APPELLANT'S RESPONSE TO 2ND RESPONDENT'S SUBMISSIONS
Following the Tribunal's Case Management Directions of 9 April 2024

References are to pages of the Open Hearing Bundle [OHB/], the Authorities Bundle [AB/*] prepared for the hearing on 5 April 2024, the Small Bundle [SB/*] provided with TfL's submissions, and a Tiny Bundle [TB/*] provided with this response.*

1. This Appellant's Response follows the submissions served by Transport for London ("**TfL**") on 17 May 2024 ("**TfL's Submissions**"). The Appellant has aimed to avoid duplication from his Grounds of Appeal and Reply where possible. Where this Response does not deal with a particular point in TfL's Submissions, this should not be taken as an admission by the Appellant of such a point; furthermore, it may already have been addressed in the Grounds of Appeal or Reply.

FACTUAL BACKGROUND

2. Para 18 of TfL's Submissions: the Appellant reaffirms that graffiti is not always criminal under S.1(1) Criminal Damage Act 1971 (CDA1971). The requisite *mens rea* will not always be present in instances of damage caused by graffiti. Furthermore, S.5 CDA1971 provides a number of lawful excuses that may be present in particular cases of graffiti. Additionally, in cases of trivial damage caused by graffiti, protesters may be able to rely on human rights defences: *Attorney General's Reference No. 1 of 2022* [2022] EWCA Crim 1259 at para 121. Therefore, the information requested also covers instances of graffiti where there is no criminal liability, but where there is civil liability.

Preliminary point - TfL's initial response & NCND Position - Part 1 of the FOI request

3. Paras 25 to 29 of TfL's Submissions: the Appellant submits that TfL's approach it now claims to have taken to answering Part 1 of the FOI request is convoluted and simply implausible for the following reasons.

A. Part 1 of the FOI request is clearly structured following the format provided by S.1(1) FOIA. TfL has an FOI team whose staff can be expected to be aware of this provision and structure. Part 1 of the FOI request should clearly be interpreted as a single request for information (requiring a response considering a. confirmation of whether the information is held; and b. provision of the information itself), rather than two

separate requests for information as TfL submits. The Commissioner agrees with the Appellant on this point (see **OHB/C86**).

B. Furthermore, even on TfL's case that Part 1 comprised two requests (the Components), the purported 'First Component' should have been interpreted as a request for the information identified in the First Component. Indeed, even if the First Component had been a standalone request, it would have been unsatisfactory for TfL to respond that 'while the information is held, it is exempt from disclosure', while their position was in fact NCND. It is therefore impossible for the Appellant to accept TfL's claim that their position was NCND from the outset, as this simply does not logically follow from the response TfL provided to the Appellant's initial request.

C. TfL's response to the Appellant's request for internal review also appears to make arguments against the full disclosure of the policies, rather than against providing confirmation of whether they are held. For example, TfL's response refers to information regarding "**our** policies and procedures" (implying they are held by using the emphasised possessive determiner). It also claims that putting information into the public domain on this subject would arm vandals with 'additional knowledge and insight' into 'priorities, processes and procedures' (see **OHB/A26**). This further supports the Appellant's view that TfL initially confirmed it held the policies, but was withholding them from full disclosure.

D. TfL's 'clarification' dated 11 September 2023 was reasonably interpreted by the Appellant as a change of position, rather than a reaffirmation of TfL's initial position. This is further supported by the fact that TfL has admitted that the NCND position "was not made clear at the outset" (see **OHB/A31**).

E. The Appellant made clear in his reply to TfL following the 'clarification' that he considered it to constitute a change of position (see **OHB/A32**). TfL did not respond to this further, whereas it could (and on TfL's case, should) have explained then what it now claims about its initial interpretation of Part 1 of the request.

4. The Appellant submits that, in any event, TfL deserves criticism for the convoluted and confusing way in which it now claims to have approached Part 1 of the request (including TfL's failure to properly explain this in its response to the request for internal review and the subsequent 'clarification').

5. Furthermore, the Appellant does not accept that, on a reasonable construction of the language and phrasing used in TfL's responses, TfL's position regarding Part 1 was NCND from the outset. The Appellant maintains that TfL originally confirmed that it held the information requested in Part 1 (but refused to disclose it), a position that was not altered in TfL's response to the request for internal review.

6. Therefore, the Appellant submits that TfL has communicated to the world at large that it holds the information requested in Part 1, both through its emailed response to the Appellant and through the publication on TfL's website. A reasonable person reading TfL's publication on its website between November 2022 and April 2024 would have concluded that TfL does hold information in scope of Part 1 of the request (see **OHB/A66**). Despite this, TfL has produced no (open) evidence that this prolonged period of publication on its website has (likely) caused any of the prejudice that TfL now claims to envision.

7. It follows that, as TfL has published confirmation that it held the information requested in Part 1, it is a "nonsense" for TfL to claim that the public interest favours a NCND response: *MC v The Information Commissioner & Anor* [2014] UKUT 481 at para 22 (see **AB/92**). If TfL does not actually hold the information, the Appellant submits that the correct procedure is for TfL to now correct the record by confirming to the Appellant that it does not hold the information.

8. If the Tribunal finds against the Appellant on this preliminary point, the Appellant submits that S.31, S.38 and S.43 FOIA still do not provide a basis for TfL's NCND position in respect of Part 1 for the reasons set out in the Appellant's Grounds of Appeal, Reply and further submissions below.

D. ENGAGEMENT OF EXEMPTIONS

9. Para 38 of TfL's Submissions: to support its reliance on S.31, S.38 and S.43 FOIA, TfL appears to rely on its contention that "graffiti vandals are most commonly private individuals with limited personal assets" who would be "emboldened" by "knowledge of TfL's approach to recovering costs associated with their criminal behaviour". However, the Appellant notes that, in this appeal, he is no longer seeking full disclosure of TfL's policies in Part 1 (which could contain the thresholds of personal assets below which TfL may decide not to take action). Additionally, the 'emboldening' arises as a result of graffiti artists' limited personal assets, rather than as a result of the information of which the Appellant seeks disclosure.

Being unable to enforce civil judgments due to a lack of assets is a common problem creditors face and it is not specific to the context of this request nor TfL.

10. Para 40 of TfL's Submissions: the mere fact that annual civil recovery information for TfL as a whole could be interpreted by inviduals as 'high' or 'low', each with a different effect, is insufficient to engage the exemptions relied upon.

A. Firstly, individuals' interpretations of the information would be entirely subjective and in any case they would not properly reflect the full range of the action that may be taken if an offender is caught;

B. Secondly, TfL may choose not to take any civil recovery action against an offender , but such an offender could still have faced criminal action and sentencing (without being included in the information sought in this appeal);

C. Thirdly, by TfL's own contention, graffiti vandals are most commonly private individuals with limited personal assets. This means that the deterrence effect against them of civil recovery action is likely to be trivial, as TfL is unlikely to successfully enforce any civil judgments it obtains against such individuals. The most substantial deterrent against a graffiti vandal with limited personal assets is likely either a community order or a prison sentence, both of which are out of the scope of this appeal.

11. In *Reith v Information Commissioner and Hammersmith and Fulham [2007]* UKIT EA_2006_0058, the Information Tribunal considered whether the publication of the council's policy on towing illegally parked vehicles would likely cause relevant prejudice (see **TB/17**). The respondents contended that the prejudice test was met, because publication would or would be likely to "enable" individuals who unscrupulously breach parking regulations to know when they could do so with relative impunity. However, the Information Tribunal rejected this argument at para 39, holding that:

A. there was no evidence that any individuals would be "enabled" by publication of the policy (the fine for a PCN still being considerable). This holding is on all fours with this appeal: the graffiti offenders that TfL is concerned about still face significant criminal penalties, even if they do not face civil recovery action;

B. whilst the consequences of a fine are considerably less than the consequences of being towed, the fine for a PCN is substantial. In this appeal, the consequences of criminal penalties (e.g. imprisonment) are, in fact, more likely to be viewed as more serious than civil recovery action: in other words, in this appeal, publication of the

requested information would be even less likely to cause prejudice than in *Reith* on this point.

C. conversely, [disclosure] might reduce the incidences of anti social parking (which would assist the Council in their function). This holding is on all fours with this appeal: publication of the requested information might **reduce** the likelihood of potential graffiti offenders with more than limited personal assets engaging in criminal activity.

D. the process of deduction: in this appeal, this is unlikely to be particularly relevant as the Appellant no longer seeks disclosure of the full policies.

12. Furthermore, if TfL's argument was held to be valid, this argument could be extended to the publication of any annual data that has some connection to criminal offences, including data that is currently routinely published. Examples include annual data from police forces about the number of arrests they make, stop and searches they carry out, or fixed penalty notices they issue. A further example include the number of people proceeded against for speeding in a particular police force area on a particular road: and it is exactly such information that the public authority had already decided to provide in *Michael Cole v. Information Commissioner* (EA - 2010 - 0071) (see **AB/34** at paras 4-5).

Section 31

13. Para 46 of TfL's Submissions: the *Hogan* test is not met in respect of S.31 for the reasons set out in the Grounds of Appeal and Reply. Furthermore, it follows from the Appellant's submissions at para 10-12 above that the causal relationship test has not been met; alternatively, that there is no real and significant risk of the envisioned prejudice occurring; alternatively, that the public interest test favours publication.

Section 43

14. Para 49 of TfL's submissions: the Appellant does not dispute TfL's commercial interests in preventing graffiti from occurring. However, TfL has failed to establish a plausible causal relationship between the requested information and the likelihood of vandalism being increased. TfL fails to make clear how the mere confirmation of whether TfL holds policies and the publication of annual civil recovery figures for TfL as a whole would likely lead TfL to:

A. Incur additional costs that arise from vandalism;

B. Incur additional costs from trying to prevent vandalism;
C. Incur additional costs from foregone revenue.

15. TfL bears the burden of plausibly demonstrating that publication of the requested information would (be likely to) cause it to incur additional costs of the types identified, above and beyond the costs TfL would have incurred anyway if publication had not occurred. However, TfL has failed to concretely establish a plausible method through which individuals could abuse annual civil recovery statistics, for TfL as a whole, to cause further costs to TfL. The Appellant repeats his submissions on the issue of S.31, as TfL's argument under S.43 effectively boils down to the increased costs resulting from increased criminal activity under S.31. TfL's (flawed) submissions under S.43 and S.31 are therefore effectively linked and similar.

Section 38

16. Paras 51 & 52 of TfL's Submissions: the Appellant has agreed with TfL from the outset that graffiti artists endanger themselves and others by trespassing on the railway network. However, that is not the question under consideration in this appeal nor is it reflective of the burden that TfL must discharge before being able to rely on S.38. TfL has failed to concretely demonstrate that the publication of the requested information would (be likely to) endanger any person and as such cannot rely on S.38 to withhold the information.

17. Para 53 of TfL's Submissions: the Appellant submits that there is no plausible causal link between disclosure of the requested information and the endangerment of graffiti artists or others. This is again for similar reasons as to S.43 and S.31. In effect, TfL's reliance on these 3 exemptions are all for the same reasons, i.e. TfL's contention that publication of the requested information would be likely to lead to increased criminal activity on its railway network (resulting in increased costs for TfL and endangerment of graffiti artists and TfL staff). The Appellant disagrees publication would likely lead to increased criminal activity for the reasons he has already provided. The Appellant also notes that the test for endangerment (S.38) is higher than the test for prejudice (Ss. 31 and 43).

18. The Commissioner has previously issued a decision notice (FS50732758) against TfL in respect of another FOI request (see in particular **TB/28** - **TB/30**). That request was for a tabular summary of the number of Person on the track ('suicide attempt') incidents during the last 12 months which occurred on London Underground, per Line and per Station, separated into fatal and non-fatal incidents. In this case, the Commissioner was not satisfied that TfL

had demonstrated a causal link between the potential disclosure and a very significant and weighty chance of endangerment. The Appellant further notes that this decision was made in the context of a (more sensitive) request for information about specific lines, stations and dates, whereas in this appeal the request only involves (less sensitive) annual information for TfL as a whole. The Appellant submits that this further supports his submission that TfL has failed to establish a plausible causal relationship in this appeal.

E. PUBLIC INTEREST

19. Para 60(4) of TfL's Submissions: the Appellant notes that British Transport Police's publication at **OBH/A35** contains the location where the damage was caused, the personal details of the offender, and the value of the damage. This is exactly the type of information that TfL claims to be concerned about in this appeal, allowing the offender to gain 'kudos', 'notoriety' and 'pride'. The point the Appellant makes is that it is peculiar that information about specific incidents is routinely available through British Transport Police and other media outlets, yet TfL claims to be concerned about offenders gaining kudos and notoriety from annual civil recovery information (from which no information about individual incidents or details of offenders can be obtained).

20. The Appellant notes the points concerning the age of the publications with details about individual graffiti offenders. To further strengthen his point, the Appellant has included a new article from the East London Advertiser (see **TB/33**). This article, dated 19 January 2024, concerns the criminal sentencing of graffiti artist Josh Miller (known as Big Bill The Damager on Instagram), who caused £71,000 worth of damage to trains. He was also linked to the use of the SIKES tag. This further goes to show that details about individual offenders are already routinely made public through the public nature of criminal proceedings, undermining TfL's arguments.

21. [...]

Conclusion

22. The Appellant invites the Tribunal to allow his appeal and he requests that the Tribunal impose a substitute decision notice requiring TfL to:

A. In relation to Part 1 of the request, confirm or deny whether the information is held;
B. In relation to Parts 3-5 of the request, disclose the information.

[...]

Dated: 24 May 2024