
APPELLANT'S REPLY

1. This Appellant's Reply is served pursuant to rule 24 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, following the Response of the Information Commissioner ("the Commissioner") dated 7 December 2023. Where this reply does not deal with a particular point in the Commissioner's Response ("the Response"), this should not be taken as an admission by the Appellant of such a point.

Ground I

2. In respect of paras 36 to 42 of the Response, the Appellant submits that this appeal is entirely properly made against the Commissioner's Decision Notice. The appeal is clearly not made against the initial position of Transport for London ("TfL") in respect of Part 1 of the request, where TfL confirmed it held the information but withheld disclosure.

3. In respect of para 41 of the Response, the fact that TfL had already confirmed it holds the information is a highly relevant consideration to take into account when deciding whether S.31 FOIA enables TfL to NCND. The Appellant further submits that it is bizarre that the Commissioner decided that S.31 FOIA enabled TfL to NCND, given that TfL had already confirmed that it held the information by email in response to the Appellant's initial request.

4. Furthermore, after the Appellant had served the Grounds of Appeal, the Appellant found that TfL has itself published its response to the Appellant's Freedom of Information Request on its website at

<https://tfl.gov.uk/corporate/transparency/freedom-of-information/foi-request-detail?referenceId=FOI-1927-2223> This publication clearly states: "In relation to **questions 1** and 3a through to 5e, **while the information is held** it is exempt from disclosure [...] [emphasis added]". A copy of this website publication is separately attached in the new Supporting Document 10.

5. TfL's publication appears to have been publicly available on its website since 29 November 2022. It is therefore already obvious to the world at large that TfL does indeed hold the information I requested in Part 1 of my request. Additionally, it would appear no prejudice whatsoever has been caused to TfL through its website publication confirming it holds the requested information; nor is any such prejudice likely to occur. Had any prejudice been likely to occur or indeed have occurred, it seems that TfL would not have published the confirmation on its website and would not have kept it published there to this day.

6. In respect of paras 44 to 47 of the Response, the Appellant submits that the mere confirmation of whether TfL holds the information in Part 1:

- (a) cannot possibly assist the "planning and preparation of criminal damage";
- (b) clearly cannot be seen as "motivational" for graffiti artists, nor provide such artists with "notoriety", "pride" or "kudos";
- (c) cannot reasonably be combined with other information to predict the matters listed in para 47 of the Response;

(d) cannot be prejudicial to the prevention of crime, particularly as TfL has already made such confirmation available to the world at large through its initial email response and the publication on its own website.

7. In respect of paras 49 to 53 of the Response, Hampshire can clearly be distinguished from this appeal. Due to the nature of Part 1 of the request, merely confirming or denying whether the information in Part 1 is held does not provide any confirmation about whether the policies had been in place, followed or used in any particular cases. Additionally, the information requested in Part 1 does not concern covert detection or preventative measures and does not concern information about the outcomes of cases.

8. Accordingly, the Commissioner was clearly wrong to decide that TfL can NCND the information requested in Part 1.

Ground II

9. In respect of para 56 of the Response, the Appellant repeats his submissions at paras 8-9 of the Grounds of Appeal. The requested information in Parts 3-5 does not relate to crime “prevention activities”. The requested information is not concerned with how TfL detects or prevents criminal damage. Rather, the requested information relates to how effectively TfL as a whole recovers compensation in respect of damage caused by graffiti (including damage where there is not necessarily criminal liability).

10. In respect of paras 58 to 62 of the Response, Cole can clearly be distinguished from the appeal. Parts 3-5 of the request relate to TfL’s recovery action across the entire organisation covering vast, yearly periods. Parts 3-5 of the request do not seek individual figures for a particular place or road (i.e. the M6 in Cole); nor do they seek individual figures based on the seriousness of the torts committed (whereas in Cole information was requested about speeding offences with a particular degree of seriousness and any applied leniency). The disclosure of the requested information would therefore **not** demonstrate any particular policy enabling potential tortfeasors to make judgements of the probabilities of TfL taking recovery action depending on the location or seriousness of a particular case.

11. Cole can be further distinguished by the fact that all the information requested is directly related to the criminal offence of speeding. In the current appeal, Parts 3-5 focus mainly on civil recovery action, which includes instances where there is civil, but no criminal, liability (e.g. if the requisite elements of the actus reus/mens rea for criminal damage are not made out, or if a statutory defence applies). Furthermore, in Cole, the public authority did provide information about the total number of prosecutions. This is broadly analogous to the aggregated, total information requested in Parts 3-5 of the request considered in this appeal.

Ground IV

12. In respect of paras 70 to 72 of the Response, the test for prejudice being ‘likely’ as set out in Hogan has not been met. The Commissioner has given undue weight to TfL’s assertion that there is an “ever-growing culture which encourages aspiring graffiti artists to target TFL trains and post the results on dedicated social media platforms”. As submitted in the Grounds of Appeal, the likelihood that the information requested in Parts 3-5 could cause

prejudice within the scope of S.31 FOIA is, at best, hypothetical and remote. The Appellant submits that the aggregated information requested in Parts 3-5 cannot reasonably be linked to particular graffiti incidents, locations or social media posts; nor can it reasonably be considered to encourage graffiti artists to target TfL trains.

Ground V

13. In respect of paras 76 to 79 of the Response, Camden can be clearly distinguished from this appeal. Whereas in Camden the request was for a list of empty properties, Parts 3-5 of the request do not seek disclosure of a list of locations at which it may be particularly attractive to commit offences or torts. Rather, Parts 3-5 request aggregated recovery action statistics for TfL as a whole in respect of vast, yearly time periods, which the Appellant has further offered to accept on a bi-annual basis. This information is only useful for scrutinising TfL's overall performance of the extent to which it exercises its legal rights to recover compensation to reduce the burden on the taxpayer and fare-paying passengers. The Commissioner's assertion that such aggregated information about TfL as a whole could enable potential tortfeasors to change their behaviour (in terms of dates, locations, times and intensity to avoid recovery action) is wholly misconceived.

14. In respect of para 83 of the Response, the Appellant does **not** agree that the information requested in Parts 3-5 relates to the prevention or detection of crime for the purposes of S.31 FOIA. Ground V is stated to be advanced alternatively to Grounds II-IV, i.e. the Appellant relies on Ground V if the Tribunal does not find in favour of the Appellant in respect of Grounds II-IV (see e.g. para 18 of the Grounds of Appeal).

Conclusion

15. In respect of para 94 of the Response, the Appellant made reference to Ss. 38 and 43 FOIA because these provisions were relied upon in TfL's responses to the Appellant. The Commissioner's Decision Notice also refers to these provisions, but does not consider them in further detail (see para 43 of the Decision Notice).

16. The Appellant further submits that the Commissioner should have fully considered the public interest arguments in favour of disclosure relating to Ss. 38 and 43 FOIA in its Decision Notice, in combination with the arguments relating to S.31 (*The Department for Business and Trade v The Information Commissioner & Anor [2023] EWCA Civ 1378* at para 48).

17. In summary, the Commissioner should order TfL to confirm or deny whether it holds the information in Part 1 of the request; and to disclose the information in Parts 3-5 of the request.

Dated: 8 December 2023