

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 14 October 2013

**Public Authority:** London Borough of Southwark  
**Address:** PO Box 64529  
London  
SE1P 5LX

**Decision (including any steps ordered)**

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1. The complainant requested information relating to the public authority's enforcement responsibilities under the Disused Burial Grounds Act 1884, specifically in connection with *Cross Bones disused burial ground*. The public authority withheld the requested information under the exception at regulation 12(5)(b) of the EIR on the basis that it is legally privileged information.
2. The Commissioner's decision is that the public authority was entitled to withhold the requested information on the basis of regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 3 June 2013 the complainant wrote to the public authority and requested information relating to a building on a disused burial ground known as *Cross Bones burial ground*. She claimed that use of the land on the site for a building development would be illegal under the Disused Burial Grounds Act 1884. Her request was worded in the following terms:

*'Before I return comments to that letter [of May 2013] I should like sight of the "briefing note" that you confirm has been finalised and circulated within the Council.'*

5. The public authority responded on 12 June 2013. It considered that the request was for *'.....the "briefing note" prepared by the Council, referred to in your previous correspondence with.....Assistant Lawyer in the Council's Legal Services department.'* The public authority however claimed that the *briefing note* was exempt from disclosure on the basis of section 42(1) FOIA – legal professional privilege exemption.
6. The complainant requested an internal review on 13 June 2013. The public authority wrote to the complainant with the outcome of its internal review on 16 July 2013.<sup>1</sup> It upheld the original decision to withhold the *briefing note* on the basis of section 42(1).
7. During the course of the investigation by the Commissioner, the public authority accepted that the request should have been dealt with under the terms of the Environmental Information Regulation 2004 (the EIR) by virtue of the provision in regulation 2(1)(c) of the EIR. Under regulation 2(1)(c), information is to be considered *environmental information* if it is information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in regulations 2(1) (a) and (b) (of the EIR) as well as measures or activities designed to protect those elements. The public authority accepted that the *briefing note* was on an activity affecting or likely to affect the elements.

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<sup>1</sup> The Commissioner has commented on this delay in the 'Other Matters' section further below.

8. The public authority consequently issued another refusal notice to the complainant on 6 September 2013 under the terms of the EIR. It claimed that the *briefing note* was exempt from disclosure on the basis of the exception at regulation 12(5)(b) of the EIR.

## Scope of the case

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9. On 17 July 2013 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She initially challenged the application of the exemption at section 42(1) because that was the exemption relied on by the public authority at the time of her request. Following the revised refusal notice issued to her by the public authority on 6 September, she further challenged the application of the exception at regulation 12(5)(b). The grounds on which she challenged the public authority's refusal to disclose the *briefing note* are addressed further below.
10. The substantive scope of the investigation therefore was to determine whether the public authority was entitled to withhold the *briefing note* (the disputed information) on the basis of the exception at regulation 12(5)(b).

## Reasons for decision

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### The disputed information

11. The Commissioner understands that the disputed information was produced by the public authority's Legal Services department with the primary purpose of considering the public authority's responsibilities in relation to enforcing the prohibitions on buildings on disused burial grounds as laid out in the Disused Burial Grounds Act 1884.

### Regulation 12(5)(b)

12. A public authority may refuse to disclose information on the basis of regulation 12(5)(b) if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
13. The public authority submitted that the disputed information is subject to legal professional privilege because it was sent by a solicitor to the Director of Legal Services for the benefit and use of its officers only. It

argued that the exception at regulation 12(5)(b) is a broad exception which extends to information covered by legal professional privilege.

14. The public authority argued that disclosure would adversely affect its ability to provide legal advice to its departments and officers without fear that the advice in question will then be disclosed beyond its intended recipients. Without this assurance the purpose intended by legal professional privilege, namely to ensure access to full and frank advice between solicitor and client, will be lost.
15. It explained that the issue was still *live* because the public authority could be called upon to bring enforcement action against previous and future developments on the Cross Bones site. If the disputed information was to be disclosed, the public authority's ability to bring legal action or other action in respect of contraventions of the Disused Burial Grounds Act 1884 either in respect of the Cross Bones site or elsewhere may be impeded or prejudiced.
16. The complainant queried what she regarded as a discrepancy between the public authority's explanation above<sup>2</sup> and the following statement in its letter of 12 June 2013: *'The Council confirms that it does hold information in the form of a briefing paper prepared by the Director of Legal Services and which provides legal advice regarding disused burial grounds.'* She felt that the public authority was suggesting that a solicitor in the private sector had prepared the briefing note. She strongly disagreed that was the position and emphasised that the individuals who prepared the briefing note *'do not provide legal advice to the Council in an independent capacity.'* The suggestion (as the Commissioner understands) being that legal professional privilege would not apply to legal advice provided by in-house lawyers – i.e. lawyers employed by the Council.
17. The complainant also disagreed that disclosure would impede or prejudice the public authority's ability to take enforcement action in future. She alleged that Transport for London (TfL) owns the Cross Bones site and that it had not been contacted by the public authority regarding the potential development on the site. Making public what action an enforcement authority can and will take if the law is broken is not unusual. The public should be confident that an enforcement authority correctly interprets the law in respect of disused burial

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<sup>2</sup> The public authority had provided her with the same explanation on 6 September

grounds. She submitted that *ignorance of the law* resulted in the London County Council (former acting enforcement authority) failing to take steps to prevent the building on the Cross Bones site in or around 1928/29. Her intention as she put it, '*is to ensure that the same mistakes are not made in the future.*'

18. Legal professional privilege may be litigation privilege or advice privilege.
19. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
20. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.
21. The public authority did not state specifically whether the disputed information is subject to litigation privilege or advice privilege. However, having carefully considered the briefing paper in the circumstances of the case, the Commissioner does not consider that it was prepared by the public authority's Legal Services department in view of proposed or contemplated litigation. He does not consider that the briefing paper was prepared for the dominant purpose of giving legal advice for use in preparation of a case for litigation. There was no a real prospect or likelihood of litigation against the public authority at the time the briefing paper was prepared.
22. The Commissioner is however satisfied that the briefing paper was prepared in a legal context. It was prepared primarily to consider the public authority's responsibilities under the Disused Burial Grounds Act 1884 in relation to the enforcement of the prohibitions on buildings on disused burial grounds.
23. The Commissioner disagrees with the suggestion that legal professional privilege would not apply to communications between in-house lawyers and other employees of the public authority. Legal professional privilege is simply a set of rules or principles designed to protect the confidentiality of legal communications between a client and a lawyer.

The client here is the public authority. It is irrelevant that the Legal Services department is part of the public authority. Client/lawyer relationship does not cease to exist as result, and neither does the principle of protecting the confidentiality of communications arising from that relationship.

24. The Commissioner accepts that the issue is still *live* because of the potential of legal action against the public authority in relation its enforcement responsibilities (under the Disused Burial Grounds Act 1884) in connection with developments (current or future) on the Cross Bones site. He shares the view that disclosure may prejudice the public authority's ability to pursue successful legal action in future. The Commissioner notes that it is a matter which it appears the public authority only started dealing with recently in 2012, resulting in the preparation of the briefing paper. The Commissioner is also of the view that disclosure is likely to prejudice the public authority's ability to defend itself against legal action regarding its enforcement responsibilities in connection with building developments on the Cross Bones site. He notes the complainant's intention to ensure that structures or buildings are not constructed on the site in contravention of the Disused Burial Grounds Act 1884. Although the Commissioner disagrees with the complainant's view in relation to the adverse effect of disclosure on the ability of the public authority's ability to take legal action in future, he has addressed the arguments she submitted in support of her position further below under the public interest. He considers that those arguments relate to the public interest in disclosure rather than whether or not the exception is actually engaged.
25. In view of the above, especially the fact that the withheld information is legally privileged and is also still *live*, the Commissioner accepts that disclosure would adversely affect the course of justice. He consequently finds that the public authority was entitled to engage the exception at regulation 12(5)(b).

#### Public Interest Test

26. The exception at regulation 12(5)(a) is subject to a public interest test. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

#### *Complainant's arguments*

27. The complainant's arguments have already been summarised above in paragraph 17.

*Public authority's arguments*

28. The public authority considered the following factors were in favour of disclosing the disputed information:
- Openness and transparency in decision making.
  - Opening up issues of the day to public debate.
  - Releasing the information will lead to a greater public understanding of the legal issues relating to disused burial grounds.
  - The presumption in favour of disclosure under regulation 12(2) of the EIR.
29. The public authority however considered that the following factors were in favour of maintaining the exemption:
- The inherent public interest in maintaining the fundamental principle of legal professional privilege.
  - The risk of a weakening of confidence in the general principle of legal professional privilege.
  - The public interest in safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice.
  - The inherent public interest in the fundamental importance of the general principle of upholding the administration of justice.
  - The council's ability to bring legal or other action in respect of contraventions of the Disused Burial Grounds Act 1884 may be impeded or prejudiced if the legal advice were to be publicised.
  - The age of the information (April 2013) means it is still current.
30. The public authority considered that the public interest in not weakening the confidence in the general principle of legal professional privilege was particularly relevant. In addition, it argued that there were no '*special or unusual factors*' in the circumstances of this case to justify disclosure in the public interest against the strong public interest in maintaining the principle of legal professional privilege. It found support for this position in the Information Rights (Upper Tribunal) Tribunal's decision in Information Commissioner & WR [2012] UKUT 103 (AAC) (28 March 2012). The public authority therefore concluded that on balance, the public interest factors in favour of maintaining the exception outweighed the public interest in disclosure.

*Balance of the public interest*

31. In addition to the public interest factors identified by the public authority in favour of disclosure, the Commissioner agrees with the complainant that the public should be confident that an enforcement authority has and is correctly interpreting the law in relation to disused burial grounds. If mistakes have been made in the past, the Commissioner accepts that it is in the public interest to disclose the disputed information if it would help to ensure that similar mistakes are not made.
32. However, the Commissioner has to balance those factors against the strong public interest inherent in the principle of legal professional privilege. That public interest as the public authority correctly noted is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Equally strong public interest in disclosure must at least be shown in order to override the inbuilt public interest in maintaining legal professional privilege.
33. In addition to that inbuilt strong public interest in legal professional privilege, the Commissioner is also persuaded that there is a strong public interest in the ability of the public authority to bring legal action as well as defend itself against any legal action in relation to its enforcement responsibilities under the Disused Burial Grounds Act 1884. He accepts that making the public aware of what action an enforcement authority can and will take if the law is broken is not unusual. However, he believes that can be achieved without disclosing legally privileged information. This is more so if the information could be used by a public authority to initiate legal action or defend itself against such an action. In any event, the disputed information may not necessarily reflect the public authority's finalised position in relation to its enforcement responsibilities under the Disused Burial Grounds Act 1884. Advice from solicitors and counsel is a professional opinion on a set of particular facts and circumstances and because professional opinions may differ, the disputed information cannot be regarded as the finished article that the complainant seeks.
34. The Commissioner therefore agrees with the public authority that the public interest factors in favour of disclosure are appreciably weaker than those in favour of maintaining legal professional privilege by not disclosing the disputed information. He consequently finds that, in all the circumstances of this case, the public interest in maintaining the exception at regulation 12(5)(a) outweighs the public interest in disclosure.



## **Other matters**

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35. The FOIA does not stipulate a time limit for public authorities to issue internal reviews. However, as a matter of good practice, the Commissioner considers that a public authority should take no more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
36. The Commissioner therefore wishes to record his concern that it took the public authority over 20 working days to issue the outcome of its internal review to the complainant. He expects the public authority to complete internal reviews of responses to requests for information more promptly in future.
37. As mentioned in the body of the notice, the public authority should have handled the request under the provisions of the EIR and not the FOIA.

## Right of appeal

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38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
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**SK9 5AF**