

Edinburgh Tram Inquiry

edinburghtraminquiry.org

Floor 1, Waverley Gate

2-4 Waterloo Place

Edinburgh EH1 3EG

www.edinburghtraminquiry.org

email:evidence@edinburghtraminquiry.org

Phone: 0300 244 1940

Nick Smith
Head of Legal and Risk and Monitoring Officer
City of Edinburgh Council
Waverley Court
4 East Market Street
Edinburgh EH8 8BG

11 September 2017

By e-mail only: nick.smith@edinburgh.gov.uk

Dear Mr Smith,

**EDINBURGH TRAM INQUIRY
INQUIRIES ACT 2005 - SECTION 21 NOTICE**

I refer to your letter dated 31 August 2017, in response to the Notice issued on 28 August 2017 by the Inquiry, to the Council under section 21(2) of the Inquiries Act 2005 ("the Notice").

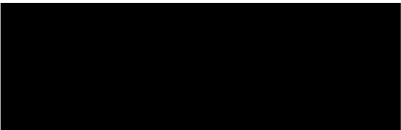
Lord Hardie has reviewed your claim, pursuant to section 21(4) of the Act that the Council is unable to comply with the Notice or that it is not reasonable in all the circumstances to require the Council to comply with the Notice.

Lord Hardie has considered your claim and has issued a written decision. Lord Hardie has also decided to vary the Notice.

I therefore enclose Lord Hardie's written decision in response to your claim and the variation to the Notice (the "variation Notice") which he has now issued under section 21(4) of the Act.

I look forward to receiving the Council's response within the timescale specified in the Notice, as that has been amended by the variation Notice.

Yours sincerely,



Gordon McNicoll,
Solicitor to the Edinburgh Tram Inquiry

Decision in respect of claim by CEC dated 31 August 2017 under section 21(4) of the Inquiries Act 2005.

Introduction

On 28 August 2017 I signed a Notice ("the Notice") under section 21(2) of the Inquiries Act 2005 ("the Act") which was served upon the City of Edinburgh Council ("CEC"). The Notice required CEC (a) to produce evidence to the Inquiry in the form of a written statement, certified as true and authenticated by CEC, and as specified in paragraph 1 of the Annex to the Notice; and (b) to provide the documents specified in paragraph 2 of the said Annex. The date for compliance with the Notice was 11 September 2017, subject to any claim made by CEC in terms of section 21(4) of the Act prior to 4.30 pm on Wednesday 6 September 2017. The Notice was accompanied by a letter from the Solicitor to the Inquiry ("the Solicitor"), explaining that the Inquiry required production of all (sic) evidence to the Inquiry in the form of a written statement with supporting documents.

Claim under section 21(4)

On 31 August 2017 CEC exercised its rights under section 21(4) of the Act. In doing so, CEC referred to the different terms used in the Notice and the letter but stated that CEC presumed that the terms of the Notice should prevail in any difference between them.

CEC claims that it is unable to comply with the Notice, or that it is not reasonable in all the circumstances to require it to do so. The reasons for the claim is that CEC is "unable to speak for the individuals concerned in agreeing the price of £362.5 m and/or the target sum of £39 m" and that "none of the relevant individuals are still employed by the Council". In addition CEC noted that "a number of witnesses have addressed these matters in their statements and appear on the list of witnesses who will give evidence at the oral hearings". Further reliance is placed upon the fact that "Documents relative to this matter have been produced to the Inquiry by the Council and Pinsent Masons LLP in response to the section 21 notices dated 31 July 2017".

Issues raised by CEC

The first issue is the alleged discrepancy between the Notice and the letter. I am not satisfied that there is any material difference between the two documents. In any event CEC is correct in giving precedence to the Notice, as the letter was provided to assist CEC.

The principal issue for my concern is whether and, if so, to what extent there is merit in any of the claims made by CEC under section 21(4). The alleged inability of CEC to comply with the Notice is based upon the fact that the individuals concerned in agreeing the price of £362.5 m and the target sum of £39 m are no longer employed by CEC. This seems to me to fail to recognise that CEC is a local authority accountable to the public for its actions. It cannot be the case that individuals, as

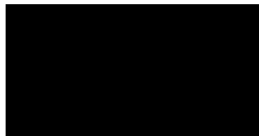
opposed to the Council, can spend in excess of £400 m of public funds without the approval of the Council. That is a decision of CEC and where such approval is given the public is entitled to know the basis of calculation or derivation of settlement figures of that amount. For that purpose proper records are required. CEC cannot evade its obligations in this regard by seeking to pass them on to former employees. The Notice was seeking the evidence of CEC, as opposed to its current or former employees, about the expenditure totalling in excess of £400 m. If CEC cannot explain that expenditure, it should say so in a certified and authenticated statement.

I reject the claim that CEC is unable to comply with the Notice.

The second claim is that it is unreasonable to expect CEC to comply for the reason stated above, which I have rejected. In addition, CEC rely upon the fact that other witnesses have addressed these matters in their statements and will give evidence at the oral hearings and also that documents relating to this matter have been produced. The first of these two reasons fails to appreciate that there is a distinction between the evidence of individuals and the evidence of the Council. What the Notice is seeking is the evidence of the Council, authenticated in accordance with its procedures and certified to be true. The second reason fails to recognise the distinction between a written statement and the production of documents generally. The Notice seeks the former. Insofar as the written statement refers to documents, they should be identified from the documents already produced to the Inquiry by using their alphanumeric number; where they have not already been produced to the Inquiry, copies should accompany the statement.

I reject the claim that it is unreasonable to expect CEC to comply with the Notice for these reasons.

However, as CEC mentioned apparent discrepancies between the Notice and the Solicitor's letter, it may indicate uncertainty as to what is required and whether it is reasonable to expect compliance in such circumstances. Accordingly, I have decided to vary the Notice requiring a written statement from CEC about the matters specified and such variation will accompany this decision.



Lord Hardie

Chairman

Edinburgh Tram Inquiry

11 September 2017

**INQUIRIES ACT 2005
NOTICE IN TERMS OF SECTION 21**

In terms of section 21(4) of the Inquiries Act 2005 ("the Act"), notice is hereby given to City of Edinburgh Council (CEC), having a place of business at Waverley Court BC 2/6, 4 East Market Street, Edinburgh EH8 8BG, that, as Chairman of the Edinburgh Tram Inquiry, I hereby vary the Notice issued to CEC in terms of section 21(2) of the Act dated 28 August 2017 ("the Notice") as follows:

(i) for the words from, "(b) to provide the documents" to, "of the said Annex" substitute:

"(b) to provide any documents mentioned in the said statement in accordance with paragraphs 2 and 3 of the said Annex";

(ii) for "Monday 11 September" substitute "Friday 22 September";

(iii) for "Wednesday 6 September" substitute "Tuesday 19 September";

(iv) for the Annex attached to the Notice substitute the Annex attached to this Notice.

Except in so far as the Notice has been varied as above, it shall remain in full force and effect.

In terms of section 35 of the Act, if CEC fails without reasonable excuse to comply with the requirements of the Notice as varied by this Notice it will be guilty of an offence and liable on summary conviction to a fine not exceeding level three on the standard scale.

In terms of section 36 of the Act, if CEC fails to comply with, or acts in breach of, the Notice as varied by this Notice or threatens to do so I, or after the end of the Inquiry the Scottish Ministers, may certify the matter to the Court of Session which, after hearing any evidence or representations, may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before that Court.



**Lord Hardie
Chairman
Edinburgh Tram Inquiry**

11 September 2017

Annex to Notice dated 28 August (as varied by Notice dated 11 September 2017)

(1) A written statement under section 21(2)(a) of the Inquiries Act 2005 explaining, with reference to relevant documents (if any) identified where possible in accordance with paragraph 3 below, whether CEC holds any record of the basis of calculation or derivation of the settlement figures specified in paragraphs (a) and (b) below:

(a) the price of £362.5m stated in paragraph 1 of the Agreed Key Points of Principle dated 10 March 2011 (CEC02084685) and in paragraph 6.1 of the Heads of Terms signed on or around 12 March 2011 (CEC02084685) (copies of both of which documents are appended here for ease of reference);

(b) the proposed price (or target sum) of £39m stated in paragraph 2 of the said Key Points of Principle and paragraph 6.3 of the said Heads of Terms.

and, whether or not it holds such a record, whether CEC is satisfied those figures were supported by calculations carried out or checked on its behalf, and if so the basis for that satisfaction;

(2) Under section 21(2)(b) of the Inquiries Act 2005, any documents in the custody or control of CEC referred to in the written statement supplied under paragraph 1, other than those identified by the inquiry alphanumeric reference number mentioned in paragraph 3 below.

(3) Any documents to which reference is made in the written statement supplied under paragraph 1 should be identified by the Inquiry alphanumeric reference number if such documents appear in the Haymarket database available to CEC; where such documents do not appear in the Haymarket database electronic copies, failing which, hard copies of such documents should accompany the authenticated written statement.

