



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2017/0040**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50625652  
Dated: 19 January 2017**

**Appellant: Ian Driver**

**Respondent: The Information Commissioner**

**Heard at: Fleetbank House**

**Date of Hearing: 23 August 2017**

**Before  
Chris Hughes  
Judge**

**Dave Sivers and David Wilkinson**

**Tribunal Members**

**Date of Decision: 31 October 2017**

**Date of Promulgation: 8 November 2017**

**Attendances:**

For the Appellant: in person

For the Respondent: no attendance

**Subject matter:**

Section 42 Freedom of Information Act 2000

**Cases:**

R v Special Commissioner, ex parte Morgan Grenfell and Co. Ltd [2002] UKHL 21

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 19 January 2017 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. Thanet District Council (the Council), as part of its economic development agenda, compulsorily purchased Dreamland Amusement Park. It planned, with assistance of the Heritage Lottery Fund (HLF) and Kent County Council (KCC), to secure its restoration redevelopment and re-opening. It found a new operator, Sands Heritage Limited (SHL), to take on and re-open the park. The operator went into liquidation causing delay and disruption to the redevelopment of the facility.

2. On 31 January 2016 the Appellant wrote to the Council:-

*“In a report produced by TDC officer [name redacted] and e-mailed to the HLF on 6 May 2015 (attached) [name redacted] says “Following legal advice from Trowers and Hamlins we agreed to consider the previous tender submission from SHL.”*

*Clearly there was an issue of great concern to the Council which required the taking of legal advice about SHL’s application to become the operator of the Dreamland Amusement Park. Clearly this issue was of sufficient magnitude to require that AHL’s second tender submission be discounted from consideration in favour of its first.*

*Please provide me with a copy of the legal advice provided to the Council by Trowers and Hamlins. There is an overwhelming public interest in this information being made available to the public. The information has, I believe, already been shared with the HLF and no court case related to this matter is pending therefore rejection of my request on the basis of client confidentiality cannot be sustained.”*

3. The Council refused to provide the information relying on s42 FOIA which provides (so far as is relevant):-

***“Legal professional privilege.***

*(1)Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

4. This is a qualified exemption, where the exemption is engaged the public authority must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
5. In refusing the request the Council emphasised the importance of maintaining legal professional privilege which protected communications between client and solicitor, thus assisting openness, and the full and frank advice fundamental to the administration of justice. The refusal disputed the Appellant's argument that there was an overwhelming public interest in making the information public arguing there was no such clear justification and claimed that the advice was relatively recent and only affected a limited number of people.
6. In seeking a review of the request the Appellant argued that the advice had been taken in the latter part of 2014 and, since it related to the choice of an operator, the advice had now served its purpose and the Council should have recognised this and disclosed it. There was significant public interest given the significant public expenditure and the extent of media coverage. The disclosure would shed light on any potential wrong-doing, on whether it was a wise decision with respect to public money and whether the Council had carried out a fair procurement process. The review, upholding the original decision, acknowledged the level of public interest and the significant expenditure but indicated that disclosure would "*prejudice the outcome of ongoing legal matters connected to the Dreamland Project*". The author of the reply denied the existence of any allegations of misconduct, the advice did not refer to any allegations and the issue was not relevant to the consideration of the public interest which remained in upholding the exemption.
7. The Appellant complained to the Information Commissioner on 19 April. On 31 May he updated her by informing her that SHL was placed in administration on 27 May. The ICO investigated. She confirmed that there were two separate items of advice within the scope of the request. In weighing the public interest she noted £5M of funding from the HLF had been provided and that shortly before the information request SHL had applied for a Company Voluntary Administration to allow it to continue to trade. There was significant public interest in transparency concerning the public money involved. However there was a strong public interest in maintaining the privilege, at the time of the request the situation was in flux, negotiations were in progress and the legal advice remained pertinent therefore the public interest in maintaining the exemption had not waned. The ICO upheld the decision not to disclose.

The appeal to the Tribunal

8. The Appellant's grounds of appeal of 8 March 2017 agreed that legal advice privilege attached to the advice. He argued that the selection process for the new operator finished in 2014 and there had been no judicial review of that decision; the advice was therefore separate from the subsequent financial problems of SHL and not related to any current negotiations. He detailed the progress with the administration and winding up of SHL, that a new investor had come forward to fund the operation, that the Council would now be in negotiation with the Administrators and the new investor and therefore he submitted any legal advice relating to SHL could not be pertinent.
9. In advancing the positive case for disclosure he emphasised the number of people in the Council's area and the costs to them already incurred through the burden on the Council's finances, the significant irrecoverable sums due to the two local authorities and the likelihood that any new deal with an investor would be worse than that negotiated with SHL, and the loss to other creditors.
10. He gave details of a report to the Council's Scrutiny Panel of 13 December 2016 dealing with the lessons learned from this project, including the elevated risk of doing business with a fledgling company with no track record. He drew attention to the concerns expressed by members of the Panel which led to the setting up of a Dreamland Working Group whose minutes of 2 February 2017 record advice from the Council's Chief Executive:-  
  
*"in some instances it may be necessary to review some of the information relating to the subject in private. In particular, some of the information would be exempt from publication because of the ongoing legal negotiations and any public discussion of such matters may be prejudicial to the Council."*
11. In the light of this he argued that the extensive public interest, the need to know whether the Council had acted wisely, the significant loss to the public purse, the concerns of elected members about the events, the lack of transparency of the Council and the irrelevance of the advice to current legal issues meant that the advice should be disclosed.

The ICO response

12. The ICO argued that contrary to the Appellant's claim the advice remained live at the time of the request in January 2016. The ICO broadly acknowledged the public

interests in favour of disclosure identified by the Appellant (with the exception of the needs of creditors for the information).

13. The Appellant's argument that disclosure would enable the public to know whether the Council had acted wisely underscored the strength of public interest in the maintenance of the exemption explained in *Morgan Grenfell*:-

*"such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice"*

14. The ICO contended that the material the Appellant relied upon, the report to the Overview and Scrutiny Panel and the minutes of the meetings showed that there had been an explanation of the operator selection process and an exploration of what the Council needed to learn. Review of legal advice in private by members of the Council was an aspect of the proper working of the Council structure and not inappropriate lack of transparency.

#### The Appellant's oral arguments

15. The Appellant argued that in this context this was not a strong claim to privilege given the passage of time. There had been two items of advice to assist the Council find a new operator, he had been a councillor at the time and his best guess was that the advice was in autumn 2014 which meant that the advice was almost three years old.
16. The position was not in flux, a new investor had 99.9% of the equity and had invested £25M over six months and everyone, including the Council, were optimistic about the future.
17. With respect to the public interest the Appellant (relying on the caselaw of the tribunal) argued that there a lot of people were affected, significant sums had been lost and there needed to be transparency about the decision making of the public body; this amounted to a clear, specific justification for disclosure. On his analysis the legal advice had been instrumental in the appointment of SHL, which had resulted in financial loss to every household in the Council area, significant losses to the Council, a likelihood that the terms negotiated with the new operator would be less favourable to the Council. He argued that there had not been full transparency, the former leader of the Council and the Chief Executive were involved in the Dreamland Working Party and would not be keen to look at their own mistakes. The Working Party (as at August 23) had not met since its initial February meeting;

although a meeting scheduled for 8 May had been cancelled due to the General Election there had been no new date fixed.

18. The advice should be put in the public domain. He had become aware of the advice through a FOIA request to HLF from Louise Oldfield in May 2015 seeking all the correspondence between the Council and HLF about the opening of Dreamland. HLF had been concerned about the procurement and through this disclosure he was aware of legal advice. The officer report to the Council of 31 August 2016 entitled "Post Implementation Review Dreamland Phase One Lessons Learned" (bundle pages 87-13) stated (bundle page 95):- *"We received the expression of interest forms from six candidates, but following legal advice from Trowers and Hamlins, we agreed to consider previous tender submission from Sands Heritage Limited"* This report had been considered in open meeting by two Council Committees and the FOIA request to HLF had received a similar summary. He argued that this summary of the advice as sufficient to waive privilege.

#### Consideration

19. The tribunal was grateful to the Appellant for the clear and thoughtful way in which he presented his case. There were however significant problems with his case. Perhaps the most significant is with respect to the timeframe.
20. Although the Appellant emphasised the age of the advice which is now nearly three years old, that investment is going ahead with a new operator and therefore things are not in flux, the correct point of time to consider in evaluating the significance of any claimed exemption is the time when the request is made and answered. The request was made on 31 January 2016, it was refused on 2 March and the refusal was upheld in internal review on 19 April.
21. While the Appellant, as an active citizen and councillor for some of the period the project has been moving forward, has a long-running interest in the Dreamland project, his request was clearly triggered by recent developments. SHL had got into financial difficulties and had had a CVA approved by its creditors on 23 December 2015 and in March 2016 the Council did not hand over areas of the Park to SHL as had been intended (bundle pages 23-76 at page 28. Report to Creditors, Duff and Phelps, 19 July 2016). It is clear therefore that at the relevant time, everything was in flux, the rights of the various parties affected and the decisions as to the way forward which each or any might take – the Council, SHL, HLF or KCC were uncertain. Under such circumstances there is conflict and a risk of litigation and the legal advice

one of the parties has received which paved the way for it to enter into the agreement which helped create the situation is certainly “live”.

22. There is another conceptual problem with the Appellant’s approach. The Chronology attached to the committee report show the many steps in the process since the Council entered into a Memorandum of Understanding with two other parties to take the Dreamland project forward in 2009. Throughout that time the Council will, no doubt, have taken legal advice on various issues at various times as part of the process of ensuring the regularity and effective control of the process. In such a project it is likely that legal advice may have significance over a period of time in shaping and reflecting the approach of the public body to unfolding events. It will remain current for a long period.
23. The Appellant argued strongly for the public interest in disclosure, stressing the scale of the numbers of people and the amount of money concerned and also a lack of transparency. While the amounts of money involved are substantial, the tribunal did not think submissions based on the number of residents in the Council’s area added to the case. The arguments with respect to a lack of transparency and the need for more information to ensure accountability were also unsatisfactory. The reality is that substantial information has been put in the public domain through the various accountability processes (excluding FOIA) and the Appellant has made use of them; the liquidator’s report provides one valuable set of information, the Council through its lessons learned report and its committee processes has been ensuring scrutiny of a complex project which always had inherent risk, which required public intervention in the first place to bring the site back into use when in private ownership it had failed.
24. The argument advanced that, by referring to the contents of the advice in correspondence to HLF in 2014/5 and in a Council report of August 2016 which has been published under the normal governance arrangements, the Council does not stand scrutiny. The Appellant is aware of something drawn from advice provided by solicitors, but that reference to what the solicitors have provided is very far from a summary of documents which may deal with a range of related complexities with continuing ramifications. The tribunal is satisfied that the Council has not either in its letter to HLF nor in its Committee report, waived legal professional privilege.
25. The tribunal is satisfied that while there are arguments for disclosure the weight that they carry is not substantial when weighed in the balance. The principle of legal professional privilege carries substantial weight. Furthermore the specific

circumstances of this case are that the request was made at a time when the advice was live and the risk of litigation real.

26. The tribunal is satisfied that the ICO's decision notice is correct and dismisses the appeal.

27. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 31 October 2017