

## **NOTE REGARDING DISCLOSURE OF FILE NOTES**

This note sets out the circumstances of the discovery of file notes detailed in the appended Schedule, why it is believed those may not have previously been disclosed to the Inquiry and how that appears to have come about. Given the late stage at which these documents are being disclosed, DLA do not seek to rely on the file notes in the context of the Inquiry.

### **1 CEC Mandate & DLA Piper Database**

1.1 In January 2012 DLA Piper ("DLA") received a mandate from CEC for all files and any other papers held relating to the Edinburgh Tram Project. DLA used a "DLA Database" for the purposes of the disclosure process. DLA's files were uploaded onto the "DLA Database". DLA reviewed all of the files on the DLA Database and separated out what was considered by DLA to be disclosable and non-disclosable under the Mandate. The non-disclosable documentation included internal DLA documents, relating to issues such as billing, printing, DLA staff resourcing and performance, internal circulation of drafts, notes of work and administrative matters such as booking meetings. Some of those documents included personal information relative to members of DLA staff working on the Edinburgh Tram project. The documentation which was marked relevant on the DLA Database was provided to CEC.

### **2 Disclosure to Brodies via Project Fathom Database & Brodies' Review**

2.1 In or around October 2013 Brodies were provided access to files via a database called the "Project Fathom Database". The Project Fathom Database was a subset of the DLA Database and included certain of the documents identified as non-disclosable under the terms of the Mandate by DLA. It therefore contained everything that had been provided to CEC via the Mandate as well as some internal documents which were non-disclosable under the Mandate.

2.2 Brodies carried out searches of the Project Fathom database using search criteria to identify relevant documents for review. The search criteria applied were all documents falling within a certain date range (principally from around December 2007 to shortly after contract close in May 2008) and there was also a key word search done. Brodies undertook a review of approximately 28,000 documents produced from the search criteria and marked them 'key', 'relevant', 'not relevant' or 'not sure'. Brodies kept a spreadsheet of notable documents reviewed with comments on each document.

2.3 When reviewing documents for the purpose of preparing repudiation letters to Pinsent Masons, in relation to the claims by CEC and TIE, the File Note dated 9 April 2010 was reviewed. Brodies e-mailed DLA in March 2014 to query the file note as, from the content, it appeared to relate to events during the period before close of the Infracore contract, which would suggest it should be dated sometime in 2008, rather than 9 April 2010. DLA responded to advise that, when looking at the files for CEC's Mandate, there were several file notes drafted in the same way, with square bracketed dates years after the original meeting and the recollection was that the properties of those file notes indicated that they were typed up by Andrew Fitchie's secretary Christa De Vos at

a later date. DLA provided Brodies with the metadata demonstrating it was created on 23 February 2011. DLA could not ascertain the provenance/origin of the file note and assumed it was created on the back of Andrew Fitchie's handwritten notes but it was not possible to confirm that with him at the time of the Mandate disclosure to CEC and there was not time to confirm it from handwritten notes. In DLA's view, notebooks were not disclosable under the terms of the Mandate. Given this view and the assumption that these file notes were typed up from notebooks, these file notes were not released under the Mandate. Those file notes were within the Project Fathom database provided to Brodies by DLA but it appears that only the file notes enclosed with the repudiation letters were identified in Brodies' searches.

- 2.4 Brodies provided 174 documents as enclosures to the repudiation letters to Pinsent Masons, dated 19 May 2014 and 22 September 2014.

### **3 Disclosure to the Inquiry**

- 3.1 In June 2014 the Public Inquiry was set up and a call for documents issued. The Inquiry was provided with all of the documents provided to CEC under the Mandate, as well as Brodies' repudiation letters and the enclosures to those.

### **4 Investigations following Inquiry queries regarding File Note dated 9 April 2010**

- 4.1 On 21 December 2017, Gordon McNicoll, Solicitor to the Inquiry, e-mailed Brodies to ask if the original file note from 9 April 2010 could be provided and to ask for any documentary evidence to support paragraphs 7.517 to 7.536 of Andrew Fitchie's statement regarding events surrounding the redrafting of clause 80 of the Infraco contract.
- 4.2 Brodies contacted Andrew Fitchie for any further information he could provide in relation to the Inquiry's queries. An extensive search was also undertaken for the original handwritten note on which the 9 April 2010 file note would have been based. Several boxes of handwritten notes/files were retrieved from storage by DLA and provided to Brodies on 5 January 2018. A search of those was completed on 25 January 2018 without locating the handwritten file note and further boxes were retrieved from storage by DLA for review and delivered to Brodies on 29 January 2018. The further search was completed on 1 March 2018 and the handwritten note was not found. DLA confirmed they had checked all of the boxes and other areas in the office where a notebook might be located but had not found anything either. DLA provided Brodies with the word document of the 9 April 2010 file note and the metadata demonstrating it was created on 23 February 2011. The Inquiry was advised of the position and Brodies offered to provide the word copy document with metadata on 7 March 2018. On 8 March 2018 the Inquiry confirmed that it did not require that to be provided.
- 4.3 The Inquiry then queried a number of apparent errors in the file note of 9 April 2010. Brodies raised those queries with Andrew Fitchie. Brodies prepared a draft letter to the Inquiry regarding the file note of 9 April 2010, which draft letter was not ultimately sent, as detailed below. The draft letter explained that: an extensive search had been undertaken for the principal handwritten note

but it had not been found; enclosed the word copy of the file note and explained the metadata; and, provided Andrew Fitchie's explanation that he had come across the handwritten note, with several others, when organising DLA's files for handover prior to his retirement from the firm and had passed them to his secretary to type up for the file and did not believe he had reviewed the typed up note. Brodies downloaded the other file notes numbered (ii), (v), (vi), (vii), (viii) and (ix) in the Schedule appended hereto from the Project Fathom Database on 13 March 2018. Those were found on 8 March 2018 by searching for documents created on 23 February 2011 in light of the explanation provided by Andrew Fitchie. It was intended to enclose all of the file notes with the letter to the Inquiry. It was believed at the time (as it transpired, mistakenly) that all of the file notes had been provided to the Inquiry previously. The draft letter was sent to Counsel with the file notes for comment on 15 March 2018, together with the file notes intended to be enclosed. The call for written submissions was then issued on the same day.

- 4.4 A draft letter was also prepared responding to the Inquiry's query regarding paragraphs 7.517 to 7.536 of Andrew Fitchie's statement regarding Clause 80 of the Infraco contract. Neither this nor the above mentioned letter was ultimately sent as (in the mistaken belief the file notes had been disclosed to the Inquiry) it seemed that the timetable for written submissions had superseded matters. The points covered in the draft letters were instead covered in the submissions. For example, the file note of 9 April 2010 is referred to at paragraphs 20 and 97 of DLA's written submissions.

## **5 Discovery File Notes not previously disclosed**

- 5.1 In order to assist Counsel with preparation of the Written Submissions, Brodies prepared various pdf binders of documents for Counsel in relation to different topics. A pdf binder of documents considered relevant to Clause 80 of the Infraco Contract was provided to Counsel along with the draft letter responding to the Inquiry's query regarding Clause 80. This contained file notes (v) and (vi) in the Schedule below. File notes (v) and (vi) were then appended to the Written Submissions (document 1 and 8 in the appendix) lodged on 27 April 2018.
- 5.2 It was noted shortly after their discovery on the Project Fathom database that documents 1 and 8 of the appended documents did not appear to be available on the Haymarket Database. At this time it was believed the file notes had been provided so were available to the Inquiry on the Waverley database but had not been uploaded to Haymarket.
- 5.3 The "Note by Chairman for core participants concerning content of closing submissions" was issued on 3 May 2018, regarding lodging of additional material beyond that previously produced to the Inquiry. Brodies presumed that the documents appended to DLA's Closing Submissions were not mentioned as they had previously been disclosed. It is understood that all documents provided to the Inquiry were placed on the Waverley Database and a smaller subset of the documents thereon were placed on the Haymarket Database. Just because something did not appear on the Haymarket Database did not mean it had not been produced to the Inquiry.

- 5.4 On 8 May 2018 Counsel e-mailed Brodies regarding Lord Hardie's note of 3 May 2018. It was noted that on one view an Application may not be required, as the documents appended to DLA's submission had been disclosed (as was then believed to be the case), though they were not on Haymarket. Counsel asked that consideration be given to whether any Application was necessary in any event. It was determined that a letter should be prepared to the Inquiry Solicitor asking whether an Application was required.
- 5.5 DLA were asked if they could access the original DLA Database to seek to definitively confirm whether the documents appended to DLA's submission had been previously submitted to the Inquiry. DLA took steps to reactivate access to the DLA Database. DLA confirmed by email on 8 May 2018 that the memos created by Andrew Fitchie's secretary were not released electronically as part of the mandate to CEC. It was possible that they were released in hard copy but it was not possible to verify that, given the volume of hard copy material released to CEC. DLA continued to check whether the other appended documents had been produced. On 9 May 2018 DLA confirmed that documents 2 - 7 appended to the Submissions had been disclosed previously and it was file notes 1 and 8 which had not been disclosed electronically. On 11 May 2018 a letter was sent to the Inquiry explaining that Brodies had discovered that documents 1 and 8 of the documents appended to the Written Submissions did not appear to have been previously disclosed and asked whether an Application was required. By letter dated 15 May 2018 the Inquiry confirmed that documents 1 and 8 would be accepted although late and that documents 2 - 7 would be uploaded to the Haymarket Database from the Waverley Database.
- 5.6 Prior to the Inquiry's letter of 15 May 2018 being received, in anticipation that an Application might be required in relation to documents 1 and 8 (file notes), Brodies contacted DLA on 11 May 2018 to clarify the explanation for documents 1 and 8 not previously being disclosed. A telephone call was had with DLA that evening. DLA confirmed that the file notes were not included in the original CEC Mandate because in DLA's view these file notes were not disclosable under the terms of the Mandate. Those file notes were in the Project Fathom database provided to Brodies. See also paragraph 2.3.
- 5.7 Brodies then carried out internal investigations to confirm what documents were provided to the Inquiry and whether or not the file notes had been produced. The supervising partner for the matter at Brodies was out of the UK on holiday, returning on Wednesday 16 May 2018. A call was arranged with DLA for Thursday 17 May 2018. Brodies then reviewed their file in relation to the notes of the approximately 28,000 documents reviewed. It was noted that only the file notes of 31 March 2009, 9 April 2010, 9 June 2010 and 24 January 2011 (all of which were attached to the repudiation letters) had been reviewed at the time. A search was also undertaken of the Haymarket Database, to check which DLA file notes had been uploaded. The documents enclosed with the repudiation letters were also checked to confirm which file notes had been disclosed with those letters. While carrying out that exercise, Brodies noted it appeared that three file notes (numbered (vii), (viii) and (ix) in the Schedule below) had not been disclosed. Following consultation with Counsel over the weekend this Note was prepared and clients updated and instructions sought on an urgent basis.

**6 DLA search disclosing further file notes**

- 6.1 DLA were asked to conduct a search of their files and the DLA Database to confirm whether there were any further file notes which had not been produced. On the afternoon of 21 May 2018 DLA advised that their search had identified several further file notes typed by Andrew Fitchie's secretary which were not included in the documents released to CEC via the Mandate but which were included in the Project Fathom database. Those file notes have been added to the Schedule appended hereto. See also paragraph 2.3.

**7 Conclusion**

- 7.1 It is of course highly regrettable that file notes detailed below were not previously disclosed to the Inquiry. Given the late stage in which they are being disclosed, DLA do not seek to rely on the file notes in the context of the Inquiry. Brodies and DLA both take their duties of disclosure to the Inquiry extremely seriously and apologise for any difficulties caused to the Inquiry as a result of these file notes not being disclosed at an earlier stage.
- 7.2 For the avoidance of doubt, nothing in this Note should be held as connoting a waiver of Legal Professional Privilege.

**APPENDIX – SCHEDULE OF FILE NOTES**

<b>File Note</b>	<b>On Haymarket?</b>	<b>Disclosed with repudiation letters?</b>	<b>Date document created/typed</b>
<b>(1) Disclosed to Inquiry with Enclosures to Repudiation Letters:</b>			
(i) 31 March 2009 • "Telephone Call – Gill Lindsay" • AF/LMH/310299/15/UKM/24662144.1	Yes • CEC01031217	Yes • Enclosure 171	26 May 2009
(ii) 9 April 2010 • "Meeting ... at CityPoint" • AF/CDV/310299/15/UKM/34720679.1	Yes • DLA00006319	Yes • Enclosure 22	23 February 2011
(iii) 9 June 2010 • "Telephone call with Tony Rush to discuss Carlisle HoTs" • AF/CDV/310299/15/UKM/30232174.1	Yes • DLA00006390	Yes • Enclosure 93	9 June 2010
(iv) 24 January 2011 • "RJ, SW, S Rae, H Moffat at City Point" • AF/CDV/310299/15/UKM/34682405.1	Yes • DLA00006406	Yes • Enclosure 109	22 February 2011
<b>(2) Disclosed to Inquiry in documents appended to Written Submissions:</b>			
(v) 11 March 2008 • "Discussed with GG" (brief note) • AF/CDV/310299/15/UKM/34722350.1	Yes • DLA00006479 • Appended to Written Submissions (Doc. No.1)	No	23 February 2011
(vi) 23 Feb 2011 • "Discussing also with GG" • AF/CDV/310299/15/UKM/34724427.1	Yes • DLA00006478 • Appended to Written Submissions (Doc. No. 8)	No	23 February 2011
<b>(3) File notes discovered not disclosed as at 18 May 2018:</b>			
(vii) 6 March 2010 • "With JME on Schedule Part 4" • AF/CDV/310299/15/UKM/34720248.1	No	No	23 February 2011
(viii) 23 February 2011 • "With GG" • AF/CDV/310299/15/UKM/34722617.1	No	No	23 February 2011
(ix) 23 Feb 2011 • "Telephone call with DM" • AF/CDV/310299/15/UKM/34725368.1	No	No	23 February 2011

<b>(4) File notes discovered by DLA search on 21 May 2018:</b>			
(x) 24 February 2008 • "Sunday am ... Telephone call with Graeme Bissett" • AF/CDV/310299/15/UKM/34492702.1	No	No	10 February 2011
(xi) 13 March 2008 • "20 min telephone call with G Lindsay" • AF/CDV/310299/15/UKM/34493135.1	No	No	22 February 2011
(xii) 1 May 2008 • "Advice to WG on letter to be sent to J Enenkel..." • AF/CDV/310299/15/UKM/34491188.1	No	No	10 February 2011
(xiii) 2 May 2008 • "Advice to tie management on procurement issues arising..." • AF/CDV/310299/15/UKM/34491371.1	No	No	10 February 2011
(xiv) 5 May 2008 • "WG/SB/AF/DMy ... at tie offices" • AF/CDV/310299/15/UKM/34491747.1	No	No	10 February 2011
(xv) 6 May 2008 • "Executive meeting following BBS sessions" • AF/CDV/310299/15/UKM/34492323.1	No	No	10 February 2011
(xvi) 21 April 2010 • "Call with Richard Jeffrey to discuss Tony Rush's role..." • AF/CDV/310299/15/UKM/29571878.1	No	No	22 April 2010
(xvii) 7 June 2010 • "Telephone call with Tony Rush" • AF/CDV/310299/15/UKM/30230895.1	No	No	9 June 2010
(xviii) 8 June 2010 • "Telephone call with Graeme Bissett" • AF/CDV/310299/15/UKM/30231770.1	No	No	10 June 2010
(xix) 9 June 2010 • "Richard Jeffrey called" • AF/CDV/310299/15/UKM/30233010.1	No	No	10 June 2010
(xx) 19 June 2010 • "Tony Rush called ... debrief with him" • AF/CDV/310299/15/UKM/30411528.1	No	No	21 June 2010
(xxi) 9 August 2010 • "Telephone call with Tony Rush to discuss Carlisle" • AF/CDV/310299/120029/UKM/32550821.1	No	No	10 February 2011

(xxii) 13 August 2010 <ul style="list-style-type: none"> <li>• "Telephone call with Tony Rush"</li> <li>• AF/CDV/310299/120029/UKM/32563650.1</li> </ul>	No	No	2 November 2011
(xxiii) 19 August 2010 <ul style="list-style-type: none"> <li>• "Telephone call with Tony Rush – 9pm"</li> <li>• AF/CDV/310299/120029/UKM/32562814.1</li> </ul>	No	No	2 November 2011
(xxiv) 19 August 2010 <ul style="list-style-type: none"> <li>• "Discussion with Richard Jeffrey, Steven Bell – post meeting"</li> <li>• AF/CDV/310299/120029/UKM/32562043.1</li> </ul>	No	No	10 February 2011
(xxv) 20 August 2010 <ul style="list-style-type: none"> <li>• "Debrief with Tony Rush on CEC meeting"</li> <li>• AF/CDV/310299/120029/UKM/32551369.1</li> </ul>	No	No	2 November 2010