

Enquiries: Ms Imogen Tonkin
Telephone: (08) 8226 8699
Ombudsman reference: 2022/00674
Agency reference: EF20/175 : ED22/6423



Mr Martyn Davis
By email: [REDACTED]

Dear Mr Davis

Your complaint about the District Council of Ceduna (the council)

I refer to your complaint about the council under the *Ombudsman Act 1972*.

You have raised several issues with this Office regarding the council's decision not to lease a heliport hangar facility (**the facility**) to you for the storage of your aircraft.

You have complained that the council's decision not to lease the facility (or a portion of the facility) to you has resulted in a loss of revenue and benefit to the community. You allege that in circumstances where the facility is costing the council \$20,000 to maintain and run each year, this decision may amount to maladministration, being a practice of a public authority that has resulted in substantial mismanagement of public resources. You also allege that the decision was made contrary to the council's *3.4 - Use of Council's Resources & Facilities* policy.

You also allege that the council has incurred a significant expense in moving containers into the facility in circumstances where the CEO, Mr Moffatt, was aware that you would be requesting a review of the council's decision. You allege that Cr Codrington informed Mr Moffatt on 22 December 2021 that you would be submitting a request for a section 270 review. At the time, Mr Moffatt advised Cr Codrington that the application would need to be submitted before 10 January 2022. You submitted your application on 6 January 2022, and the containers were allegedly moved into the facility on the same day at a cost of \$2,500. You note that, had the council subsequently chosen to lease part of the facility to you, the council would presumably have incurred a further \$2,500 expense to have the containers returned to their original location.

You also allege that your request for a section 270 review was not heard appropriately, and the council's decision not to proceed with the review was not made on the merits of the application. You allege that, without any discussion of the application, Cr Nicholls moved a motion to reject the section 270 review application. You also allege that the elected members did not consider your clarification that you had not at any stage suggested an annual rental fee of \$1,000, or the Ceduna Aboriginal Corporation's expression of support for your flying school proposal.

Finally, you allege that Mr Moffatt was inappropriately involved in the section 270 review decision. You allege that at the February 2022 council meeting, Mr Moffatt verbally admitted that a week prior to the January 2022 meeting, he had put together a motion to dismiss for Cr

Nicholls to bring forward. You allege that this was inappropriate, as the decision was not to be made by Mr Moffatt, but rather by the elected members of the council.

Whenever this Office receives a complaint, the matter is assessed as to whether the complaint comes within the Ombudsman's jurisdiction and, if so, whether he should exercise his discretion to commence an investigation. I have assessed your complaint and, although it is within jurisdiction, I have determined, in my discretion, that it is not in the public interest to take further action in relation to the matter.¹ I explain how I arrived at this decision below.

My enquiries

In my enquiries, this Office:

- assessed the information provided by you
- obtained a response from the council
- obtained and reviewed a recording of the February 2022 council meeting from you
- prepared this letter to you.

My assessment of your complaint

In deciding whether an investigation may be in the public interest, the following criteria may be considered:

- does the alleged administrative error amount to a serious failure to meet expected standards of public administration?
- is the complaint about matters of serious concern and benefit to the public rather than simply an individual's interest?
- is there evidence of ongoing systemic failure in public administration?
- are the circumstances of the complaint likely to arise again?
- is the complaint about an error of process?
- is the complaint about failures of ethical and transparent management?
- does the complaint relate to matters of public safety and security, the economic well-being of South Australia, the protection of public well-being, the protection of human rights or the rights and freedoms of citizens?
- has the complainant suffered significant personal loss?
- do the circumstances of the complainant increase their risk of experiencing abuse, neglect or other disadvantage?
- would investigation of the complaint be likely to lead to meaningful outcomes for the complainant and/or to the improvement of public administration?
- has another review body considered the matter or is another body more appropriate for reviewing the matter?
- what is the likelihood of collecting sufficient evidence to support a finding of administrative error?
- would investigation of the complaint involve effort and resources that are proportionate to the seriousness of the matter.

The decision not to lease the facility to you

The first issue raised by your complaint is whether the council's decision not to lease the facility (or a portion of the facility) to you was unreasonable, made contrary to policy, or constituted maladministration.

¹ Section 12H(1)(c) of the *Ombudsman Act 1972*.

In response to my enquiries, the council has advised that your request for use of a portion of the facility for storage of your aircraft was declined on the basis that it would not, on balance, represent the council's best use of the facility.

In reaching that conclusion, the council noted that the current and planned use of the facility for storage of Plant, Equipment and Records would need to be abandoned in order to provide for storage of an aircraft. The council advises that this is because the facility was not designed or intended for the storage of fixed wing aircraft, but rather for the short-term maintenance (and not storage) of up to two Sikorsky S92 helicopters. As such, access and egress from the facility is unusually constrained, and it would not be possible for a single engine fixed wing aircraft to be moved in and out of the facility while it was also being used for the council's intended use.

The council notes that the cost of abandoning the current and planned use of the facility and constructing a suitable alternative facility for the storage of Plant, Equipment and Records would be significant when compared with any reasonable rental fee you would rationally or commercially pay to the council, and it was for this reason that your request was denied.

I note you have also questioned why it was necessary for the council's records to be moved from their previous location into the facility. In response to my enquiries, the council has advised that the previous shed used for storage of the shipping containers holding council records was no longer suitable due to the location and age of the shed, as well as Ceduna's climate, particularly in summer.

The council advises that relocation of the records storage containers to the facility was considered 'a far superior solution to the existing shed, with the additional benefit of providing on site office facilities, including access to toilet facilities and Council's IT network (none of which was available at the existing shed) - at no additional cost to Council'. The council advises that, to date, no other suitable facility or location has been identified for the storage of council records.

I have considered the council's *3.4 Use of Council's Resources & Facilities* policy and note that the policy is simply a 'general statement' that the 'Council is committed to sharing resources or facilities where the applicant can show a clear link to a wider community benefit'. Noting the practical reasons the council has provided for declining your request, I consider that it was reasonably open to the council to make this decision.

In light of the above, I do not consider that an investigation of this matter by this Office would be likely to result in a finding of error or maladministration.

The expense incurred in relocating the containers

The second issue raised by your complaint is whether the council unreasonably incurred expenditure in relocating the containers to the facility, despite the CEO being aware that you would be requesting a section 270 review of the decision not to lease the facility to you.

In response to my enquiries, the council has advised that council staff 'had been waiting for many months for a Ceduna contractor to confirm when he would be able to move the 4 records storage containers to the Heliport Hangar, in pursuit of the strategy approved by Council on 20 May 2020'.

I understand the contractor advised the council in early December 2021 that he was in a position to move the containers, however a works order was not issued due to the pending consideration of your request to lease the facility, to be decided at the council meeting held on 15 December 2021.

Following the council's decision to decline your request, a works order was issued to the contractor on 16 December 2021 for the work to be undertaken by 14 January 2022. Noting that Mr Moffatt was only advised of your intention to submit a section 270 review request on 22 December 2021, it appears that the works order was issued prior to Mr Moffatt becoming aware that you intended to request a review of the council's decision.

The council advises that, had it reneged on the work order after learning of your intentions, it would still have been commercially liable for the cost, regardless of whether the work had actually been undertaken. The council also advises that the cost of the work undertaken was \$800, not \$2,500 as has been alleged.

The council additionally notes that its other plant and equipment had been stored in the facility for some time prior to your request and as such, would have needed to be removed in any case had the council changed its decision following your request for review.

In light of the above, I do not consider that an investigation of this matter by this Office would be likely to result in a finding of error.

The section 270 review

The third issue raised by your complaint is whether the council failed to appropriately consider your request for a section 270 review. I will consider this issue together with the fourth issue of your complaint, which is whether Mr Moffatt was inappropriately involved in the section 270 review decision.

I understand you allege that the council voted to reject your application, however I note that the minutes of the 19 January 2022 meeting state:

That Council, having reviewed it's [sic] previous decision of 15 December 2021 to decline Mr Davis' request for a lease of a portion of the Ceduna Airport Heliport Hangar for storage of his private aircraft, reconfirms the previous decision as made.

I understand that Cr Codrington raised his concern that the minutes of the 19 January 2022 meeting had been recorded incorrectly at the council's subsequent meeting on 16 February 2022, however the remainder of the elected members confirmed the minutes as written.

The council advises that some confusion may have arisen as Cr Nicholls did initially attempt to move a motion to either dismiss or reject your application. I am advised that the Mayor refused to accept the motion, as it would not be permitted under the provisions of section 270 of the *Local Government Act 1999*.

Mr Moffatt advises that, with assistance from himself and the Mayor in forming the motion in the manner he desired, Cr Nicholls ultimately moved a motion for the council to reconfirm its previous decision.

Having reviewed the recording of the 16 February 2022 council meeting which you have provided to this Office, I do note that, although the recording is difficult to hear, Mr Moffatt appears to have stated that he assisted Cr Nicholls in preparing the motion *in advance* of the meeting.

While I note that Mr Moffatt's explanation of his role in assisting Cr Nicholls to prepare his motion appears to differ from that which he provided at the 16 February 2022 meeting, it appears that, in either case, Cr Nicholls formed his own view of the motion and simply approached Mr Moffatt for assistance in preparing it. I consider that it was reasonably open

to Mr Moffatt to provide that assistance and, as such, I do not consider that Mr Moffatt was unreasonably involved in the section 270 review decision.

Turning now to the section 270 review decision itself, I note that, prior to its decision, the council was provided with a full copy of your section 270 review request, a copy of the council's Review of Decisions Policy, a full copy of the CEO's report to the council in relation to its original decision, and a full copy of the report to the council in relation to its decision to store records at the facility, made on 20 May 2020.

In addition, I note that all elected members undertook an inspection of the facility on the morning of the meeting, at which you were provided with an opportunity to address the councillors and to ask questions of the elected members and staff. I understand you were also offered the opportunity to address the elected members during the 19 January 2022 meeting, however declined to do so.

With regard to the letter from the Ceduna Aboriginal Corporation, the council advises that a copy of the letter was read out during the meeting by an elected member, however the letter was never received by or provided to council administration for recording.

I consider that a significant amount of information was provided to the elected members in advance of the 19 January 2022 meeting which would have allowed them to make a fully informed decision in relation to your section 270 review request. If any of the elected members held concerns about the proposed motion, it would have been reasonably open to them to raise those concerns during the meeting. I do note that Cr Codrington appears to have raised several such concerns during the debate.

In light of the above, I do not consider that an investigation of this matter by this Office would be likely to result in a finding of error.

Outcome of my enquiries

In light of my assessment above and on the basis of the evidence available I do not consider that an investigation of your complaint would be likely to result in a finding of error. Accordingly, I do not consider that it is in the public interest for this Office to undertake further enquiries into your complaint.

I understand that this may not be the outcome you wanted, but on the evidence currently available to me, I do not think further enquiries would achieve a different result.

I intend to end my consideration of your complaint, unless you are able to identify an error in my assessment of the matter. If you think you are able to identify such an error, I ask you to contact this Office by **15 September 2022** with your reasoning. If you do not contact this Office within that time, I will close the file.

Confidentiality

Please note that the Ombudsman Act imposes certain obligations on this Office and others, including complainants, officers and members of a council, to keep information about assessments confidential.

While section 29A of the Ombudsman Act restricts disclosure of information connected to a matter dealt with under the Act, I am able to authorise disclosure. Generally, I consider there is a public interest in disclosure of my decisions. Therefore, once I have closed the file, I authorise disclosure of this letter by you as you see fit.

I have sent a copy of this letter to the council.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steven Strelan', written in a cursive style.

Steven Strelan
DEPUTY OMBUDSMAN

8 September 2022

Cc Mr Geoffrey Moffatt
Chief Executive Officer
The District Council of Ceduna
By email