the complaint.

35. On 7 July 2005 Mr C wrote again to the Chief Executive. He provided details of alleged anti-social activities and explained that five incidents had been reported to the police. Mr C stated 'I hope that [Officer 4] will now reassess his opinion of the situation ... and recognise exactly who the real perpetrators are. May I respectfully request that my wife be granted a reply to her third feedback appeal which she submitted on 22 April 2005'.

36. On 11 July the Council acknowledged receipt of Mr C's letter and indicated they had passed it to Officer 4.

37. The same day, Officer 4 wrote to Mr C's MSP on behalf of the Chief Executive addressing the points in the MSP's letter of 24 June 2005.

38. The next day, Officer 4 wrote a similar letter to Mr C in response to the 'recent letters addressed to both the Chief Executive and me regarding complaints of harassment and intimidation to your wife from neighbours and to previous feedback complaints in this regard'. He explained 'As you are aware my staff and the police have found it difficult to ascertain corroboration of the matters in your letters of complaint and as a result it has not been possible to take any appropriate action. It is my intention to convene a meeting with housing staff and the local police in order to discuss your complaints in more detail. Unfortunately, this has not been possible due to the recent G8 Summit, however, I would hope to arrange this meeting soon. I will contact you again to advise you of the outcome of the meeting'.

39. On 29 July 2005 a meeting attended by Officer 1 and a Senior Housing Officer from the Council and an Inspector and a Superintendent from Lothian and Borders Police was held to discuss Mr and Mrs C's complaints. This meeting led, over a month later, to the joint response letter dated September 2005 as detailed in paragraphs 43 to 46 below.

40. However, in the meantime, Mr C wrote to the Chief Executive on 30 August 2005. He said that he and his wife were still being harassed and intimidated by Mr D and he provided details of further incidents. He pointed out that they were still awaiting a reply to their third appeal dated 22 April 2005.

41. On 2 September 2005 Mr C's MSP wrote to Officer 4 asking for 'a report on the Council's actions' in relation to Mr and Mrs C's complaints.

42. On 5 September 2005 the Council wrote to Mr C acknowledging receipt of his letter.

43. Later that month the Council and the police issued a joint response to Mr C, signed by Officer 4 and a Chief Superintendent for Lothian and Borders Police. The response referred to Mr C's previous letters dated 9 October, 3 November, 7 December 2004 and 4 February, 22 May and 3 July 2005 to the Council and along with seven letters sent by Mr C to the Lothian and Borders Police. The letter confirmed the Council and police had investigated the problems. The letter stated 'considerable efforts have been made by both agencies to resolve these to the satisfaction of all concerned. Whilst it is clear that you and your neighbours have contradictory views on a number of issues affecting your everyday lives, we have to advise you that we consider the issues you raise in your correspondence to be matters which would under normal circumstances be resolved between neighbours, and are not criminal issues or matters which are relevant for action under Anti-social Behaviour legislation'.

44. They stated 'With regard to the disability parking bay provided by the Council, you have been advised that such bays are intended for any disabled badge holder, not solely for yourself, and that control of the bay is not enforceable by road traffic law and relies solely on the courtesy of other road users. Whilst the use or obstruction of this bay by others will cause inconvenience, please understand that such actions do not contravene road traffic law'.

45. They explained 'With regard to the problems being experienced by your wife as a result of the alleged anti-social behaviour of your neighbours, we have to advise you that the action that either the police or council can take is extremely limited as there is no substantial corroboration of these events, nor can the incidents be regarded as criminal offences. The Council is, however, prepared to offer mediation between parties in an effort to resolve matters'. Mr and Mrs C have advised me that they have refused offers of mediation made by the Council.

46. The letter concluded by saying 'Lothian and Borders Police and the Council have made considerable efforts, over a long period of time, to resolve the complaints made by you. We would not wish to underestimate the personal distress that such disputes can create, however, we have to advise you that, whilst we will continue to deal robustly with allegations of a criminal or anti-

social nature it will not be possible to enter into any further correspondence involving issues that we consider are either uncorroborated or have been satisfactorily dealt with'.

47. On 23 September 2005 Officer 4 wrote to Mr C's MSP and enclosed a copy of the joint letter to Mr C. He stated 'Whilst it is clear that there are issues of disagreement between these neighbours, the situation has degenerated into petty complaints from [Mr and Mrs C] which are not corroborated ... Mediation has also been offered but has not been taken up'.

48. In October 2005 the Council wrote to Mrs C in response to concerns raised by [Mrs C]'s Councillor on her behalf about her 'dissatisfaction with the response you have received from the Council to date'. They explained that 'unless the reported incidents are corroborated, we are unable to progress these through the legal action which you are stipulating is required. We are, however, able to offer mediation through a professional mediation service to all parties concerned. I note that, as yet, you have not wished to avail yourself of this service, but, should your decision change, please contact my Senior Housing Officer ... who will arrange it'.

Complaint: The Council failed to take appropriate action in response to complaints made by Mr C and Mrs C regarding the anti-social behaviour of two local residents including the consideration of witness statements and video evidence

49. In their responses to my enquiries, the Council provided copies of the Guidebook and the Tenancy Agreement for Mr D. The Guidebook details the procedures used to deal with neighbour complaints from tenants. In response to my initial enquiries the Council claimed that this procedure was also used for dealing with anti-social complaints 'related to owners and private tenants'. The relevant extracts from these documents are listed in Annex 2. The Council have confirmed that Mr D is a Council tenant and Mr E is an owner-occupier.

50. The Guidebook provided by the Council only details the steps which should be taken on receipt of a complaint from a 'tenant'. As Mr and Mrs C are owner-occupiers, I asked the Council to clarify their legal obligations in dealing with complaints of alleged intimidation and harassment made by owner-occupiers against a Council tenant and an owner-occupier, during the period October 2004 to September 2005. I also asked the Council to confirm which Council procedure they would have applied for each scenario.

51. The Council's initial response was 'although there is no legal obligation on the Council, where there were complaints from an owner against a tenant housing staff would try to resolve if possible'. The Council said 'at the time of these complaints, the council did not have an Anti-social Behaviour Team so the response would have been through the Area Housing Officer using Estate management procedures'. The Council later clarified that this meant using the procedure contained in the Guidebook. For complaints by an owner-occupier against an owner-occupier, the Council said 'we would not have become involved and the complainant would have been advised to contact their solicitor'.

52. I was not satisfied with the Council's explanation of their duties and responsibilities in this area and arranged to conduct a telephone interview with Officer 4. At various points during this interview, I drew Officer 4's attention to the legislation and Scottish Executive Guidance in this area and to the Council's obligations to their tenants as specified in their Tenancy Agreement (see Annex 2). I suggested that the legislation, guidance and Tenancy Agreement indicated that the Council had a role to play in dealing with complaints of the type detailed in Mr and Mrs Cs' correspondence with the Council. I suggested that these documents showed that, in response to complaints about alleged anti-social behaviour, the Council had the power to raise proceedings for recovery of possession of a tenant's property and to apply for an ASBO against persons of all housing tenure types. I also explained that, as I understood it, the legislation stated that the Council were obliged to have a joint strategy with the police which detailed how they will co-ordinate the discharge of their function in relation to anti-social behaviour in the authority's area.

53. Officer 4's initial response to my questioning was that the Council had no legal obligation to do anything for Mr and Mrs C. He explained that if the complaint involves a tenant, the Council would try to resolve the matter and would consider the tenancy conditions. He said that the Council would always try to resolve such a complaint as they try to foster good relations in the housing estate. Officer 4 agreed that there was an obligation on the Council to take up a complaint by an owner-occupier against a tenant where there is an alleged breach of the tenancy conditions. He indicated that the complaint would be dealt with under the procedure contained in the Guidebook as this was the procedure which they would use to enforce the Tenancy Agreement. He added that the Council would also try to work with the police. He explained that the

procedure in the Guidebook was originally written for dealing with complaints from Council tenants as the Council's main responsibility at that time was to tenants, but that it now had a broader application. He said that the Council could also take action in relation to the Tenancy Agreement ie issue warnings or take legal action to end the tenancy and that this would be part of the investigation process. Officer 4 said that he believed that the types of complaints received from Mr and Mrs C were not a potential breach of the conditions. Officer 4 also suggested that, because Mr and Mrs Cs' complaints were allegations by one individual against another, then it would not be possible to consider action in terms of eviction from the Council property. I advised Officer 4 that, from my understanding of the law in this area, this was not the case (further details of the current legislative position are contained in Annex 2).

54. Officer 4 explained that as the Council have multi-tenure estates they would try to take steps to resolve any neighbour complaints as a matter of good practice. However, he said that the Council have to be aware of the limitations of their powers, for example, they cannot take immediate action against an owner-occupier. He said any complaints about owner-occupiers would initially be dealt with as a goodwill gesture and in the spirit of resolution of complaints in the Council estate. He said that the Council would then refer complaints of this type to the police as he believed this would be within their remit. He added that the Council's Anti-social Behaviour Team now deals with complaints of behaviour about all housing tenure types.

55. Officer 4 agreed that, in theory, an ASBO could have been considered for the type of complaints made by Mr and Mrs C. However, he explained that, at the time of the complaints, the legislation was in its infancy and so the ASBO route was not considered.

56. During further discussions, Officer 4 explained that the Council now have an anti-social behaviour strategy which was produced in partnership with the police and other local partner agencies and that the Council were legally obliged to have such a strategy as of 31 March 2005.

57. Officer 4 explained that, in this case, the Council's final document was in place from October 2005. Prior to October 2005, Officer 4 advised that the Council operated on previous guidelines ie they dealt with preliminary enquiries as a goodwill gesture and then referred the matter to the police.

58. I later made an enquiry of the Anti-social Behaviour Unit at the Scottish Executive. They confirmed that Councils first obtained the power to apply for ASBOs on 1 April 1999, under the provisions of the Crime and Disorder Act 1998. They advised that the Anti-social Behaviour etc. (Scotland) Act 2004 came into being on 28 October 2004 and that the Council had a statutory responsibility from that date to develop a joint strategy with the police on anti-social behaviour. They added that although, in general, the strategies were submitted to the Scottish Executive by Councils in 2005/2006 for assessment and approval, there was no statutory deadline for the completion of this task.

59. Along with the correspondence on his complaint, Mr C provided me with a copy of the Council's Feedback procedure which he and his wife had used to formally raise their complaints about the alleged anti-social behaviour. The relevant extracts from this document can also be found in Annex 2.

60. In response to my question about what steps had been taken by the Council to deal with the witness statements and references to CCTV footage contained in the documentation provided by Mr and Mrs C, the Council claimed that they had not received all of the relevant documentation but were unable to confirm exactly which documents they had received. The Council claimed that they did not have any record of 'a list of incidents or CCTV evidence being submitted' to the Council but that they 'would be happy to review this if the appropriate evidence can be made available'. They also stated 'you may wish to note that during the period of [Mr C]'s complaints, the Housing Unit has moved from a manual house file system to a computerised system. Because of the ongoing nature of [Mr C]'s case, papers have been progressed on the computerised system. I would also confirm that the Housing Officer involved most closely with [Mr C]'s case is on long term sickness leave ..., and we are unable to gain direct clarification from him at this time'.

61. When questioned on their procedures for dealing with witness statements and video evidence of alleged anti-social behaviour, the Council advised me that they did not have specific guidance on dealing with video evidence. They said 'Normally the evidence will be viewed by the Housing Officer or Anti-social Behaviour Officer, who will note the evidence, and follow this up with interviews with the complainer and anyone identified by the video in order to gain further background information. The Council is mindful that videos taken which record areas outwith the individuals own property may leave the person open to prosecution, and I enclose a copy of a note prepared by the Council's Legal

section detailing these concerns. This is taken [in] to account when acting on video evidence. I confirm that [Officer 1] did view a video provided by [Mr C], however, it was of poor quality, showing a shadowy figure and it was impossible to make any identification from it'. In his comments, Mr C stated that he did not recall showing any video tape to Officer 1, but said that he had sent a tape to the police.

62. During my enquiries I asked the Council if they asked to see the CCTV footage mentioned in Mr C's letters of 10 or 28 June 2005 or whether they commented on this point in any response to Mr C. The Council stated 'No CCTV evidence has been submitted to the council. The Area Housing Officer had previously viewed video tapes that proved to be inconclusive due to the poor standard of recording. As a result we did not request to view any further tapes or DVDs'.

63. During my enquiries the Council advised that they felt that the reports raised by Mr C related to incidents 'which either cannot be corroborated' or were 'of a minor nature which the Council and the Police have little power to resolve'. When asked which of the complaints they considered to be 'of a minor nature' and which were deemed to be uncorroborated the Council stated 'a number of the complaints from [Mr and Mrs C], including some that were witnessed, related to allegations that neighbours were 'Staring as she walked by'; 'Parking cars in an awkward fashion'; 'Deliberately talking to each other as [Mrs C] walked by'. After discussion with the police it was agreed that many of these incidents were minor in nature and even with witness statements, it would be difficult to either prove or indeed prohibit such behaviour'.

64. They added 'Mediation has been offered to [Mr C] as the most appropriate way to deal with such complaints, but this has not been taken up. As a result of this the council is of the view that there is insufficient corroboration of incidents and a lack of appropriate interventions having been tried to allow the ASBO procedure to be pursued'.

65. The Council also explained that they did not consider Mr and Mrs C's complaints against Mr D to be a potential breach of tenancy conditions 'due to lack of evidence and police corroboration'.

66. When questioned about why they made reference to the F family in response to Mr C's complaints about Mr D and Mr E, the Council explained

'prior to [Mr and Mrs C]'s complaints against their two neighbours the council had been dealing with an ongoing problem of harassment against [the F family] involving [Mr and Mrs C] in collusion with the two neighbours that they are now complaining about. In order to resolve the problem [the F family] were re-housed in June 2005'. The Council added 'In the written response to [Mr and Mrs C]'s early complaints against Messrs [Mr D] and [Mr E], it appears that the two problems may have become confused. The Council did, however, take note of the fact that [Mr and Mrs C] had advised that their complaints did not relate to [the F Family] through [Officer 4]'s response of 12 July 2005, further investigations and discussions with the police and the subsequent joint response in September 2005'. In his comments, Mr C denied that he or his wife had colluded with any neighbours.

67. In their comments on my draft report, the Council were strongly of the view that they had worked in partnership with the police in investigating and attempting to resolve Mr C's complaints and they suggested that I confirm this with the police themselves. I agreed this was a good idea and I had a meeting with a Superintendent from Lothian and Borders Police (Officer 5) who was involved in Mr C's case. Officer 5 explained that both his officers and Council staff were involved in dealing with complaints of alleged anti-social behaviour both by and against Mr and Mrs C during the period in question. He said that it was routine for the Council's Anti-Social Behaviour Team to check with the police about their involvement in dealing with complaints in the area around Mr and Mrs C's home. He explained that Officer 3 would regularly check the computer systems in the police station for any reported incidents in the area in question. He advised that he was aware that there had been two meetings held in order to try to find a solution to the problems in the area and that the police were present at the second of these, which had then led to the production of the joint letter by the police and the Council dated September 2005. Officer 5 said that the basic problem was that the types of incidents complained of fell short of the threshold for criminal charges and that the Procurator Fiscal would be unable to take matters forward.

68. As part of their comments on this report, the Council advised that, since the time of this complaint, they have developed a number of new strategies and protocols for dealing with complaints of alleged anti-social behaviour. They said this has included a review of the Guidebook, which is still on-going.

Conclusion

69. I agree that the Council have a limited role to play in dealing with complaints of alleged intimidation and harassment from owner-occupiers against owner-occupiers and that, if initial efforts by the Council did not resolve matters, they would refer complaints to the police. The Council have said that under the provisions of the Anti-social Behaviour, etc. (Scotland) Act 2004 they were obliged to have a joint strategy for dealing with anti-social behaviour complaints in general and that they had such a strategy in place in October 2005. It is noted that, in terms of the policy which the Council said they were applying at the time of Mr and Mrs C's complaints, there is little documentation to show that the Council 'dealt with' all the complaints about Mr E, referred them to the police or were satisfied that these complaints had already been dealt with by the police. However, it is clear from the letter issued jointly by the Council and the police of September 2005 that the two organisations considered correspondence sent by Mr and Mrs C to the Council and the police regarding the complaints. The letter does not refer to all the correspondence sent by Mr and Mrs C to the Council, however, the Council explained that the letter shows that the types of complaint were discussed with the police and that this included discussions on appropriate action as well as the determination of police involvement. I also note that Officer 5 has stated that Officer 3 facilitated regular contact between the Council's Anti-Social Behaviour Team and the police on the complaints and that this included Officer 3 making regular checks on the police's computerised system for any reported incidents around Mr and Mrs C's home. And although Mr C said he cannot remember giving video evidence to Officer 1, he has confirmed he gave it to the police.

70. It is clear, however, that the Council did not advise Mr and Mrs C of the Council's limited powers in dealing with complaints from owner-occupiers or of their policy of referring such complaints to the police and that it would have been helpful for them to have done so in this case.

71. The Guidebook contains a detailed procedure for dealing with neighbour complaints where it is alleged that there has been a breach of tenancy conditions. The Council have confirmed that complaints of alleged intimidation and harassment made by an owner-occupier against a Council tenant would be dealt with under this procedure. As Mr and Mrs C are owner-occupiers and Mr D is a Council tenant then this is the procedure which would have applied.

72. Throughout the period of this complaint the Council advised Mr and Mrs C that they were unable to take their complaints further due to the lack of corroboration of alleged events and lack of evidence. The correspondence provided by Mr C shows that on several occasions he and his wife wrote to the Council and advised them that there was corroboration and provided copies of signed witness statements. The Council have indicated that they do not have all the correspondence referred to, that their systems changed during the time of Mr C's complaint and that Officer 1 was not available to comment on the case. Mr C has indicated that he and his wife either posted or hand delivered the correspondence to the Council offices. Having studied the correspondence in detail, it is clear to me that the Council have either acknowledged receipt of Mr and Mrs C's letters or that there is evidence in the Council's files which indicates that they received the correspondence sent by Mr and Mrs C.

73. It is clear from the discussions with the Council and the police that the Council did take steps to consider the complaints made by Mr and Mrs C against Mr D including having meetings with the police in May 2005 and July 2005 to discuss the complaints. The view taken by the Council and the police, having considered the complaint, was that as the types of complaint made were deemed to be trivial in nature and would not be matters which would be considered appropriate for legal action then no formal action could be taken. It is noted that the Council did offer mediation as a method of resolution but that Mr and Mrs C did not accept this.

74. While I note all the contents of the joint letter, and am satisfied that the Council and police did consider the complaints in partnership, the Council have only been able to provide reports on their handling of two of Mr and Mrs C's complaints and a copy of three brief entries in diary sheets for November 2004 to January 2005. With the exception of the joint letter of September 2005, they have been unable to provide any other records of investigation or specific action taken in this area. The procedure in the Guidebook requires case reports to be completed for each complaint with details of the interview with the complainant, interviews with witnesses, information from the most relevant three neighbours in the locality and details of police involvement. I accept that the Council and the police have indicated that the types of complaints made by Mr and Mrs C were deemed to be trivial in nature, were not criminal issues and that no formal action could be taken under anti-social behaviour legislation. However, I consider that the overall lack of internal documentation is unfortunate.

75. In terms of their responses to Mr and Mrs C's complaints, it is clear from the Council's letter of 19 April 2005 that, by suggesting that the re-housing of the F family would resolve matters, the Council failed to specifically address Mr and Mrs C's complaints about Mr D. The correspondence between Mr and Mrs C and the Council during the period October 2004 to April 2005 clearly related to Mr D and not the F family.

76. I have also noted that, given that Mr and Mrs C had exhausted the Council's complaints procedure, the Council did not advise Mr C in their letter of September 2005 of his right of appeal to the Ombudsman's office. However, the evidence I have demonstrates that Mr and Mrs C were already aware of our office and had been in touch with us some five months earlier, in April that year. I am, therefore, satisfied that there was no injustice to Mr and Mrs C.

77. I would also comment that, in general, there would appear to have been a lack of knowledge on the part of the Council staff who dealt with this complaint on the content of the law, guidance and procedures which should have been applied. This is evident in both the correspondence between the Council and the complainant and the communications between the Council and the Ombudsman's office.

78. In conclusion, as the Council and the police have determined that, due to the nature of Mr and Mrs C's complaints, no formal action could be taken by the Council, other than the offer of mediation, then I believe that the Council have shown that, overall, they did take appropriate action to deal with Mr and Mrs C's complaints. However, the Council have not shown that the steps which were taken were documented in accordance with procedure or that they dealt with the complaints in compliance with the Council's Feedback procedure. I, therefore, conclude that there has been maladministration in the Council's handling of the complaints and I partially uphold this complaint.

Recommendation

79. The Ombudsman recommends that the Council:

- (i) apologise to Mr and Mrs C for failing to formalise their complaint into the Council's Feedback Procedure at the correct time;
- (ii) ensure any future complaints by Mr and Mrs C are dealt with in accordance with current procedural requirements; and
- (iii) ensure that staff involved with complaints of the same or a similar type are adequately trained in current Council procedures.

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

22 August 2007

Explanation of abbreviations used

Mr and Mrs C	The complainants
The Council	Midlothian Council
Mr D and Mr E	The alleged perpetrators
Officer 1	Housing Officer
Officer 2	Anti-social Behaviour Officer
Officer 3	Anti-social Behaviour Liaison Officer
Officer 4	Housing Manager
Officer 5	Superintendent for Lothian and Borders Police
The F family	Local residents
The Guidebook	Midlothian Council, Dealing with Neighbour Complaints, Housing Officer's Guidebook
Tenancy Agreement	Midlothian Council Standard Tenancy Agreement

Legislation, policies and procedures considered, including relevant extracts

Midlothian Council, Dealing with Neighbour Complaints, Housing Officer's Guidebook

The procedure states that once a complaint has been received a standard case report EM41 must be filled in at all stages of the process and that the complainant must be interviewed within ten working days. The procedure also specifies the details which must be obtained during the interview, including the need to clarify if there were any witnesses to the events.

For complainants who allege breach of tenancy conditions the procedure states that the Council are required to investigate the matter by interviewing any witnesses or 'if the complainant is unsure if other neighbours/residents witnessed an incident, the Housing Officer will request information from the nearest most relevant 3 neighbours'. It adds 'If Police involved get details of their involvement'. The procedure explains what information should be obtained and that 'this information is to be clearly and legibly written on the case report'. The procedure states that the Council should then interview the alleged perpetrator and, if the matter is not solely for the housing unit, the Council should liaise with the necessary external agencies and then reach a decision on the case.

The potential decisions which can be reached are noted as 'situation resolved prior to investigation', 'no action', where the complainant wished no action to be taken, 'no corroboration', in which case negotiation or mediation between the parties will be offered or 'complaint corroborated'. In the last case the Council procedure then goes on to describe further available options under the headings: 'negotiation and mediation', 'verbal warning' and 'written warning'. Further corroborated complaints can lead to potential 'legal remedies' such as 'apply for an interdict', 'apply for an ASBO' and 'Serve NOPFROP [Notice of Intention to Proceed for Recovery of Property]'.

For alleged breaches of tenancy conditions for which there are no witnesses the procedure states 'the alleged perpetrator will be spoken to, however, if appropriate all that is likely to be available is negotiation and/or mediation'.

Where the complaint does not allege breach of tenancy conditions the procedure states that no further action can be taken by the Housing Unit and that they should always try to re-direct the complainant to another appropriate contact point.

Midlothian Council Standard Tenancy Agreement

The agreement states 'you must not harass or act in an anti-social manner to or pursue a course of anti-social conduct against any person in the neighbourhood'. It states that 'anti-social' means 'causing or likely to cause alarm, distress, nuisance or annoyance to any person or causing damage to any property' and 'harassment of a person includes causing the person alarm or distress'. The agreement states 'conduct includes speech' and 'a course of conduct must involve conduct on at least two occasions'. The agreement details actions which would be considered to be a 'nuisance' as 'general harassment, ... irresponsible parking ... of cars or vehicles in the street, ...'. The agreement also states 'if you ... cause such a nuisance to other residents in the area, we will take action against you, as tenant. This may include court action to end your tenancy'.

Midlothian Council Feedback Procedure

The procedure details three stages. Stage one is the completion and submission of the feedback form to the Council. The procedure states that where the matter requires a response the Council will normally respond within ten days. Where the complainant is not satisfied with the response they can ask for the matter to be referred to the nominated feedback officer for the service concerned. This officer is required to review the matter and write to the complainant within ten working days. The final stage is an appeal to the Chief Executive. The Chief Executive is required to give a reply within ten working days and if this is not possible the Chief Executive is required to contact the complainant to explain why.

The Housing (Scotland) Act 2001

Chapter 1 of Part 2 of the Act (by virtue of paragraph 7 of Part 1 of Schedule 2) provides that where a tenant has acted in an anti-social manner in relation to a person residing in the locality, or pursued a course of conduct amounting to harassment of such a person, or a course of conduct which is otherwise anti-social conduct in relation to such a person then the landlord may raise proceedings by way of summary cause for recovery of possession of the house.

Section 11 of the Act states 'a tenancy of a house is a Scottish secure tenancy if ... the landlord is a local authority landlord'.

The Crime and Disorder Act 1998

The Crime and Disorder Act 1998 (As Amended): Guidance on Interim Anti Social Behaviour Orders (ASBOs) and Power to Apply for ASBOs Extended to Registered Social Landlords'

The Criminal Justice (Scotland) Act 2003

The Antisocial Behaviour etc. (Scotland) Act 2004