

Assistant Solicitor to the Inquiry

[REDACTED]

E: [REDACTED]

T: [REDACTED]

Mr Dev Kapadia Crown Office and Procurator Fiscal Service

By email only: [REDACTED]

1 December 2022

Dear Mr Kapadia

RULE 8 REQUEST

I am writing on behalf of the Chair to the Sheku Bayoh Public Inquiry ("the Inquiry").

As you may be aware we had previously written to the Crown Office and Procurator Fiscal Service ("COPFS") to try to arrange to take a statement from you. COPFS have written to us to confirm your preference for your statement to be prepared under Rule 8 procedure.

Under Section 21(2)(a) of the Inquiries Act 2005 the Chair may, by notice, require a person to provide evidence in the form of a written statement. Rule 8 of The Inquiries (Scotland) Rules 2007, provides that the Inquiry may send a written request to any person for a written statement of evidence. I hereby request you provide a written statement to the Inquiry by **5pm on 22 December 2022**.

It is a criminal offence to fail to comply with this request without reasonable excuse. I refer you to Section 35(1) of the Inquiries Act 2005.

The Annex to this letter sets out the areas to be covered in your written statement.

Please provide your written statement by email to

[REDACTED]

ANNEX
HEARING 3a
AREAS FOR WITNESS STATEMENT
MR DEV KAPADIA

Please provide your **full name, date of birth, personal or business address.**

My full name is Dev Kapadia. My date of birth is [REDACTED] 1964. My business address is

Dundee Procurator Fiscal's Office

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Please provide as much detail as you can in relation to each of the following questions. These questions will focus on your involvement insofar as it relates to Police Scotland post incident management.

For the purposes of this statement, please consider Police Scotland post incident management to include all matters dealt with by Police Scotland relating to Sheku Bayoh's death, including but not limited to the investigation into the circumstances of his death, the procedures used to manage the response officers and engagement with the media.

Your role on 3 and 4 May 2015

1. What was your position in COPFS on and around 3 May 2015? How long had you been in this position prior to 3 May 2015? What were your duties and responsibilities in this position? What training did you have for this position?

On 3 May 2015 I held the position of Senior Procurator Fiscal depute in COPFS based in the Dunfermline office. At that time I had been in the role as a senior depute for about 6 years and had been in the Service since January 2000 as a Procurator Fiscal Depute.

My role as a senior court depute was to make decisions on reports received from the Police (aka marking cases), other reporting agencies and then decide on appropriate action, to prepare and conducted criminal prosecutions in court both at summary and solemn level, to mentor and provide advice and support to colleagues when required, to deal with search warrant applications and other legal requests, and give advice and instruction to reporting agencies and other external organisations as appropriate.

I was also an on-call depute as I had the relevant experience. I dealt with on-call requests appropriately, giving advice and direction as necessary to the calling police officer, bearing in mind not to interfere with operational matters within the jurisdiction of the Police service of Scotland.

This is not an exhaustive list

2. What is COPFS' role in Police Scotland post incident management? What was your role in dealing with Police Scotland in respect of post incident management?

I am not able to comment on this as I have not been involved in any post incident management and have no experience of this.

3. What were your duties and responsibilities in your role?

I did not have any post incident management duties or responsibilities. If this question relates to my general role, I have referred to them in Q1.

4. What training did you have for your role?

In my role as a senior depute (not post incident management) I received the general training every depute receives at the beginning of their service from case marking, professional standards, advocacy training, to being mentored by experienced deputies in the office and court, and thereafter ongoing compulsory training in domestic abuse, racial abuse, health and safety, data protection to name but a few areas of training. On-call training was on an on-going basis by experienced colleagues, until enough experience was built up to be on-call without supervision.

Formal training is provided by the COPFS Learning and Development team and I would refer the Inquiry to COPFS as they would be better placed to provide an overview and/or specific details of the training

provided to new Deputes and trainees when they join COPFS, both now and in 2015.

5. How many times had you carried out this role in dealing with Police Scotland prior to 3 May 2015? Please provide an estimate if required.

I would be on-call about 6-8 times a year, so in 2015 I would have been on the on-call rota since around 2003 – so roughly 60 times. The on-call duty would be for a week and it did not always mean that there would be calls from the police

6. Prior to 3 May 2015, what experience did you have in matters referred to you as part of the on-call Procurator Fiscal Depute role in which race was a factor to investigate?

I had not dealt with any on-call matters that involved race as a factor either by 2015 or since then, or at least where police have indicated specifically that the target of any search warrants was of a specified race, colour, or gender. Had there been such a time I would have questioned why such a factor was raised.

7. What training had you completed by 3 May 2015 in relation to equality and diversity issues? Which aspects of this training, if any, were applicable to your role?

I have received specific diversity training, but cannot specify when that was. If I recall correctly it was training about diversity awareness, for example where language might be an issue for suspects in police custody, or witnesses attending court during religious periods.

Formal training is provided by the COPFS Learning and Development team and I would refer the Inquiry to COPFS as they would be better placed to provide an overview and/or specific details of the training provided to new Deputes and trainees when they join COPFS, both now and in 2015.

Records

8. Is there a requirement for you to take contemporaneous notes of your involvement in an investigation? Is there a requirement to retain them?

I am aware that there is a data retention policy in relation to case papers and documents held by COPFS, but I'm not aware if there is such a requirement to retain notes such as notes taken during trials or on-call, but I consider it good practice to do so. Any notes taken manually on-call would be taken to the office rather than kept at home for obvious security reasons. I have in practice retained physical on-call notes until I have moved office, and then purging them in a clear out.

Insofar as on-call warrants are concerned, if a written application is received from the police, this and any search warrant applied for is retained in electronic or paper form (the latter much less so now, in the age of electronic warrants) in line with COPFS data retention policy.

Post-covid procedural regulation changes allow for electronic warrants with electronic signatures by the procurator fiscal and the sheriff. A full record is kept of the application and the electronically signed warrants in pdf form

In cases where the application is refused during the initial telephone call, for example in a case such as this, there is no copy of an application (unless the police have pre-prepared one – and retained it themselves) or a warrant as there is no need to prepare one. The only record I would have had was the hand written note I took during the telephone call, which I would have taken to the office and put in a folder holding my on-call notes and subsequently destroyed securely. I also have secondary notes from when I prepared my on-call claim form at the end of the on-call week and submitted electronically and retained in an electronic folder on my COPFS laptop.

This claim form is attached hereto

9. What notes did you take in the course of the matter? Please compile the full terms of your notes insofar as they relate to Police Scotland's post incident management.

As I had no involvement in the post incident management, I have no such notes.

The only notes I have retained in this matter come from my on- call claim form. This was a call from the police on 4 May 2015 at 16:46 hours lasting 5 minutes which notes "T/C – Drugs search warrant – search of property "connected" to death of Sheku Bayoh"

This was my only involvement in the matter, where it would appear that I was called by the police with a request to apply to a sheriff for a search warrant under the misuse of drugs act 1971 for a property which was connected the death of Sheku Bayoh.

From recollection it was for a minute amount of cannabis and a grinder, and it seemed to me at the time that the link to the death was somewhat tenuous in that the information I had was that the property to be searched was "connected" to the death. I did not have any details about the death or how it had come about or any indication that the death had resulted from the drugs from that property.

PIRC's role

10. What experience and training did you have in dealing with PIRC prior to 3 May 2015?

None. I don't think I had any dealings with PIRC prior to 2015.

11. What was PIRC's role in Police Scotland's investigation into the death of Sheku Bayoh? Did PIRC's role extend to matters in which you were involved?

This was not within the scope of my role and I am unable to comment on this

12. Was consultation with PIRC required in the course of your involvement?

No

What liaison, if any, did you have with PIRC in relation to the Sheku Bayoh investigation?

None

Understanding of the incident

13. When did you first become aware of the incident on the morning of 3 May 2015 between Sheku Bayoh and Police Scotland's officers?

When the police called about the warrant request on 4 May 2022 at 1646 hours

14. What was the first account provided to you of the incident? Who provided it, when and why?

By the police during the call, I don't have my notes anymore so cannot recall who the officer was. If DC Finch say it was he who phoned me then I am happy to accept that

15. When were you told that the person involved was black? What influence, if any, did this have on your understanding of the incident and your decisions and actions?

I was not told that the person involved was black. Why would I be told that? If I had been, I would have seriously questioned what the relevance of that was

16. To what extent, if any, were any of your actions or decisions in relation to Police Scotland post incident management influenced by Sheku Bayoh's race?

None whatsoever had I been told of his race

17. On 3 and 4 May 2015, were you aware of any media coverage surrounding the incident? Were you aware of any details of the incident on social media? Were any community impact issues considered by you at that stage? Did any of these factors influence your actions or decision making in relation to Police Scotland post incident management?

I was not aware of the death at all until the phone call from the police.

18. How did your initial understanding of the incident affect your decision making? What is the interaction between accuracy of information and decisions taken? What steps did you take, if any, to verify the accuracy of the information that was being given to you? Were your actions in this regard normal practice?

My understanding was that the police had advised me, briefly, of the death of an individual and wanted a warrant for a property for a small

amount of cannabis and (possibly a grinder) and the property appeared to be connected to the death. I refused the police application because (from my recollection) it did not appear that the death resulted from the drugs or that there was any previous intelligence of drug dealing at that property. It did not appear to me that a search warrant was proportionate under those circumstances.

19. Were you provided with any further information about the circumstances of the incident throughout the day? Please provide details of what and when you were told and the source of the information.

No, I believe the one phone call was the only one I had about the matter

20. Were you aware at any point of the terms of the Police Scotland death report or any post mortem examination report? What can you recall? Securing and searching property.

I had no further involvement other than the phone call

21. What is COPFS' involvement in the securing and searching of property by Police Scotland?

I don't understand which property is being referred to, but I didn't apply to a sheriff for a search warrant in this case

22. In what circumstances is a warrant required for Police Scotland securing property? What is COPFS' involvement in obtaining a warrant? To what extent is the process for warrants different for instances where a police officer suspects controlled drugs to be found?

Generally speaking the police will crave a warrant to secure evidence where the occupants of the property will not freely allow police access. The purpose of the search warrant might be to seize drugs, electronic equipment, stolen property, clothing, firearms or other weapons.

The procurator fiscal's role is to assess the intelligence, it's quality, and the necessity to use force to secure whatever evidence the police reasonably believe is likely to be in the property. Once it passes that threshold, the procurator fiscal will draft the search warrant and submit it to the sheriff with the relevant details and it will then be a

matter for the sheriff whether or not there is sufficient information or intelligence to grant a warrant. For search warrants which require to be sworn on oath or affirmed (mainly firearms and drugs), the deponing officer will have to address the sheriff directly about the veracity of the intelligence.

If a police officer suspects an individual (or a vehicle) in a public place has possession of drugs, the officer can search that individual or a motor vehicle under the authority of s23 of the Misuse of Drugs Act 1971. If the drugs are suspected to be in a private property, unless there is an element of urgency, the police will require a search warrant to enter the premises and carry out a search.

23. What property was secured on 3 and 4 May 2015 in relation to the Sheku Bayoh investigation? What was the legal basis for the property being secured by police? What involvement did you have in this process?

I do not have any knowledge of the police securing any property or the legal basis for it as I had no further involvement to the best of my recollection.

24. What property was searched on 3 and 4 May 2015 in relation to the Sheku Bayoh investigation? What was the legal basis for any searches by police? What involvement did you have in this process?

A repetition of Q.23?

25. Are you aware of any of Police Scotland's officers consulting COPFS in respect of any secured property? What was discussed and what was the outcome?

I don't recall being told of any secured property

Liaison with Police Scotland

26. How were your decisions, instructions and advice communicated to Police Scotland? What is normal practice for this?

By telephone in this instance which is the usual form of initial communication between the police and the PF

27. Insofar as not stated previously, please provide full details of all decisions taken and instructions given to Police Scotland.

I think I have covered the reasoning for my decision regarding my refusal for the application

DC Robert Finch

28. Do you recall speaking to DC Robert Finch on 4 May 2015? Do you recall speaking to DC Finch about herbal matter and grinders found at [REDACTED], the home of Martyn Dick and Kirsty MacLeod?

I don't specifically recall speaking to DC Finch, but I accept he must have called

29. DC Finch's Inquiry statement includes the following sections:-

69. *I've written in my daybook (PS18485) at page 13:*

"Relating to investigation?

Putting pen through it

No wanting to bother Sheriff 1700

Spoke to A/N – PF

Operational matter From prosecution point of view – nothing will be done"

...

71. *I have been referred to my notebook at pages 2 and 3: "Monday 4 May 2015... 1700. Spoke to PF DEV KAPADIA*

Not authorised to approach JP/Sheriff for warrant.

Prosecution would do nothing. Operational matter..."

29. To what extent do these daybook and notebook entries conform with your recollection of your conversations with DC Finch?

I don't recall using these words but accept that that was the tenor of my response ie that the 'connection' between the property was tenuous as described to me and that the any offence re the cannabis and the grinder was de minimis and would not reach the threshold of prosecution in court for any offences relating to the drugs themselves. The on call facility is not designed to be available for small amounts of drugs which at best would be marked for non-court disposals such as fiscal fines or warning letters. On that basis I would not 'bother' a sheriff for a de minimis matter.

30. Do you recall saying words to the effect of "putting pen through it"? What does this mean? Why was that the case in this matter?

It meant that if the police reported someone for being in possession of a small amount of cannabis, depending on the amount, the accused's previous convictions, and circumstances, there would likely be no further action. Although I no longer have any notes, I would have said that if it appeared to me from the information provided that the quantity of drugs was so small that it would not merit prosecution and any further action would be disproportionate.

31. Do you recall saying nothing will be done from a prosecution point of view? What does this mean and why would nothing be done?

I don't specifically recall saying this but I may well have done for the reasons stated above.

32. Do you recall saying that you were not wanting to bother a Sheriff? What does this mean?

See my response to Q.29

33. Do you recall saying that the matter with DC Finch was an operational matter? What does this mean?

Again I don't specifically recall saying this but it is something I would say because I don't have the power or authority to prevent or advise the police what to do in terms of reporting an offence through a SPR (Standard Prosecution Report) but I can tell them what the likely outcome would be in terms of marking a case, and therefore reporting a de minimis matter such as a few crumbs of cannabis or the tail end of a 'joint' would be a decision for the police and 'an operational matter'.

34. Do you recall the query regarding the discovery of herbal matter and grinders was related to the investigation? What was discussed? If you were asking about relevancy to the Sheku Bayoh investigation, would the presence of controlled drugs at the property visited by the deceased on the morning of his engagement with police be relevant?

I don't recall the specifics of the conversation, but the presence of cannabis at that property would not have had any significant relevance at that time. Had the deceased been under the influence

of drugs, I'm not sure where he got them from was particularly relevant. One example of where I would definitely apply for a warrant would be where a deceased might have died from ingesting drugs and it would be critical for the police to find the source of where the drugs might have come from. There was no suggestion that the deceased had died as a result of ingesting cannabis and therefore the 'connection' to the property was of little relevance.

35. What was the interaction between you and DC Finch? What was DC Finch seeking from you? Was the nature of what you said an instruction, advice, guidance or did it have another quality? Was this normal practice?

The officer I spoke to was looking for a drugs search warrant for a property, as I have noted 'connected' to the death of the deceased, where I took the view that the connection was tenuous. I was being formally asked to apply for a search warrant, which was normal except the amount of drugs to be recovered was very small. Normal practice would be to ask what intelligence the police had about the individuals and their connections to drugs or the onward supply of drugs. If, prima facie, there was enough information available to me to apply for a search warrant, the police officer would be requested to submit a written application which would contain full details of the property to be searched, the occupants of the property, what intelligence the police had about the individuals and/or the property e.g. the property was a 'known' safe house to store drugs, or that the occupier was a 'known' dealer and there were recent reports of individuals regularly attending to buy drugs.

If the written application and information reflected what I had been told over the phone and it was necessary to do so, then I would take steps to draft a warrant and submit it to the on-call sheriff at any time of the day or night. An example of the necessary urgency would be if the police had received a tip-off that drugs were about to be moved from a property, or a dealer had been arrested in possession of drugs and his/her associates might go to the house concerned and remove drugs or paraphernalia, for the dealer (or for themselves!)

36. What was the outcome of the matters DC Finch raised with you?

I refused the warrant application

37. What did you expect DC Finch to do following your phone call?

I don't know.

38. Did you expect the herbal matter to be seized? What was the basis for doing so?

If the police had found the herbal matter, I would expect them to seize it, regardless of the amount, as it is a controlled substance under the Misuse of Drugs Act 1971. I would also expect the police to be dealing with very small quantities by way of a police warning rather than wasting resources for very minor matters

39. Did you expect the herbal matter to be tested and for a Standard Prosecution Report to be submitted? What was the basis for your expectation?

I would expect the police to presumptively test the herbal matter, but as I have said, the reporting of the same is an operational matter. For minor amounts, it would be pointless to report it through a SPR, because in practice very small amounts are unlikely to be prosecuted and at best an accused might be given a warning letter or a fiscal fine at the bottom range of prosecutorial disposals available.

40. Did you expect the herbal matter and grinders to be left in situ by police and nothing further to be done?

No, I would not. As I said earlier cannabis is a controlled substance and I would expect the police to seize it

41. What was the involvement of PIRC, if any, in your dealings with DC Finch?

I don't think there was any.

Race

42. Was anything you have stated above done or not done because of Sheku Bayoh's actual or perceived race?

No, it wasn't even a consideration, and I would have reached the same conclusion and decision regardless of colour, race, religion or any other factor.

43. In hindsight was there anything you have stated above that you would have done differently were you presented with the same

situation again? If so, was race a factor in what you would have done differently?

No, I would not have done anything differently. I do not accept that race has any factor in the way I carry out my duties, unless race or any other discriminatory factor has a bearing on the case itself, for example prosecuting a racially motivated assault or racially aggravated conduct. It doesn't matter if an accused is black or white or any other colour, if there is sufficient admissible evidence to prosecute, and it is in the public interest to do so, I will take the same decision regardless of the ethnicity of the accused.

Miscellaneous

45. Please state the following in the final paragraph of your statement:- "I believe the facts stated in this witness statement are true. I understand that this statement may form part of the evidence before the Inquiry and be published on the Inquiry's website."

I believe the facts stated in this witness statement are true to the best of my recollection. I understand that this statement may form part of the evidence before the Inquiry and be published on the Inquiry's website.

46. Please sign and date your statement.



Dev Kapadia
Procurator Fiscal Depute
Dundee

21 December 2022