



Neutral citation number: [2024] UKFTT 778 (GRC)

Case Reference: EA/2023/0433

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard on: 5 April 2024.**

**Adjournment and Case Management Directions given on: 9 April 2024.**

**Hearing: 01 August 2024 and final deliberations on 20 August 2024.**

**Before**

**Tribunal: Judge Brian Kennedy KC with,  
Specialist Panel members Miriam Scott & Marion Saunders.**

**Between**

**ALBERT TARCY**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**TRANSPORT FOR LONDON**

Second Respondent

**Representation:**

For the Appellant: The Appellant as a Litigant in person.

For the Respondent: Alec J. Watson, Solicitor in a written Response dated 7 December 2023 and Raphael Hogarth of Counsel at the hearing and by way of comprehensive submissions.

**Decision:** The appeal is dismissed.

## REASONS

### Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) against his decision notice of the Commissioner dated 2<sup>nd</sup> October 2023 Ref. IC-210387 (“the DN”) which is a matter of public record.
2. The Commissioner opposes the Appeal, the Appellant submitted his appeal on the 5<sup>th</sup> of October 2023.

### Background:

3. On 5 November 2022 the Appellant wrote to Transport for London (“TfL”) with a multi-part request pertaining to “Graffiti damage & costs recovery from offenders”
4. The Request comprised 15 questions, as follows:
  1. Does TfL have any policies for recovering the costs of removing damage caused by graffiti from offenders, either through debt recovery action, civil court action, or by asking a criminal court for a compensation order? If so, please provide me with those policies.
  2. How much money did TfL spend to remove damage caused by graffiti in 2020 and 2021? If an exact figure cannot be provided, please provide your best estimation.
  - 3a. How much compensation did TfL ask to be awarded by criminal courts in respect of damage caused by graffiti in 2020 and 2021?
  - 3b. How much compensation was TfL awarded by criminal courts in respect of damage caused by graffiti in 2020 and 2021?
  - 3c. How much of this awarded compensation has been paid to TfL by offenders?
  - 3d. What action is TfL taking to recover any such unpaid compensation that is overdue?
  - 4a. Against how many people did TfL take debt recovery action (not including civil court action) in respect of damage caused by graffiti in 2020 and 2021?
  - 4b. What was the total sum claimed by TfL in respect of all such debt recovery action?

- 4c. Out of the total sum claimed, what was the total sum paid to TfL in respect of all such debt recovery action?
- 4d. What action is TfL taking to recover any such unpaid sums?
- 5a. Against how many people did TfL take civil court action in respect of compensation for damage caused by graffiti in 2020 and 2021?
- 5b. What was the total sum claimed by TfL in respect of all such civil court action?
- 5c. What was the total sum awarded to TfL through civil court judgments (including default judgments & admissions) resulting from such civil court action?
- 5d. Out of the total sum awarded, what was the total sum paid to TfL in respect of such civil court judgments?
- 5e. What action is TfL taking to enforce any such unpaid sums awarded?
5. TfL responded on 29<sup>th</sup> November 2022.
6. TfL explained that the information requested in Question 2 (“How much money did TfL spend to remove damage caused by graffiti in 2020 and 2021?”) was not held because removal work is covered within the broader costs of cleaning and maintenance overall.
7. In respect of Questions 1, 3, 4 and 5 TfL asserted the requested information is exempt pursuant to Sections 31, 38 and 43 of FOIA.
8. TfL affirmed its position after internal review on 12<sup>th</sup> January 2023.
9. On 12<sup>th</sup> January 2023 the Appellant filed a Section 50 complaint to the Commissioner.
10. On 11<sup>th</sup> September 2023 TfL revised its reply in relation to Question 1 by adopting a “Neither Confirm Nor Deny” position, pursuant to Section 31(3) FOIA.
11. The Commissioner issued his Decision Notice on 2<sup>nd</sup> October 2023.
12. The Commissioner determined that TfL correctly applied the exemptions in Section 31 of FOIA, and was therefore entitled to withhold the requested information in Questions 3, 4 and 5, and it was entitled to neither confirm nor deny (“NCND”) holding the requested information in Question 1.

13. Having concluded that the Section 31 FOIA exemption was engaged the Commissioner did not go on to consider the Section 38 and 43 exemptions.

**The Relevant Law:**

14. Section 1(1) of the FOIA affords a general right of access to information from public authorities on request, and a corresponding duty on public authorities to comply with such a request by (a) confirming or denying that it holds the requested information and (b) communicating the information to the requester.

15. However these rights are subject to certain exemptions, set out in Part II of FOIA.

16. For the purposes of this case, the relevant exemption in Part II is Section 31 of FOIA which reads insofar as relevant:

**31 Law Enforcement:**

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified

(2) The purposes referred to in subsection (1) are –

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (e) the purpose of ascertaining the cause of an accident,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

17. Furthermore, Section 31 confers a qualified exemption by operation of Section 2(2)(b) FOIA, which means there is public interest test to be considered when the exemption

is engaged - information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

**Commissioner's Decision Notice:**

18. The information requested relates to TFL's policies and activities concerning graffiti on its property and rolling stock; compliance with the request would be likely to prejudice prevention of such activities.
19. The Commissioner is satisfied that the prejudice identified by TFL does relate to the prevention or detection of crime (criminal damage).
20. The provision of historic information about past prevention activities can have a prejudicial effect on TFL's ability to prevent graffiti in the future, and is valuable to individuals seeking to engage in future criminal activity.
21. Compliance with the request could be capable of harming the prevention or detection of crime in some way, and that a causal link between compliance with the request and prejudice to the prevention or detection of crime has therefore been demonstrated.
22. The disclosure of the requested information (including confirmation of whether particular information is held) would be likely to prejudice the prevention or detection of crime.
23. This is because such disclosure / confirmation / denial would be useful to someone intent on establishing the likelihood that they would be pursued for costs if they were to commit damage to TFL's network.
24. Consequently, disclosure / confirmation / denial would be likely to represent a real and significant risk to prevention & enforcement.
25. In terms of the public interest graffiti is a significant problem for TFL in terms of cost, and in terms of the safety of the perpetrators and those who attempt to prevent it.
26. There is a significant public interest in understanding the extent of this problem on TFL's network.

27. There is also a significant public interest in the measures TFL takes to prevent graffiti on its network.
28. There is a corresponding public interest in the measures TFL takes to recoup any costs incurred as a result of graffiti particularly as those costs are ultimately made up of public money.
29. However, the Commissioner also recognises that putting information into the public domain that could assist offenders in carrying out criminal damage would be detrimental to TFL's ability to prevent such activity.
30. This would ultimately be of detriment to the public, both in terms of the direct effects of graffiti on public assets like the London Underground to the members of the public who use it, and in terms of the additional cost to the public purse.
31. In this case, disclosure of the information requested would be to the detriment of the wider public, as those seeking to commit crime may be able to ascertain how best to do so, or better judge the risk of the consequences for doing so.
32. Therefore, the balance of the public interest in maintaining the exemption at Sec. 31 FOIA outweighs the public interest in disclosure (including NCND) in this case.

**Notice of Appeal:**

33. The Appellant's Grounds of Appeal are as follows:
  - (i) The Information Commissioner was wrong to find that TFL is entitled to neither confirm or deny (NCND) the existence of the policy requested in Question One;
  - (ii) The Information Commissioner was wrong to determine that Questions Three, Four and Five relate to the 'prevention or detection of crime';
  - (iii) The Information Commissioner was wrong to find a causal relationship between the requested information and the envisioned prejudice;
  - (iv) The Information Commissioner was wrong to find the requested information would likely cause the envisioned prejudice;

- (v) The Information Commissioner was wrong to determine that the public interest in disclosure was outweighed by the public interest in maintaining the exemption.

**Commissioner's Response:**

34. Parliament has made available an NCND response to combat the under-mining of crime prevention/detection measures.
35. This issue has been considered by the First Tier Tribunal in case number EA/2011/0114, Chief Constable of Hampshire Constabulary v. Information Commissioner.
36. The case involved investigation of suspected misconduct in relation to police officers by covert surveillance, known as 'Executive Authority'.
37. The Tribunal said at [23]:

*"There is no dispute that ... confirming or denying that the information is held would indicate whether Executive Authority had in fact been used during the time specified. If the Appellant holds information of the "outcome of the operation", that can only be because there must have been an operation (which within the terms of the request would include the use of Executive Authority).*

*The Tribunal is satisfied that s 31(3) FOIA is engaged because confirming or denying that the information is held would indicate whether Executive Authority had been used and the Tribunal is satisfied for the reasons set out above that this would prejudice the prevention and detection of misconduct."*

38. It is submitted the Tribunal's reasoning in Hampshire above is on all fours with the instant case.
39. This is because confirming or denying the existence of a costs-recovery policy would indicate to a graffiti artist whether the policy had been deployed on a case-by-case basis (as he or she would know whether they had, or had not, been subject to costs recovery action) – which in turn would inform their future criminal damage activities, thereby prejudicing the prevention of crime.
40. The Commissioner maintains that the Decision Notice reveals no error of law, and this ground of appeal should be dismissed.

41. The Commissioner is satisfied that the prejudice predicted by TFL does relate to the prevention or detection of crime (criminal damage).
42. The Commissioner is further satisfied provision of historic information about past prevention activities is valuable to individuals seeking to engage in future criminal activity.
43. The Commissioner does not agree with the Appellant's contention that annual aggregated figures of recovered compensation cannot be likely to cause prejudice to TFL's crime prevention or detection methods.
44. The Commissioner submits it is abundantly clear that putting information into the public domain on this subject would arm artists with additional knowledge and insight into TFL's processes and procedures for dealing with this criminal activity.
45. In turn he argues, that would be likely to assist with the planning and preparation of future criminal damage.
46. There can be little doubt, the Commissioner argues, compliance with the request would be capable of harming the prevention or detection of crime.
47. Thus he maintains a causal link between compliance with the request and prejudice to the prevention / detection of crime has been demonstrated.
48. In any event this ground of appeal, he argues does not identify any error of law in the DN, but rather appears to largely reiterate the Appellant's 'Request for an Internal Review' (29<sup>th</sup> November 2022) – and as such should be dismissed.
49. Section 31 of FOIA, he maintains is a prejudice-based exemption.
50. Determining whether a prejudice-based exemption is engaged depends on a three-stage analysis, as set out by the Information Tribunal in *Hogan v ICO* and *Oxford City Council* [2011] 1 Info LR 588 (“Hogan”) (approved by the Court of Appeal in *DWP v ICO* and *Zola* [2016] EWCA Civ 758).
51. Applying the principles of *Hogan* to the instant appeal, TFL points out there is an ever-growing culture which encourages aspiring graffiti artists to target TFL trains and post the results on dedicated social media platforms.



52. The Appellant has identified no error of law in the DN, and as such this ground of appeal should be dismissed.
53. The Commissioner recognises there is an inherent public interest in openness where this relates to the maintenance of public assets and the effective use of public funds. In this case, it may also be of interest in enabling the general public to understand the extent of the graffiti problem on TFL's network.
54. However it is clearly in the public interest to ensure the ability to deter and prevent criminal activity is not hindered by, *inter alia*, releasing to information which can be used to aid and assist with the perpetration of such criminal activity.
55. Having accepted that disclosure of the requested information in this case would be likely to prejudice the prevention / detection of crime, this will accordingly add weight to the public interest in maintaining the exemption in that context.

**Further Submissions from the Commissioner:**

56. The Commissioner says:

- (i) The prejudice identified by TFL is that revealing the policy and methodology used in relation to damages & costs recovery from graffiti offenders would give information to potential graffiti artists which could enable them to strategize their activities according to the methodology. That is a prejudice which is connected to the prevention of crime.
- (ii) There is a causal relationship between the disclosure of information within the scope of the request and the prejudice identified. Disclosure of the information used to pursue graffiti artists could be advantageous to potential offenders (who could use this information to focus their activity geographically or temporally).
- (iii) Anything which emboldens perpetrators of criminal damage could have the consequence of prejudicing the ability to detect crime. Accordingly, in the Commissioner's view, the potential prejudice is real and of substance, and there is a causal relationship between potential disclosure and the prejudice identified.
- (iv) The Commissioner's view is that disclosure would be likely to lead to the prejudice identified. The Commissioner invites the Tribunal to apply the same approach.

(v) The Commissioner considers there is a “real and significant risk” of the disclosure leading to the identified harm, even if the risk falls short of being ‘more probable than not’.

(vi) The Commissioner considers that disclosure of information about the recovery of damages and costs could assist potential graffiti offenders to perpetrate their crimes in time, date, place and intensity that exploits the rhythm and cycle of recovery actions. This in turn would be likely to prejudice the prevention of crime.

57. The Commissioner has invited the Tribunal to uphold his Decision that the public interest favours maintaining the exemption in this case.

58. The Commissioner submitted that where it is established that Section 31(1)(a) is engaged, the fact that disclosure would (at least) be likely to cause such prejudice is a factor which should be given weight in the public interest balance.

59. The Commissioner concluded that:

- i. TFL was right to withhold the information requested by the Appellant.
- ii. The Commissioner was right to uphold TFL’s decision.
- iii. There is no error of law in the DN, or improper exercise of any discretion.
- iv. The Appellant’s Appeal should be dismissed.
- v. Finally, the Commissioner noted that the Appellant makes passing reference to Sections 38 and 43 of FOIA in his Notice of Appeal. Given that these provisions do not feature in the Decision Notice the Commissioner is in no position to develop an argument in Response.
- vi. In the event the Appellant’s Appeal is successful in relation to Section 31 the Tribunal was invited to join TFL as 2nd Respondent to the proceedings so it may file any submissions as regards Sections 38 and 43.

### **Appellant’s Reply:**

60. The Appellant states in his response that the appeal is properly made against the Commissioner’s decision notice. The Appellant avers that the 2<sup>nd</sup> Respondent

confirmed that it holds the information. Further, the Appellant contends that the 2<sup>nd</sup> Respondent responded to his grounds of appeal online.

61. The Appellant argues that the Commissioner cannot hold that the 2<sup>nd</sup> Respondent can NCND. The Appellant states that the requested information concerns how the 2<sup>nd</sup> Respondent recovers compensation.
62. The Appellant avers that *Hogan* is not satisfied and the Commissioner did not give appropriate weight to the 2<sup>nd</sup> Respondents assertion regarding aspiring graffiti artists. The Appellant contends that the information requested in Parts 3-5 does not relate to the prevention or detection of crime for the purposes of section 31 FOIA.
63. The Appellant argues that the Commissioner failed to fully consider the public interest arguments in favour of disclosure specifically with reference to section 38 and 43 FOIA. The Tribunal on a comprehensive consideration of all the issues to be determined noted the Commissioners' helpful comment and adjourned the case to join the public authority, Transport for London ("TfL") as a second Respondent.
64. At the oral hearing the Appellant had the advantage of hearing evidence from Ms Hayward, a senior official, responsible for approximately 650 people in the public authority, including the policing and partnerships team and the crime reduction team, and reporting to the Chief Operating Officer (Hayward/1 [SCHB/37]);
65. Ms Hayward is experienced and expert in the matters covered by her witness evidence, having been at TfL since 2007, previously as Head of Transport Policing (Hayward/1 [SCHB/37]); The Tribunal had the further advantage of hearing her evidence in closed session and found Ms Hayward presented as a direct, helpful and knowledgeable and important witness on the issues before us.
66. As Ms Hayward explained, TfL's experience of 'Operation Silverback' is one aspect of an intelligence picture that has led it to conclude that, as Ms Hayward explained, any information TfL states publicly about its processes or practices, when it comes to pursuing graffiti offenders, is likely to fuel further offending.
67. The Appellant doubts that the graffiti was a direct response to public statements by the British Transport Police ("BTP"), and in any event contests the relevance of this evidence. In this regard the Tribunal is referred to: (i) the evidence at [SCHB/50], to which the Tribunal was taken in the CLOSED session, and (ii) the fact that Camden Town is the closest tube station to BTP headquarters (notwithstanding the Appellant's point about a railway station at §15 of his submissions), and (iii) in any event, Ms Hayward's professional judgment on the basis of a wide range of sources

of intelligence (as to which see Hayward/9 [SCHB/39]). In any event, TfL further relies on the specific points made in CLOSED at Hayward/17-18 [SCHB/41] and developed in their skeleton argument.

68. In §§22-28 of the Post-Hearing Submissions, the Appellant seeks to argue that the information he is seeking is less likely to prejudice the prevention of crime (and related interests) than information already published by TfL regarding fare evasion. Ms Hayward explained the particular characteristics of the graffiti vandal community, which distinguish this from other crime types, both in her statement (e.g. see Hayward/13) and in Open oral evidence (in the course of which she explained that TfL's experience, intelligence and "*years of expertise*" indicate that the mindset of graffiti vandals is unlike that of other crime groups, in particular in respect of their motivation and persistence). Isolated evidence about the characteristics of certain offenders of the kind referred to at §23 of the Post-Hearing Submissions is not capable of refuting that evidence (a fortiori in circumstances where it was not put to the witness). In any event, TfL further relies on the points made at Hayward/11-18 and expanded upon in Closed session.
69. As to §§29-31 of the Post-Hearing Submissions, TfL explained the basis, and proper construction, of its initial response to the Appellant's information request at §§23-28 of its skeleton argument.
70. The Tribunal has considered the Closed version of TfL's skeleton argument for a fuller exposition of its position on each of the issues in the appeal and is now satisfied that on all the evidence and the submissions before us before us we can accept and adopt the reasoning of the Commissioner in the DN and as set out above. We unanimously accept S31(3) FOIA is engaged for part one of the request and s31(1) for parts 3 to 5 of the request and the public interest favours non-disclosure of the requested information. Accordingly, we find that the DN reveals no error of law, nor any error in the exercise of the Commissioners' discretion and the Appellants grounds of appeal should be dismissed.

Brian Kennedy KC.

20 August 2024.

Promulgation Date : 29 August 2024.