ADDITIONAL QUESTIONS FOR ALASTAIR MACLEAN (2.3.18)

1. At the hearings (20 September 2017, transcript pages 48- 77 and 183-189), you were asked about the report to Council on 14 October 2010 by the Directors of Finance and City Development (CEC02083124) including, in particular, the sentence in the report that *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"* (paragraph 2.50) (which sentence first appeared in the report to Council on 24 June 2010, CEC02083184, paragraph 3.12). We have since identified the following emails: (i) an email dated 6 October 2010 from Alan Coyle to Dave Anderson and others (CEC00013930) which attached a draft (v1.5) of the report to Council on 14 October 2010 (CEC00013931, password "14.5") which contains a discussion of the outcome of the DRPs but does not contain that sentence, (ii) an email dated 7 October 2010 from you to Nick Smith in which you stated, "Can't open as I don't know the password but suffice to say I don't like the idea of going into the detail of DRPs for reasons I have already made clear at the meeting earlier today. The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now. Please remove any wording that goes beyond June" (CEC00012663), (iii) an email dated 8 October 2010 from Nick Smith to Alan Coyle in which Mr Smith (CEC00036170) suggested a new paragraph in relation to the DRPs, which included the sentence, *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"* and (iv) an email dated 8 October 2010 from Nick Smith to you (and Carol Campbell), forwarding Mr Smith's said email to Mr Coyle, including his proposed paragraph in the report in relation to the DRPs (CEC00036173).
   (a) In your email of 7 October 2010 you referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?
   (b) What did you mean in your email of 7 October 2010 by your request to "Please remove any wording that goes beyond June"?
   (c) Did you have any concerns that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report to Council on 24 June 2010, the report to Council in October 2010 would not fully take into account the further adjudication decisions between June and October 2010 and may, therefore, be misleading or potentially misleading?
   (d) It appears that by email dated 8 October 2010 (CEC00036173) Mr Smith sent you his proposed paragraph 2.49 (which became paragraph 2.50) of the report to Council on 14 October 2010. It appears, therefore, that you were aware of the

wording in that paragraph, including the sentence, *"The outcome of the DRPs, in terms of legal principles, remains finely balanced and subject to debate between the parties"*, before the meeting of Council on 14 October 2010. Do you agree? If so, that seems inconsistent with your evidence that you were first aware of the wording at the meeting of Council on 14 October 2010. Do you have any explanation for that apparent discrepancy? Are you able to explain why you did not take issue with what was said in the report in relation to the outcome of the DRPs either before, or at, the meeting of Council on 14 October 2010?

Answers supplied by Alastair Maclean via email on 19 March 2018

Alastair Maclean

Response to request for further information

Edinburgh Tram Inquiry ("ETI")

March 2018

1. Background

I have provided written evidence to the ETI on 4 November 2016 and oral evidence on 20 September 2017.

On 15 March 2018, the ETI raised some additional questions and provided me with relevant copy emails. These relate to what was reported to the City of Edinburgh Council (the "Council") in October 2010 in connection with the outcome of the adjudications.

I have reviewed the emails and also found in my own files a copy of:

(1) handwritten comments I marked on a draft of the October 2010 report (which appears to be Alan Coyle's ("AC") draft, numbered v 1.5); and

(2) a different version (numbered v1.6) of the draft report with covering email to AC from Nick Smith ("NS") dated 6 October 2010 at 1443.

The different drafts are confusing and it looks as though there may have been a problem with version control.

A pdf copy of both items is attached.

2. 14 October 2010 Council report

The October 2010 Council report came at a time when I had become sceptical about tie's strategy and prospects of success in the contractual dispute with the Infraco.

I believe I have given evidence to the ETI about the steps I was taking to ingather the appropriate information and to obtain independent advice for the Council, often in the face of fairly stiff resistance.

The Council was at that stage not yet in a position to challenge the advice from tie in any meaningful way and my strategy was to get the "legal ducks in a row" over the following weeks, so that a more informed and reasoned approach could be taken by the Council.

It is difficult to remember the chronology of events after all this time but to the best of my recollection, assisted by the papers I have available to me, the events surrounding the preparation of this report and my involvement in it are as follows:

2.1 AC and NS had been drafting the Council report on behalf of Dave Anderson ("DA"), the Director of City Development and SRO of the project with input from tie;

2.2 I (along with others at the Council and tie) was sent AC's draft report v1.5 by his email of 6 October 2010 1233;

2.3 Shortly after that, at 1443 the same day, NS sent an email to AC that had a different version of the draft attached;

I see that NS refers to my concern that the draft should not breach the confidentiality provisions in the Infraco contract which could have resulted in a technical breach by tie.

2.4 On 7 October 2010 at 2102 I replied to an email received from NS at 2038. In that email NS had forwarded on an updated draft which I was unable to open as it was password protected but I could see from the email chain that Richard Jeffrey of tie had added into the Council report some "numbers".

In that email I say:

"*...The agreed position was that we would not extend the risk beyond that taken inadvertently in June so I am surprised if Richard wants to do the exact opposite of that now.*

Please remove any wording that goes beyond June."

I was simply restating to NS my earlier comments that I did not want to run the risk of breaching the confidentiality provisions in the Infraco contract thereby resulting in tie being in technical breach.

I was also aware that the previous reporting on these matters to the elected members of the Council had taken place in June. There was a concern at that time that the Council/tie had inadvertently breached confidentiality by the wording in that June report and I asked that this report did not give any further detail so as not to exacerbate that concern any further.

At this stage, the concern was primarily about tie being in breach of the confidentiality provisions in the Infraco contract.

2.5 When I read AC's draft v 1.5 mentioned above, I provided a handwritten mark up to NS. I cannot be certain exactly when that was but I believe that it would have been around 6/7 October 2010.

In that mark up, I made various amendments but the main ones of relevance are that I:

(a) deleted the wording in paragraphs 3.49 to 3.53; and

(b) instead substituted one simple paragraph 3.49 as follows:

"*To date tie has been exercising its various rights and remedies under the Infraco contract but the detail of that needs to remain confidential at this stage. However, the Council should be aware that all options are being considered.*"

This version of the draft report was concerning because in addition to the confidentiality concern already mentioned, the language at paragraphs 3.49 to 3.53 went into detail about the adjudications, sought to justify tie's approach and present them in a favourable light and also gave detail in relation to the RTNs.

As I think I have explained to the ETI, I was hearing different views on the adjudication results (some of which were simply not credible) and I wanted the Council to get a proper independent analysis as to where we were and why in relation to the overall contractual position, rather than for tie's version of events simply to be put forward unchallenged. That analysis would include advice on the prospects of success in relation to termination of the Infraco contract by tie.

The essence of my revisals was to put a neutral holding position into the report to 'buy time' to enable a proper legal analysis by the Council (not tie) to be carried out, for me to understand that and then hopefully in turn for a more accurate and reasoned position to be reported to the elected members that the Council could properly stand behind.

I can see from the final published version of the report that some of my revisals relating to other paragraphs in the report have been taken into account but my substitute paragraph has not.

2.6 The ETI has now provided me with a copy of an email from NS to AC on 8 October 2010 at 0930 and an email with no covering message forwarding that on to me from NS on 8 October 2010 at 0931.

In that email NS proposes to AC that different wording is inserted into the 14 October 2010 Council report.

I do not recollect having seen that email although I can see that it was forwarded on to me.

My only comments on that are that I can only assume:

(a) those preparing the Council report had received further input from tie or others; and

(b) given that the Council paper would have been due to have been submitted on 7 October (ie one week before 14 October 2010), those preparing the report may have been under pressure to make last minute changes and submit the report.

2.7 Notwithstanding that email, the first time that I remember seeing the erroneous wording was in the 14 October Council meeting when the item was being considered by the elected members. I do recollect being exasperated and annoyed that there had been a continuation and repetition of the earlier overly optimistic version of events. However, I took the view that for the first time a proper reasoned analysis of Council's

legal position was being carried out and the position could be rectified in the following weeks/months when we were in a better informed position to do so. At that time reporting on the project was fairly regular.

3. Questions posed by ETI

I now turn to the particular questions (in bold) posed by the ETI:

(a) In your email of 7 October you referred to not extending the risk "beyond that taken inadvertently in June". What was that a reference to?

As indicated at para 2.4 above, I was aware that previous reporting on these matters to the elected members of the Council had taken place in June. There was a concern that the confidentiality provisions of the Infraco contract had been inadvertently breached by Council/tie as a result of the wording in the June report.

(b) What did you mean in your email of 7 October 2010 by your request to "please remove any wording that goes beyond June"

As indicated at para 2.4 above, I asked that October report did not go into any further detail at that stage in a way that would exacerbate the above concern any further.

(c) Did you have any concern that if the wording in the report to Council on 14 October 2010 was not to go beyond that in the report on 24 June 2010 the October report would not fully take into account the further adjudication decision between June and October and may therefore be misleading or potentially misleading.

Based on my/the Council's incomplete knowledge at that time, we were not in a position to inform the elected members about the full import of the adjudication decisions unless we simply put forward tie's version of events as had happened previously. To avoid doing so, the revised wording which I had sought (which ultimately did not end up in the final version to the elected members) was to delete all information about the adjudications and to insert wording which was more of a neutral holding position until a better informed position could be taken to the elected members.

(d) It appears that by email 8 October Nick Smith sent you his proposed paragraph 2.49 (which became para 2.50) of the report to Council on 14 October 2010. It appears therefore that you were aware of the wording in that paragraph including the sentence "the outcome of the DRPs in terms of legal principles, remains finely balanced and subject to debate between the parties", before the meeting of Council on 14 October 2010. Do you agree?

No.

As indicated at paragraphs 2.6 and 2.7 above, I do not recollect having seen that email although, having been sent it by the ETI, I can see that it was forwarded to me.

Please see my comments above.

If so, that seems inconsistent with your evidence that you were first aware of the wording at the meeting of Council on 14 October 2010. Do you have any explanation for that apparent discrepancy?

See above

Are you able to explain why you did not take issue with what was said in the report in relation to the outcome of the DRPs either before or at the meeting of Council on 14 October 2010.

As indicated above at paragraph 2.7, notwithstanding the email which you have forwarded to me, the first time that I remember seeing the erroneous wording was in the 14 October Council meeting when the item was being considered by the elected members. That is why I did not take issue with it before the meeting. Looking back, I do wish that I had seen a final version of this report before it was submitted to check whether or not my comments had been appropriately reflected.

I did not take issue with it in the Council meeting. It would have been unheard of and a significant breach of protocol for a third tier officer (as I was at that stage) to correct a Director's report in public and in front of the elected members. It is also not widely understood that officers (even the Directors) do not speak to their reports at meetings of the full Council. At the time I believed that I had given my advice on this matter and if my superiors chose to override that that was their prerogative to do so. As I think I indicated to the ETI in my oral evidence, I took the view that rather than creating further confusion, a wiser course of action was to continue to pull together for the first time a proper reasoned analysis of Council's legal position and once that was done the matter could be rectified, if needs be, in the following weeks/months when we were in a better informed position to do so. As the ETI is aware, matters were subsequently overtaken by the political and commercial desire to move to a short form mediation process.

Alastair D Maclean

Edinburgh

19 March 2018