
GROUNDS OF APPEAL

1. The Appellant considers that the Information Commissioner (“**the Commissioner**”) has erred in fact and law by finding that:

(a) Transport for London (“**TfL**”) can rely on S.31(3) Freedom of Information Act 2000 (“**FOIA**”) to neither confirm nor deny (“**NCND**”) that the information requested in Part 1 of the request is held; and

(b) that TfL can rely on S.31(1)(a) to withhold the information requested in Parts 3-5 of the request.

PART 1 (policies regarding recovery action related to graffiti)

2. In its responses to the Appellant's initial FOI request and the subsequent request for internal review, TfL confirmed that it held the information requested in Part 1. Please see page 2 of supporting document 1 and page 2 of supporting document 3. TfL also has a live press release on its website about successful civil proceedings for compensation against a graffiti vandal, which materially states: "This judgement is great news. It sends a message to any graffiti vandal thinking of targeting the Tube. Not only do you face a criminal record, but **we will pursue you for the full cost of your vandalism too** [emphasis added]." Please see supporting document 7.

3. After the Appellant complained to the Commissioner, TfL sought to change its position to NCND. TfL did not provide any further reasons why merely confirming whether the information was held would be likely to cause any relevant prejudice (despite having already confirmed twice that it held the information). Please see supporting document 5.

4. The Appellant accordingly submits that, following TfL's own disclosures specified at para 2 above, it is already obvious to a reasonable person that TfL holds the information requested in Part 1. Furthermore, merely confirming or denying whether recovery action policies exist (without disclosing those policies themselves) is not likely to cause any relevant prejudice to TfL. TfL's legal right to claim damages for civil torts such as trespass in the event of graffiti damage is a matter of law. TfL's legal right, and TfL's ability to exercise it, are entirely unaffected by the confirmation of the mere (non-)existence of an internal TfL policy. Indeed, TfL may pursue recovery action even if it does not have a policy for doing so; and it may choose not to pursue recovery action even if it does have a policy for doing so. Accordingly, S.31(3) FOIA does not apply to Part 1.

5. The Appellant consequently submits that the Commissioner erred by finding that TfL can rely on S.31(3) FOIA at para 42 of the Decision Notice. The Appellant also submits that S.38(2) and S.43(3) FOIA are also not applicable to Part 1 for the reasons specified at para 4 above. Accordingly, the Appellant submits that TfL must confirm or deny whether it holds the information requested in Part 1 in accordance with S.1(1) FOIA.

6. The Appellant accepts that the disclosure of detailed policies regarding recovery action may allow individuals with criminal intent to apply these policies to their particular plans to avoid recovery action. The Appellant notes that any restrictions to recovery imposed by TfL's policies (beyond restrictions in law) are entirely self-imposed and could be changed, to which end disclosure may in fact prompt more effective policies being put in place. However, in the premises, the Appellant does accept that disclosing the policies may render TfL more vulnerable to criminal damage, as potential offenders may be in a better position to work around specific conditions and any additional preventative information that may be set out in the policies. The Appellant would therefore now accept that S.31(1)(a) FOIA allows TfL to withhold the information if it is held.

PARTS 3-5 (annual statistics regarding graffiti recovery action & action to enforce orders)

7. Parts 3-5 relate to annual statistics for 2020 and 2021 about how TfL sought and obtained compensation for damage caused by graffiti through compensation orders during criminal proceedings, debt recovery action, and civil litigation ("**recovery action**"). Parts 3d, 4d and 5e relate to the action TfL is taking to recover any unpaid compensation (e.g. through debt collection agencies, warrants/writs of control, third-party debt orders etc.). The requested information relates to an extensive period of time and to TfL as a whole, rather than to specific incidents or locations. The Appellant submits that S.31(1)(a) FOIA does not allow this information to be withheld.

The prevention or detection of crime

8. The Appellant submits that, at para 15 of the Decision Notice, the Commissioner erred by holding that the prejudice envisioned by TfL by disclosing requested information relates to the "prevention or detection of crime". Specifically, the Commissioner erroneously accepted TfL's assertion that "the information requested relates to TfL's policies and activities to prevent graffiti on its property and rolling stock, and that compliance with the request would prejudice those activities". It should be noted that the Appellant has accepted that this reasoning does apply to the disclosure of the information requested in Part 1 (see above).

9. However, the information requested in Parts 3-5 are mainly annual, aggregated figures that allow the public to scrutinise TfL's overall performance in recovering compensation where graffiti has occurred. The Appellant therefore submits that this information cannot be likely to cause prejudice to TfL's policies and activities to 'prevent' or 'detect' graffiti. The information does not relate to TfL's crime prevention or detection methods. Rather, the requested information allows public scrutiny of how effectively TfL exercises its legal rights to obtain compensation from criminals who have already been 'detected'; and from persons who have not committed any criminal offence but are still liable in civil tort.

Causal relationship

10. Alternatively, the Appellant submits that there is no causal relationship between the requested information and the envisioned prejudice.

11. In respect of Parts 3-5, TfL has mostly relied on the mosaic effect to establish a causal relationship and the Commissioner has erroneously accepted this at paras 18-21 of the Decision Notice. The Appellant submits that the requested information cannot “enable individuals to build up a picture of past, current and potentially future enforcement activities”. This is particularly the case given that TfL may not choose to take recovery action for all incidents of criminal damage; and that not all recovery action necessarily relates to a criminal offence.

12. The requested information relates to yearly time periods and relates to TfL as a whole rather than to any specific locations or incidents. The Appellant submits that it is trivially unlikely, if not impossible, for anyone to use this information to predict “(i) the ‘value’ of certain vandalism (ii) the potential outcome of possible prosecutions to assess ‘worthiness’ (iii) collate a database of enforcement functions across TfL, other transport authorities and indeed any other public authorities”. The Appellant further submits that the requested information cannot possibly allow anyone to “predict patterns of enforcement activity by law enforcement officers, the extent to which they are likely to be subject to such enforcement activity and what the likely outcome of that enforcement activity might be”: the requested information does not relate to specific locations or enforcement activity and comprises a vast period of time.

13. The Appellant further notes that, in his complaint to the Commissioner, he had offered to accept the information for 2020 and 2021 as single sums (i.e. on a bi-annual basis) to even further eliminate the likelihood of any prejudice being caused by the mosaic effect. The Commissioner has not made any reference to this in the Decision Notice.

Likelihood of prejudice

14. Alternatively, the Appellant submits that the requested information would not be likely to cause the envisioned prejudice.

15. The relevant test is explained at para 15 of the judgment in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006) as follows: “We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.”

16. At para 25 of the Decision Notice, the Commissioner accepts that disclosure would be useful to someone intent on establishing the likelihood that they would be pursued for costs if they were to vandalise TfL’s network. While the Appellant has accepted that this applies to the disclosure of the information requested in Part 1 (see above), it cannot apply to Parts 3-5 of the request. Therefore, the Appellant submits that the Commissioner erred at para 25 of the Decision notice in respect of Parts 3-5.

17. The requested information relates to yearly time periods and relates to TfL as a whole rather than to any specific locations or incidents. The Appellant therefore submits that there is no real and significant risk that these aggregated figures could be used to predict whether committing an offence in particular circumstances at a particular time would attract recovery action by TfL. The risk suggested by TfL and accepted by the Commissioner is, at best,

hypothetical and remote. TfL's position is further contradicted by the various public disclosures regarding graffiti offences by TfL and the police forces it works with, some of which additionally include the location of the incident as well as the names of offenders and the value of the damage caused (see 'public interest' below).

Public interest

18. Alternatively, the Appellant submits that the public interest in disclosure outweighs the public interest in maintaining the exemption.

19. The Appellant accepts TfL's position, also accepted by the Commissioner, that graffiti is a significant problem for TfL in terms of cost and in terms of the safety of those who carry it out and those who attempt to prevent it. However, the Appellant sees this as a further reason in favour of disclosure, as there is significant public interest in understanding to what extent TfL exercises its legal rights to pass on this 'significant' cost burden to those responsible.

20. The Appellant makes submissions in favour of disclosure regarding Parts 3-5 which have been summarised by the Commissioner at paras 30-35 of the Decision Notice. The Appellant repeats those submissions for the purposes of this appeal. The Appellant makes the following submissions in addition:

(a) The UK has an open justice system, meaning that civil and criminal proceedings against graffiti offenders are generally public and the details can be viewed and reported on by journalists or members of the public;

(b) The 2002 'Graffiti In London' Report of the London Assembly Graffiti Investigative Committee made the following recommendation at page 71: "The GLA or TfL should appoint an officer who would be would responsible for pursuing offenders through the courts on behalf of all public transport operators. This would then enable the operators to increase investment in preventative measures." The requested information would assist members of the public in understanding whether this recommendation has had the desired effect.

(c) TfL has recently received multiple government bailouts and has increased its fares. The public have a significant interest in knowing how and to what extent TfL is exercising its legal rights to reduce the burden, caused by actionable and recoverable graffiti damage, on the taxpayer and fare-paying TfL passengers.

21. TfL's public interest arguments against disclosure are noted by the Commissioner at para 36 of the Decision Notice. The Appellant considers that these arguments primarily relate to Part 1, in respect of which the Appellant no longer seeks full disclosure (see above). However, the Appellant submits that, in respect of Parts 3-5, TfL's arguments carry no weight. This is because disclosing annual recovery action statistics for TfL as a whole cannot reasonably aid and assist the preparation of criminal activity.

22. Supporting documents 7 and 8 contain examples of press releases by TfL and British Transport Police which refer to specific graffiti incidents, including the locations, name of the offender, and value of the damage. While the Commissioner notes at para 39 of the Decision Notice that some time has passed since TfL's press release in supporting document 7, the Appellant submits that this cannot be used as an argument against disclosure. Indeed, if disclosing such information has now turned out to be as prejudicial to the prevention or

detection of crime as TfL claims, TfL could have taken the opportunity to remove the press release from its website at any time. It has, to this date, not done so.

23. Furthermore, British Transport Police's press release in supporting document 8 is dated 19/03/2021. Again, if TfL's claims relating to the prejudice were correct, TfL could have requested that this press release be taken down. The press release is, to this date, still published on British Transport Police's website, alongside numerous other press releases giving details about specific graffiti incidents. Additionally, as previously highlighted, these press releases simply contain information that would normally become public anyway through the associated criminal proceedings.

24. For all these reasons, the Appellant submits that the Commissioner erred by finding at para 41 of the Decision Notice that the balance of the public interest in maintaining the exemption at S.31 FOIA outweighs the public interest in disclosure in respect of Parts 3-5.

CONCLUSION

25. For the avoidance of doubt, the Appellant also submits that S.38 and S.43 FOIA do not provide a basis for NCND in respect of Part 1, nor for withholding the information in respect of Parts 3-5, for reasons similar to those submitted above. The Appellant repeats his submissions on the applicability of these sections from his request for internal review (supporting document 2).

26. The Appellant therefore requests that the Tribunal impose a substitute decision notice requiring TfL to:

- (a) confirm whether it holds the information requested in Part 1;
- (b) disclose the information requested in Parts 3-5.

27. As stated in the Appellant's initial complaint to the Information Commissioner, the Appellant would also be happy for TfL to provide the Part 3-5 figures for 2020 and 2021 in single, aggregated sums (i.e. as bi-annual figures) to even further reduce the possibility of the information being linked to specific locations or incidents.

Dated: 5 October 2023