

# Transcript of the Sheku Bayoh Inquiry

Friday, 8 March 2024

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(10.00 am)

MR JOHN MITCHELL (continued)

Questions from MS GRAHAME (continued)

LORD BRACADALE: Good morning Mr Mitchell.

A. Good morning my Lord.

LORD BRACADALE: Ms Grahame.

MS GRAHAME: Thank you. Good morning again Mr Mitchell.

A. Good morning.

Q. You were last here at the end of February?

A. Yes.

Q. I want to carry on with the questions that we started.

A. I understand.

Q. There was one thing I would like to clear up at the outset and that was about the timing of your move to Director of Operations. So you were director of the investigations team, and you explained last time you had moved to a new role, Director of Operations?

A. Yes.

Q. I wondered if you may have been slightly mistaken about the date. I will tell you why. The Inquiry have been told by Michelle MacLeod, Commissioner, that you moved and became Director of Operations in August 2016.

A. Okay, that --

Q. Would that --

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- 1 A. Yes --
- 2 Q. I think you said you thought maybe March/April?
- 3 A. Yes, and I think I thought originally 2017. I have
- 4 tried my hardest to get my head round that one, but if
- 5 they say it was 16, August, that would be correct.
- 6 Q. The reason I wanted to clear that up is because
- 7 am I right in thinking your move to become Director of
- 8 Operations took place after the submission of the final
- 9 PIRC report? Or not? We have heard that the final PIRC
- 10 report was sent to Crown Office in August 2016, and I am
- 11 just wondering about the timing of your move in relation
- 12 to that report?
- 13 A. I recall quite clearly the initial -- the interim report
- 14 being --
- 15 Q. That was August 2015, I think we have heard?
- 16 A. Yes, but I am not so sure about the timing of the final
- 17 report. I am not, I'm afraid.
- 18 Q. All right. Thank you. When we left off last time you
- 19 were here I was going through the five principles in
- 20 relation to Article 2.
- 21 A. Yes. Yes.
- 22 Q. And we had dealt with independent and adequacy to some
- 23 extent and we had dealt with it being reasonably prompt.
- 24 A. Yes.
- 25 Q. I want to move on to public scrutiny, which is the

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1 fourth principle. I would like to ask you some  
2 questions about media engagement.

3 A. Okay.

4 Q. So we have heard evidence that the SPF issued  
5 a statement or press release on 14 May 2015.

6 A. Okay.

7 Q. Could we look maybe at your Inquiry statement,  
8 SBPI 00423 and I am interested in paragraph 387. When  
9 you were giving your statement you were referred to  
10 a release by the SPF to the media on 14 May 2015 which  
11 contained details about the incident involving Mr Bayoh,  
12 including:

13 "A petite female police officer responding to a call  
14 of a man brandishing a knife was subject to a violent  
15 and unprovoked attack by a large male. The officer  
16 believed she was going to die as a result of this  
17 assault."

18 You have said here that that was:

19 "Completely unhelpful."

20 You say:

21 "We're in the early stages of an investigation where  
22 it hasn't been determined what the facts were, and  
23 I don't think that type of release does anything but  
24 stir annoyance in some areas. That sounds as if that's  
25 an absolute fact."

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1           I think later in your statement you describe it as  
2           "not appropriate"?

3           A. Yes.

4           Q. Can you tell us a little bit about your concerns, from  
5           the perspective of PIRC, at that time, 14 May?

6           A. Yes, I think even more generally in any investigation at  
7           the early stages what we are trying to do is identify  
8           witnesses who can provide us with evidence that is  
9           pertinent to the investigation. I sometimes feel that  
10          a release like that would tend to suggest that we knew  
11          what had happened, without any doubt whatsoever. And my  
12          fear always is that that turns witnesses off, people who  
13          may believe that they have something to offer wouldn't  
14          come forward because they have this understanding that  
15          that is an absolute, and that is what occurred. So  
16          I was worried that it may deter some people from coming  
17          forward or for providing information that would  
18          otherwise be helpful.

19          Q. Thank you. Did you have any concerns in relation to  
20          the family and how they would react to this type of  
21          information?

22          A. Yes. Again, you know, had we known that that was going  
23          to appear in the newspapers, I think we would have had  
24          a duty to tell the family, to pre-warn them that that  
25          was going to be coming out.

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1 Q. In terms of having a duty to pre-warn the family, whose  
2 responsibility would that be to organise that?

3 A. It would be -- sorry, it would be the senior  
4 investigating officer's responsibility, and in this set  
5 of circumstances either he or an instruction to the FLO  
6 to make contact with the single point of contact for the  
7 family, and make them aware that that type of detail was  
8 going to be released into the press.

9 Q. Thank you. Can I ask you to think about now  
10 paragraph 392. This relates to a later press release  
11 from SPF which was on 2 June. You will see here you  
12 have been referred to a press release issued on 2 June,  
13 so this is prior to having the officers' statements, in  
14 which the legal adviser for the SPF Peter Watson stated:

15 "The officers involved have never refused to provide  
16 statements. It was agreed at the outset with PIRC that  
17 they would revert to us when they wanted statements and  
18 when they were clear on the basis that statements were  
19 to be given. PIRC emailed me this morning at 10.46 am  
20 asking for our assistance to organise the interviews and  
21 we answered at 11.29 am confirming we would be pleased  
22 to assist. Those are the facts."

23 Then I think if we move on to 393, just below, your  
24 response is:

25 "That it was completely inaccurate. The suggestion

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1           that that was the first and only time that we had made  
2           it clear to Mr Watson or anyone else, including the  
3           individual officers, that their position was that of  
4           witness and that we wished to take a statement from  
5           them."

6           I am interested in what you say here, was it your  
7           impression that that statement from the 2 June was  
8           completely inaccurate?

9           A. Well, maybe if we take it from the sentence which  
10          begins:

11                 "PIRC emailed me this morning at 10.46 am ..."

12                 From there to the end, that is an accurate  
13                 reflection on what happened that day. The matter that  
14                 has been suggested, that there had been no attempts  
15                 previously to have statements from the officers, or that  
16                 there was no clear understanding that the officers were  
17                 witnesses was just inaccurate.

18          Q. So the statement there:

19                 "The officers involved have never refused to provide  
20                 statements."

21                 What is your position in relation to that sentence?

22          A. That is not -- sorry, that is not the case.

23          Q. "It was agreed at the outset with PIRC that they would  
24                 revert to us when they wanted statements and when they  
25                 were clear on the basis that statements were to be

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1 given."

2 That sentence, what is your comments about that?

3 A. Again, that is inaccurate.

4 Q. Thank you.

5 Now, we have heard that there was a response by  
6 the Commissioner to this --

7 A. Yes.

8 Q. -- comment from SPF. Could we look at 395. This  
9 relates to the response -- here we are. A statement  
10 released by PIRC on 4 June, so this is two days later:

11 "The PIRC has been leading on the investigation into  
12 the death in custody of Sheku Bayoh and since the hours  
13 following his death on Sunday 3 May ... has made several  
14 attempts to secure statements from the arresting  
15 officers. Those officers have now agreed to provide  
16 statements to the PIRC and now that PIRC is in the  
17 process of gathering the material, it will be considered  
18 along with the information already gathered throughout  
19 the course of the investigation to date."

20 Did you agree with that statement issued by  
21 the Commissioner?

22 A. Yes, I agreed with the terms of the statement, yes.

23 Q. Were you part of the discussions with the Commissioner  
24 about whether or not to respond to the earlier SPF  
25 comment?

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1           A. That was a decision by the Commissioner at the end of  
2           the day. She was quite exercised at the fact that that  
3           statement you have previously covered there included  
4           inaccurate information, and she felt that it was  
5           important that we responded.

6           Q. Can you explain why the PIRC responded on 4 June to the  
7           statement SPF made about the timing of statements and  
8           obtaining statements but not to the earlier statement we  
9           looked at, which was from May, about the petite female  
10          officer?

11          A. I think the rationale behind that was that that was  
12          a direct attack on the Commissioner's position in  
13          relation to inaccurate information about attempts to  
14          address the non-provision of statements.

15          Q. Thank you. Thinking about things now with the benefit  
16          of hindsight, and I appreciate you are retired, but do  
17          you have any views about whether, in the context of  
18          public scrutiny, matters would be improved if there were  
19          more prompt corrections of misinformation or inaccurate  
20          information or that a more robust approach was taken to  
21          media stories by PIRC?

22          A. I always find that to be a difficult one because I don't  
23          think that we should be playing out an investigation in  
24          the media. Now, I think it is absolutely correct that  
25          if you are looking for assistance or you are looking to



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1 trace witnesses or positive aspects towards the  
2 investigation, that you would use the media. But to  
3 generally play out in the media an ongoing  
4 investigation, no, I am not necessarily in favour of  
5 that. Maybe I am old-fashioned but that is my opinion.

6 Q. Would that be your opinion for both PIRC and any other  
7 bodies who are involved in matters in which PIRC are  
8 investigating?

9 A. Yes. I think it would be. I think it is to be  
10 reasonable in your approach.

11 Q. To what extent would that assist the investigation PIRC  
12 are carrying out, or at least not hinder the  
13 investigation?

14 A. Again, it can sway -- it can sway certain people, is my  
15 belief. You know, some people want to take one view,  
16 others another view and if they read about it in  
17 a paper, again it might have a detrimental effect in  
18 attempting to ingather evidence which may be important.

19 Q. I would like to move on to a conversation you say you  
20 had with Calum Steele. Could we look at 398:

21 "I have been asked if I recall having any  
22 discussions with SPF about this matter. I think I spoke  
23 to Calum Steele. He was either the President or the  
24 Chair of the Federation. I think it was after we  
25 responded in the media, because I think that is when he

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1           phoned to the office."

2           A. Yes, he made contact with me. That's correct.

3           Q. You have mentioned Calum Steele, and then you say he was

4           either the President or the Chair. How confident are

5           you that it was Calum Steele who phoned the office?

6           A. It was definitely Calum Steele I spoke to.

7           Q. Do you know Calum Steele?

8           A. Yes.

9           Q. You say he was either the President or the Chair of the

10          Federation, how confident are you about his role?

11          A. I am not -- general secretary -- I am not 100% sure of

12          his title, to be honest.

13          Q. Thank you. At 399, we can see that there, you say:

14                 "Just the fact that that was inappropriate. He was

15          still claiming that attempts hadn't been made, and I was

16          saying, 'Well, that's wrong; there were several attempts

17          made'."

18          A. That was my position.

19          Q. Did you maintain that position --

20          A. Absolutely, yes.

21          Q. -- through the conversation? Can we look at

22          paragraph 401 please, which is a letter sent by

23          Calum Steele on 5 June, so this is after PIRC have

24          responded publicly in the press and after the call.

25          Sent by Calum Steele to the Commissioner Kate Frame, and

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1           there is a quotation from it:

2           "On the 7th May and following receipt of information  
3           that the officers involved were to be compelled to give  
4           statements an email was sent to Detective  
5           Chief Inspector Hardie in which clarification of the  
6           status of the officer's question is sought.

7           "That email is copied to John Mitchell.

8           "I am advised Mr Mitchell subsequently confirmed by  
9           telephone that no statements could be compelled and that  
10          the status of the officers was fundamental."

11          Did you know -- obviously Mr Steele says here:

12          "I am advised Mr Mitchell subsequently confirmed by  
13          telephone that no statements could be compelled and the  
14          status of the officers was fundamental."

15          Is that something that you did contact SPF about, to  
16          say that no statements could be compelled?

17          A. Well, no statements could be compelled because there was  
18          nothing in the law that would permit us to compel  
19          statements from officers. "Status of the officers was  
20          fundamental", it is not really the type of language  
21          I would use.

22          Q. Then it says:

23          "I am also advised Mr Mitchell himself advised that  
24          the status of the officers couldn't be confirmed until  
25          such time as the post mortem had been carried out and

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1           that he would clarify with Mr Watson ..."

2           We have heard Peter Watson was the legal  
3           representative:

4           "... when the position would be clarified."

5       A. No that was Mr Watson's perception. I made it quite  
6           clear to him that we wished to interview the officers as  
7           witnesses.

8       Q. So where it says:

9           "Mr Mitchell himself advised the status of the  
10          officers couldn't be confirmed until the post mortem had  
11          been carried out~..."

12          You disagree with that?

13       A. No, I -- I had no contact with Peter Watson prior to the  
14          post mortem having been carried out. The post mortem  
15          was carried out on 4 May when I wasn't even in the  
16          office.

17       Q. Thank you. It then goes on to say:

18          "... he would clarify with Mr Watson ..."

19          That is you:

20          "... would clarify with Mr Watson when the position  
21          would be clarified."

22       A. The position at that stage was quite clear to me from  
23          day one, that the officers were witnesses.

24       Q. Thank you. Then it goes on to say:

25          "I am also aware that in a number of subsequent

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1           telephone conversations Mr Mitchell commented that in  
2           his opinion the officers were always (likely) to be  
3           considered witnesses but no written confirmation to this  
4           effect was received."

5           Do you have any comment to make about that  
6           paragraph?

7           A. I am sure at one stage an email was sent to Peter Watson  
8           and it was said in that email that the officers were  
9           witnesses. It was at the time when we had the officers  
10          approached directly to see whether they were prepared to  
11          give witness statements.

12          Q. Can I ask, at any stage did anyone, either Mr Watson or  
13          anyone from SPF, or indeed any of the officers, request  
14          written confirmation of their status?

15          A. Not that I recall, no.

16          Q. Thank you. At paragraph 402 you said you were asked if  
17          this matched your recollection, so the comments made by  
18          Mr Steele in the letter, and you say:

19                 "Absolutely not. I made it quite clear to  
20          Peter Watson that, in our view at that stage, the  
21          officers were witnesses and we wished to interview them  
22          as witnesses."

23          When you say you made it clear to Peter Watson, how  
24          did you communicate that to Peter Watson?

25          A. Verbally on the telephone, I made it quite clear to him

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1           that they were witnesses.

2           Q.   When did that verbal conversation take place?  Was that  
3           what we referred to earlier?

4           A.   I put a message in immediately in after, which would be  
5           dated -- I believe it may have been the first day I was  
6           in the office because, if I recollect correctly, he  
7           actually called to speak with the Commissioner, and she  
8           was unavailable and the call was put through to me.

9           Q.   From memory was that 5 May?

10          A.   I think it would be 5 May, yes.

11          Q.   Thank you.  I think you clarified that was the date  
12          earlier.  Can we now look at paragraph 404 of your  
13          Inquiry statement.  This refers to a subsequent letter  
14          dated 25 June from the Commissioner, Kate Frame, to  
15          Calum Steele:

16                 "... in which the Commissioner refers to me speaking  
17          to Mr Steele after his letter ... was received and  
18          providing 'clarification'.  Yes, I remember, he was  
19          quite heated about the fact that our response in the  
20          press was inaccurate, and again I pointed out to him the  
21          various attempts that we had made to secure statements  
22          from the officers."

23                 So this is in relation to a letter sent by the  
24          Commissioner to Calum Steele?

25          A.   Yes.

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1 Q. Responding to his earlier letter we have just looked at?

2 A. Yes.

3 Q. Did you assist the Commissioner in framing or drafting  
4 this letter to Calum Steele?

5 A. Well, I certainly had a discussion with the Commissioner  
6 because I was asked how he had been on the telephone and  
7 I gave the information that he had -- well, he had been  
8 less than pleased and he was heated, as I say.

9 Q. Thank you. Could we look at SPF 000205, please. Do we  
10 see here that this is the letter of 5 June to Kate Frame  
11 and this is the letter from, as I understand it at the  
12 bottom it should say Calum Steele, General Secretary?

13 A. General Secretary, yes.

14 Q. So that was his role at that time.

15 A. Yes, I appreciate that.

16 Q. Can we then look at the response from the Commissioner  
17 Kate Frame, which was dated 25 June. Now, my  
18 understanding is that this is PIRC 02150A. This is the  
19 letter from PIRC to Mr Steele, 25 June 2015. Can  
20 we look at the very bottom and it should say from  
21 Kate Frame, the Commissioner. There we are.

22 A. Yes, indeed.

23 Q. Can we look at the first page please. There is  
24 a reference to Mr Steele's letter of 5 June:  
25 "... in which you seek clarification of a number of

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1 issues. I understand that immediately after emailing  
2 your letter, you contacted Mr Mitchell ... to discuss  
3 matters.

4 "I am aware that he was able to provide the  
5 clarification you sought."

6 In paragraph 3 it says:

7 "I am concerned that you appear to query the  
8 accuracy of my press release~..."

9 I would like to look at the start of the bullet  
10 points. She says:

11 "So that you are left in no doubt about the 'several  
12 attempts', made by PIRC investigators to secure  
13 statements from the police officers involved, it may  
14 assist you if I provide a list of the specific  
15 attempts."

16 A. Yes.

17 Q. And then there are a number of bullet points:

18 "The first attempt was made on 3 May~..."

19 And there is an explanation given there in relation  
20 to those attempts.

21 A. Yes.

22 Q. "The second attempt was made on 4 May ... when PIRC  
23 informed Police Scotland that the outcome of the  
24 post mortem was inconclusive."

25 And then:



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- 1           "The third attempt was made on 5 May~...
- 2           Professor Watson, the police officers' legal
- 3           representative, was contacted. He confirmed that he had
- 4           advised officers to make no comment until full details
- 5           of the post mortem results were known."
- 6           A. That is correct.
- 7           Q. Was that the conversation you were referring to a moment
- 8           ago?
- 9           A. Yes, it was.
- 10          Q. Then:
- 11                 "The fourth attempt was made on 6 May ... when PIRC
- 12           Investigations staff again requested the provision of
- 13           operational statements from DCI Hardie, Police Scotland.
- 14           No statements were provided."
- 15          A. That is correct.
- 16          Q. We have heard evidence that DCI Hardie was instructed by
- 17           Mr McSporrان to go and speak to the officers themselves
- 18           in person?
- 19          A. That is correct.
- 20          Q. And he initially spoke to the majority of the officers,
- 21           advised them that their status was as witness.
- 22          A. Correct.
- 23          Q. And invited them to provide statements.
- 24          A. That is the case, yes.
- 25          Q. And all declined on the basis they wished legal advice?

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1 A. Yes.

2 Q. Did any of those officers ask for written confirmation  
3 of their status?

4 A. Not to my knowledge.

5 Q. We've heard that others were asked subsequent to that  
6 and the position was the same. Can we move on to the  
7 next attempt, please:

8 "The fifth attempt was made on 7 May ... when PIRC  
9 wrote to Police Scotland stating that notwithstanding  
10 Professor Watson's advice to the officers involved in  
11 the incident, we wished to confirm the individual  
12 position of each of the officers in relation to our  
13 request for statements. This correspondence also  
14 confirmed the status of the officers as witnesses to the  
15 event and I enclose a copy of that email for your  
16 information. In response, Police Scotland advised me  
17 that each of the officers had been contacted, their  
18 status clarified and that they have been asked if they  
19 were willing to provide a statement. In response,  
20 Police Scotland advised me that each of the officers did  
21 not wish to provide a statement at that time, following  
22 legal advice."

23 A. That's correct.

24 Q. And then:

25 "On the sixth occasion~... on 2 June ... Mr Mitchell

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1           emailed Peter Watson directly and again reiterated his  
2           request that PIRC Investigators interview the police  
3           officers involved. Again that email confirmed that the  
4           officers were to be interviewed as witnesses. I note  
5           that on this occasion, the officers agreed to be  
6           interviewed."

7           Was that the email you were talking about?

8           A. Absolutely, yes it was.

9           Q. Can I ask you to look at some other matters actually.

10          Can we look at something else from 7 May. PIRC 03710.  
11          This should be headed up, "Incident message", from that  
12          date. Do we see there the date on the left-hand side  
13          7 May, and the time is given as 11 am?

14          A. Yes.

15          Q. Your name appears there, John Mitchell?

16          A. Yes.

17          Q. D of I. And if we look at the information provided on  
18          this sheet, can I ask you to read that out?

19          A. Yes:

20                 "I have spoken with Peter Watson who acts for nine  
21                 (9) police officers involved in the Kirkcaldy death of  
22                 Sheku Ahmed Tejan Bayoh. Mr Watson has advised the  
23                 officers not to give operational statements until their  
24                 status is known. He states that this will be the  
25                 position until full results of the post mortem

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1 examination are known. I include a copy of email from  
2 Mr Watson."

3 Q. If we move down on to what is page 3 of the pdf, do we  
4 see that you have attached a copy of an email, and it  
5 says there:

6 "From: Peter Watson.

7 "07 May 2015 11.29."

8 A. Yes.

9 Q. And it says:

10 "Dear Mr Hardie.

11 "I represent all of the police officers (9 in  
12 number) involved in the incident in Kirkcaldy currently  
13 being investigated by PIRC. I have been given to  
14 believe that instructions have been given by you or  
15 someone connected with this inquiry that these officers  
16 are to be told that they are 'compelled' to provide  
17 statements. As a matter of law that is not correct.  
18 You should seek advice on this matter. These officers  
19 enjoy the same legal rights as any member of the public.  
20 You can ask them to provide statements but my advice is  
21 that they do not do so until their status is clarified.  
22 I have spoken with Mr Mitchell in PIRC he is aware of my  
23 position. The response each officer gives will be as  
24 follows:

25 "On legal advice I decline to provide a statement at

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1           this time until my status as a witness or a suspect has  
2           been confirmed to my legal adviser Prof Peter Watson  
3           PBW Law."

4           A. Yes.

5           Q. At this stage can I understand your position. Had you  
6           confirmed the status of the officers as witnesses to the  
7           legal adviser Professor Watson?

8           A. Yes, absolutely, on each occasion I spoke with him.

9           Q. Did you understand in relation to that email that there  
10          was an expectation that this would be done in writing?

11          A. No.

12          Q. Thank you. Can we now look at your Inquiry statement  
13          briefly and look at paragraph 290. Perhaps we should  
14          look at 289. This is a part of your statement where you  
15          have been talking about on 5 May a telephone call  
16          received from Peter Watson. And he identified himself  
17          as acting for the officers, and you said:

18                 "During the call I informed him that we were keen to  
19          get operational statements from those officers. He at  
20          that time knew the result of the initial post mortem  
21          examination and his position was that his advice to the  
22          officers was not to supply statements at this time.

23          I tried to assure him that the officers would be dealt  
24          with as witnesses but, despite that, he stuck to the  
25          line that his advice to the officers at that time was

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1 not to provide statements."

2 Is that the call you were talking about earlier?

3 A. That is the one, yes.

4 Q. At 290 you say:

5 "I spoke again with Mr Watson a couple of days after  
6 that."

7 That's after 5 May:

8 "I think that might have been 7 May. That was to  
9 inform him that despite our previous conversation we  
10 were going to have the officers approached individually  
11 and asked if that was their position. His position  
12 still was that he advised them not to provide  
13 statements."

14 A. Absolutely.

15 Q. Is that the steps that were taken in relation to  
16 the incident message we just looked at?

17 A. Yes.

18 Q. And that was dated 7 May?

19 A. Yes.

20 Q. Thank you. Can we look at 291 and 292:

21 "I have been referred to a note of this call with  
22 Peter Watson on 7 May~..."

23 That is your handwriting, and then it says:

24 "I have been referred to an email sent later on  
25 7 May ... at 1219 hours, by [Senior Investigator]

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1           McSporran to DCI Keith Hardie ... confirming the status  
2           of the officers was as 'witnesses' and requesting that  
3           they provide operational statements."

4           Was this the initial instruction from Mr McSporran  
5           to DCI Hardie?

6           A. It was, yes.

7           Q. We have heard that DCI Hardie was the single point of  
8           contact?

9           A. Yes, he was.

10          Q. Was that for Police Scotland, or was it for the  
11          officers?

12          A. It was for Police Scotland. It was to provide whatever  
13          assistance was required, maybe to receive documentation  
14          et cetera, you know, SOPs, that type of thing, so that  
15          everything would be pushed through DCI Hardie to make  
16          that a more streamlined approach.

17          Q. I am interested in the status of DC Hardie. Who  
18          appointed him as single point of contact?

19          A. Someone within Police Scotland.

20          Q. So he is not appointed by PIRC?

21          A. No, no, no.

22          Q. Can you explain, is there a difference between having  
23          a single point of contact for Police Scotland and the  
24          existence of Mr Watson, who is representing the  
25          individual officers? Is there a distinction there

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1           between communicating with Police Scotland as opposed to  
2           communicating with the officers?

3           A. Yes, I would say so. Yes. I mean the role that  
4           DCI Hardie had, as I say, was to assist the  
5           investigation in providing information, copies of SOPs,  
6           the likes. I think he was probably appointed after  
7           discussion with the Professional Standards Department  
8           within Police Scotland.

9           The situation with Mr Watson was he contacted me  
10          initially and when I phoned him back on 7 May to say  
11          that we were going to approach the officers  
12          individually, that was a courtesy more than anything.  
13          So that was why I took that on board.

14          Q. So would you normally be communicating with the lawyer  
15          representing the officers as well as the single point of  
16          contact for Police Scotland?

17          A. Well, I had no contact with the single point of contact.  
18          It was purely and simply a matter that, because  
19          Peter Watson had contacted me initially, and as I say  
20          through courtesy -- and hopefully by doing so again, and  
21          telling him that we understood that his position,  
22          because he was giving them advice to make no comment, we  
23          actually wanted to hear that from them. So ultimately  
24          it was a matter of courtesy.

25          Q. Is that why Mr McSporran ultimately went to DCI Hardie



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1           himself --

2           A.   Actually to get the action done, to get someone sent to  
3           the officers.  I wouldn't have asked Peter Watson to do  
4           that, obviously.

5           Q.   Thank you.  Was there any expectation on your part, or  
6           on the part of PIRC, that DCI Keith Hardie would be  
7           informing police officers, either individually or  
8           through Peter Watson, about steps being taken by PIRC or  
9           anything of that sort?

10          A.   I had no reason to believe that DCI Hardie would do  
11          that, no.

12          Q.   As far as you are aware, was there any request for the  
13          status to be confirmed in writing that was drawn to your  
14          attention?

15          A.   Only on 2 June.  And I did that.

16          Q.   You did that straightaway on 2 June?

17          A.   Yes.

18          Q.   Thank you.  Can I ask you now to look at COPFS 04609.  
19          We've heard some evidence about this, that this is  
20          handwritten minutes taken or noted by Lindsey Miller in  
21          Crown Office and it relates to a meeting on 14 May.  You  
22          will see the date at the top.

23          A.   Yes, I see that.

24          Q.   It was a meeting with the Lord Advocate and PIRC,  
25          namely, yourself and Kate Frame, the Commissioner.  And

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1           it was also attended by Les Brown, who was the head of  
2           CAAPD at the time, we have heard. Can I ask you to look  
3           at these minutes and in particular I am interested -- if  
4           we can move down the page first of all. First of all,  
5           you see the Lord Advocate seems to open the meeting  
6           saying it's a disgrace there are no statements provided,  
7           and they should be suspended?

8           A. Yes, he did.

9           Q. Sorry?

10          A. Yes, he did, I recall that.

11          Q. And you say you didn't disagree with that?

12          A. That is correct.

13          Q. Was that your mindset at the time?

14          A. It was. But again, that is a matter for Police Scotland  
15          at that stage.

16          Q. Then do you see the next section it refers to  
17          Peter Watson and confirming his advice. It says:

18                 "Confirmed they are taking legal advice."

19                 The officers?

20          A. Yes.

21          Q. Then further down, just below -- do you see the line  
22          that is a travelling down the page --

23          A. Yes, I do.

24          Q. -- just beneath that there is the initials JM, which are  
25          your initials:

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1                   "May need to detain and interview under caution.

2                   This is a carbon copy of the Duggan scenario."

3                   It looks like it says:

4                   "But independent confirmation of his actions."

5                   And an asterisk?

6           A.   Yes, I do see that.

7           Q.   I am interested in the phrase here that seems to have  
8               been attributed to yourself:

9                   "May need to detain and interview under caution."

10          A.   This was a general discussion around getting statements  
11               from the officers, and the concerns that by 14 May that  
12               still hadn't been achieved. I know there had been lots  
13               of discussion around this matter of compelling  
14               witnesses. At that stage the IPCC, who would have taken  
15               on board the investigation into the death of Mr Duggan,  
16               I believe had the powers to compel officers to attend  
17               for interview. What they didn't have was the power to  
18               compel them to speak once they got there.

19               From memory, I think that my point was that  
20               the closest thing that we had to that was a detention in  
21               terms of section 14 of the Criminal Procedures  
22               Scotland Act 1995. I wasn't suggesting at that time that  
23               it was appropriate to move to that stage. But the  
24               discussion, as I said, was around being able to compel  
25               people to turn up at a place at a certain time, and the

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1           only similar thing we had would be to detain them and  
2           take them there. From memory that was the route that  
3           that discussion was taking.

4       Q. So we've heard in relation to the status of the officers  
5           that if they were to move from the status of witness to  
6           suspect --

7       A. Yes.

8       Q. -- that the test to be applied to that would be whether  
9           there were reasonable grounds to suspect they had  
10          committed criminal offences?

11      A. That's correct, yes.

12      Q. As at 14 May, when you attended that meeting with the  
13          Lord Advocate, what was your view about the status of  
14          the officers at that time?

15      A. At that stage they were still witnesses as far as I was  
16          aware.

17      Q. As I understand it there were no initial accounts or  
18          statements available to PIRC at that time?

19      A. None, none at all, no.

20      Q. But on the basis of the information PIRC had in terms of  
21          the investigation that had been carried out up until  
22          that point, did you have any grounds or any belief that  
23          they could have been suspects?

24      A. Not at that stage, no.

25      Q. Can I ask you again about the phrase:

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1                    "This is a carbon copy of the Duggan scenario."

2                    I'm interested in your understanding about why this  
3 scenario in relation to Mr Bayoh would have been viewed  
4 as a carbon copy of the Duggan scenario?

5            A.    Although we were in the early stages of this  
6 investigation, by that time we knew that the police  
7 officers had decided not to fill in documentation that  
8 we would have expected them to fill in: use of force  
9 forms, et cetera, CS forms, et cetera. We had attempted  
10 to have them provide operational statements. That  
11 hadn't occurred either. And from discussion around the  
12 Duggan Inquiry I knew that, although officers had turned  
13 up, as they had to, for interview, they hadn't provided  
14 any statements, and I think again from discussion  
15 I learned that the IPCC believed that that ability to  
16 commit them to attend for interview was actually  
17 worthless because quite often they sat, refused to  
18 answer questions, and then went away to think about it.

19                    I think the problem there was is that, yes, people  
20 were becoming exercised at the fact that the officers by  
21 14 May still weren't engaging with the inquiry, and  
22 a fear that that may perpetuate.

23            Q.    At that stage did you feel you had any power to compel  
24 the officers to attend for interview or to provide  
25 operational statements?

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1 A. None whatsoever.

2 Q. Did you feel you had any power to compel them to provide  
3 either brief accounts or initial accounts or brief  
4 facts?

5 A. I'm afraid not, no.

6 Q. Is that something that would have assisted PIRC, if that  
7 power had been available?

8 A. No doubts, yes.

9 Q. Then if we look at page 2 of these minutes, please. You  
10 will see halfway down there is another reference to your  
11 initials, JM:

12 "SPF position is that they employ Peter Watson but  
13 they disagree with legal advice; should be for each  
14 individual officer to decide. AA has set himself upset  
15 himself up as family liaison point."

16 Can I ask you what your understanding of the SPF  
17 position was at that stage?

18 A. I didn't really have much contact with the Federation at  
19 that time. It was Mr Watson that I had dealings with.  
20 I know that I had experience where the SPF take on  
21 a lawyer during the investigations and the blanket  
22 coverage appears to be "say nothing". I was never  
23 necessarily of the opinion that that was the best advice  
24 in all incidents and I know that in a past life that  
25 I had certainly had discussions with members of the SPF

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1           who shared that view, that it was always -- it wasn't  
2           always appropriate to say nothing at all.

3           Q. So from what you are saying could this have been  
4           a reference to your prior knowledge of SPF positions  
5           rather than specifically in relation to this  
6           investigation?

7           A. Yes, because this was part of a larger discussion around  
8           the ability to compel, and as you know, by then we had  
9           actually approached the officers individually because,  
10          as I said earlier, it is all very good and well  
11          Mr Watson holding the position that he has provided  
12          advice not to speak, I wanted to hear that from the  
13          officers. I didn't want an officer sitting at home  
14          wishing to assist this inquiry and give a statement and  
15          feeling that they couldn't because of this blanket  
16          coverage.

17          Q. Thank you. Then if we move slightly down the page,  
18          please, you will also see a small reference where it  
19          says:

20                 "LA [Lord Advocate] (PM was far too quick)."

21                 That is in brackets. Is that something that the  
22          Lord Advocate said? Do you see that on the second line  
23          there:

24                 "LA (PM was far too quick)"?

25          A. If it is noted there he must have said it. As I say, it

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1           was a lengthy discussion that day.

2           Q. All right. Thank you very much.

3                   Going back to return to the five principles,  
4           can I now move on to the -- there's the aspect of the  
5           victim involvement, or the next of kin must be involved  
6           to an appropriate extent.

7           A. Yes.

8           Q. That was in the -- a reference that was in the Article 2  
9           document we looked at the last time you were here.

10          A. Yes.

11          Q. Can I ask you about the meeting with the family and  
12          Kate Frame, the Commissioner.

13          A. Yes.

14          Q. We have heard that took place on 3 September 2015.

15          A. Okay, yes.

16          Q. Could we look at paragraph 508 of your Inquiry  
17          statement, please:

18                   "Mr Anwar and the family wanted a meeting. We would  
19          have been open to a meeting with the family before this  
20          point, but it was never requested, and I suppose we  
21          never offered it. Although, when we say we didn't meet  
22          family, of course we met with the family. The  
23          organisation met with the family through John McSporran,  
24          Billy Little and the FLOs. The people who tend to take  
25          on these meetings are the senior investigator and the



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1 FLOs."

2 A. Yes.

3 Q. So there had been meetings --

4 A. Yes.

5 Q. -- between the investigators or the FLO?

6 A. Yes.

7 Q. But in terms of a meeting with the Commissioner, as

8 we understand it the one and only meeting with the

9 Commissioner was 3 September?

10 A. That is my understanding, my memory, yes.

11 Q. Can we move up slightly back to the top of that

12 paragraph. It says:

13 "Mr Anwar and the family wanted a meeting. We would

14 have been open to ... [it] ... but it was never

15 requested, and ... we never offered it."

16 Looking back now, do you think there may have been

17 benefit in the Commissioner offering a meeting prior to

18 3 September 2015?

19 A. I would have to agree it wouldn't have -- it wouldn't

20 have done any harm.

21 Q. Can I ask you to look at the management policy log.

22 PIRC 04154. It's page 94 of the policy log. While we

23 wait for that to come up on the screen because it's

24 a long document, what I am really interested in here is

25 a reference in correspondence from Mr Anwar. It's

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1           an email that is attached behind decision 61. Here we  
2           are. So it's dated 28 July 2015. So this is months  
3           after, two months after -- more than two months after  
4           the death. Could we look at page 2, please and it's (v)  
5           I am interested in.

6           A. Yes.

7           Q. It says here:

8                        "On a number of occasions a meeting has been  
9                        requested with Kate Frame but the family and ourselves  
10                      have not had the courtesy of a response to this request  
11                      following her return from leave. If it is the case that  
12                      Ms Frame is unwilling to meet us and the Bayoh family  
13                      then please advise."

14           I am interested in -- obviously your Inquiry  
15           statement says a meeting was never requested. You would  
16           have been open to that if it had been requested. But  
17           here it seems to give the impression that there had been  
18           requests made for a meeting with Ms Frame. Were you  
19           aware that requests had been made?

20          A. No. No, I wasn't. I wasn't aware.

21          Q. Had you been aware that Mr Anwar and the family were  
22           keen to meet with Ms Frame, is that something that you  
23           could have pursued or sought to arrange?

24          A. Absolutely. I would have no reason not to do that.

25          Q. Thank you. If we could go back to your Inquiry

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1 statement, please. I think at paragraph 514:

2 "I have been referred to the PIRC's family liaison  
3 log ... which ... contains a note of PIRC's meeting with  
4 the family on 3 September~... I'm afraid that there are  
5 some things that I just can't remember specifics of."

6 I think in paragraph 505 you say you don't recall it  
7 was "particularly positive", I think is the phrase you  
8 use?

9 A. Yes.

10 Q. "I still think the family weren't happy with the level  
11 of information that they were getting. I understand  
12 that as well because families want to know."

13 You say it wasn't "particularly positive". Can you  
14 give us your impressions of that meeting and how it  
15 went?

16 A. Just that; that the family, as I said there, rightly  
17 want information. There can be no argument around that.  
18 But quite often either information isn't available or on  
19 some occasions, if it pertains to particular areas of  
20 the investigation which are sensitive evidence, it might  
21 not be appropriate at that time. It's a very, very  
22 emotive meeting for the family, I totally understand  
23 that. And it wasn't a particularly easy meeting. There  
24 was friction, but as I say I totally understand why.

25 Q. Looking back at that meeting now, do you think there

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1           could have been a better way of handling the meeting and  
2           meeting with the family?

3           A. I am not sure how -- I think I also make comment that  
4           I am not necessarily in favour of boardroom-style  
5           meetings around a table in this set of circumstances.  
6           I think it is much, much better, less formal, less  
7           formal. But it was a big meeting, there were lots of  
8           people there, and as a result I think indeed we had to  
9           borrow a meeting room in a building next door just to  
10          accommodate it. No, it wasn't a great meeting, it  
11          wasn't a great meeting. I am not laying blame on  
12          anybody, it just wasn't great meeting.

13          Q. You say less formal.

14          A. Yes.

15          Q. Can you suggest how that could have been achieved, that  
16          reduced formality?

17          A. Maybe where the meeting was. Maybe if it had been ...  
18          in a less business setting. But I am not quite sure how  
19          you would manage that. That would be a difficulty  
20          because you are going to discuss very sensitive matters,  
21          so there has to be some control around it.

22                 No, I'm sorry, I don't really think that to involve  
23          everybody who wanted to be involved or who needed to be  
24          involved, that it could have been much less formal. But  
25          that may have assisted.

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1 Q. Was there much discussion in advance of making it a less  
2 formal meeting and making the family feel comfortable?

3 A. I think it was more about finding accommodation that  
4 would accommodate the size of that meeting.

5 Q. Do you remember any prior discussion about how the  
6 family could be made more comfortable or more at ease?

7 A. No, I don't, I don't.

8 Q. Despite the difficulties, do you think that might have  
9 been a conversation worth having?

10 A. If it had made the meeting any better or is likely to,  
11 yes, it would have.

12 Q. Can I ask you about paragraph 516, please:

13 "I have been referred to Alistair Lewis' note~...  
14 that: 'Commissioner assured family all investigators are  
15 diversity trained'. I have been asked what this  
16 diversity training involved. I've had so much diversity  
17 training over the years. I've had continuous updates in  
18 diversity training, and rightly so. I do remember  
19 getting an input which did talk about unconscious bias,  
20 but it wouldn't be truthful of me to say whether that  
21 was before or after. It wasn't just investigators. It  
22 was a whole organisation having diversity training, and  
23 it was outsourced and brought in."

24 A. Yes.

25 Q. I am interested in what is said here. Were you

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1           satisfied that all investigators were diversity trained  
2           at the time of the meeting?

3           A. I knew that those who had previously been police  
4           officers throughout their career would have diversity  
5           training, at different locations and to a different  
6           level, absolutely.

7           Q. For those who weren't former police officers, were you  
8           confident that they had been diversity trained?

9           A. Again, the majority of them came from public bodies,  
10          and, yes, I was aware that those bodies also had  
11          a requirement to provide diversity training to their  
12          staff.

13          Q. You say you don't remember if that training on  
14          unconscious bias was before or after?

15          A. No. No, I don't.

16          Q. You have no recollection of that?

17          A. I think if I was going to err on the side of safety,  
18          I probably would think it was after Mr Bayoh's death.

19          Q. Can I ask you about some evidence that we heard from  
20          Collette Bell.

21          A. Yes.

22          Q. She gave evidence on Day 40 of the Inquiry, last year,  
23          February of last year, and I would just like to ask you  
24          if you have any recollection of what she is describing.  
25          She talked about a phrase where it was mentioned that

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1           PIRC had inherited "bad apples". Do you remember anyone  
2           saying anything along those lines?

3           A. No, I don't, no. Sorry, was that at that meeting?

4           Q. Yes, a meeting with the Commissioner.

5           A. No. No, I don't.

6           Q. You don't remember. Then she recollected  
7           the Commissioner -- her impression of the Commissioner  
8           was that she was very snide and felt she was almost  
9           laughing at her, Collette Bell. And she says:

10                 "Answer: I think at one point she actually did  
11                 snigger, almost that my anger and my upset was funny to  
12                 her."

13                 That is what she said. Do you remember anything  
14                 along those lines?

15           A. No. No, I don't.

16           Q. Do you remember the Commissioner almost sniggering or  
17           laughing?

18           A. No.

19           Q. She said in evidence -- I asked her:

20                 "Question: Could Kate Frame have done anything or  
21                 said anything that may have made things~..."

22                 I was asking about if things could have been made  
23                 better, and she said:

24                 "Answer: She probably could have been a little bit  
25                 more understanding. I just felt like she had a very bad

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1           attitude towards us, very much she is right we're  
2           wrong."

3           Do you have any comment to make about that?

4           A. I am sorry to hear that that was how Collette Bell or  
5           any of the family members felt.

6           Q. Do you think that is an accurate view of how Kate Frame  
7           was at that meeting?

8           A. Not to my recollection, no. That would have been very  
9           unprofessional and I think that would have stuck in my  
10          mind.

11          Q. Thank you. Do you know anything of the -- and you may  
12          not -- do you know anything of the proposal in relation  
13          to the duty of candour regarding officers?

14          A. I think I have heard something recently that it is being  
15          considered as now at Government level, but I'm six years  
16          retired now, I'm afraid I don't know a great deal about  
17          it.

18          Q. Absolutely no problem. Thank you. We may hear evidence  
19          in the future in the Inquiry in relation to dealing with  
20          grieving families and arrangements in relation to the  
21          next of kin.

22          A. Yes.

23          Q. I would like to ask you for your thoughts on whether you  
24          think any of these proposals might be of benefit.

25          A. Okay.



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1 Q. "Consideration should be given to preventing a police  
2 force whose officers' actions are being considered in  
3 an independent investigation from commenting on the  
4 matters in issue to the media at all."

5 So they should be prevented from commenting in the  
6 media about the matters that are being investigated?

7 A. For the reasons I gave earlier, yes, I think that would  
8 be -- that would be helpful.

9 Q. Is that something you think would be helpful to the  
10 families?

11 A. Yes. Again, I mean I don't think there can be anything  
12 worse than for the family turning on the media or  
13 lifting up a newspaper and reading or hearing some  
14 contentious comment which grieves them.

15 Q. From the PIRC investigation perspective, would that be  
16 something that would also assist PIRC?

17 A. I think so, yes. As I say, for the reasons we discussed  
18 earlier, that we don't want anyone being tainted by  
19 whatever they hear in the news or read in a newspaper  
20 and just assume that that must be right and therefore no  
21 reason for going forward and giving statements.

22 Q. Thank you. What about the suggestion that any press  
23 release to be issued by PIRC should be agreed in advance  
24 with the family of the deceased. Have you any thoughts  
25 on that?

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1           A. I would think that would depend what sort of release  
2           that you are talking about there. If it involved or in  
3           some way referred to the family, absolutely. If it was  
4           a general press release in relation to seeking  
5           witnesses, for example, I am not so sure at that level  
6           that -- anything that might concern, upset, the family,  
7           absolutely.

8           Q. Do you think there would be merit in simply informing  
9           the family of press releases that were going out, even  
10          if it was as simple as seeking witnesses to an incident?

11          A. Again, it would do no harm. It wouldn't undermine the  
12          investigation, no.

13          Q. Have you any thoughts on whether that could actually  
14          assist -- bolster trust and confidence in the  
15          investigation, that steps are being taken?

16          A. Yes, I think it probably would.

17          Q. Do you have any thoughts on whether media briefings by  
18          police officers or on their behalf, if they are  
19          inaccurate or considered by PIRC to be inappropriate,  
20          should be commented on by PIRC and whether they should  
21          be considered as a misconduct issue?

22          A. Oh, now that is a different matter altogether.

23          I suppose you would have to look at every incident on  
24          its own merit there and whether you would wish to  
25          respond or whether you would wish to try and clarify

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1 a point. That is a difficult one. You know, if it was  
2 a ridiculously and obvious misleading statement, yes  
3 there might be scope to do a bit more with it.

4 Q. We have heard in the Inquiry that in any event issues of  
5 misconduct are for Police Scotland rather than anyone  
6 else.

7 A. At this moment in time the legislation -- misconduct  
8 matters only relate to senior officers when they become  
9 PIRC investigations, so that is Assistant Chief  
10 Constable and above. Below that it's a Professional  
11 Standards Department investigation.

12 Q. And nothing to do with PIRC?

13 A. Absolutely nothing to do with PIRC.

14 Q. Can I ask you about other evidence we may hear about  
15 possibly the supply of literature to a family who are  
16 grieving, at an early stage after the incident has taken  
17 place. It may be that a booklet is given or a pamphlet  
18 of some description can be given. Could we look at  
19 paragraph -- sorry. We may hear evidence that this is  
20 not always the norm in dealing with families who are  
21 grieving, although guidance documents are available.

22 I am interested in -- if we could look at  
23 PIRC 04457, please. This is an example of a guide that  
24 is available for families on the role of the PIRC and  
25 family liaison officers. So this is a guide that gives

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- 1 families some information in writing --
- 2 A. Yes.
- 3 Q. -- at an early stage, as I understand it, in  
4 an investigation. Is this something that you were  
5 involved in, in considering and preparing, in your role,  
6 information for families?
- 7 A. Again, I think it was something that was also -- always  
8 available even, you know, when I was in the police. So  
9 yes, it's good practice that families should be provided  
10 with information at the appropriate time.
- 11 Q. Do you think that handing them a leaflet with things  
12 written down is a good way to communicate --
- 13 A. It is not sufficient, if that is what you are asking.  
14 Ultimately I would expect an explanation and  
15 a discussion about what was contained in that leaflet to  
16 make it sure that the family understood and -- because  
17 I can only imagine there is so much for families to take  
18 in at that time, that explanation would be required.
- 19 Q. Would you agree that the combination of both  
20 an explanation given face-to-face perhaps or in some way  
21 with the family but also written leaflets might be  
22 a good combination?
- 23 A. Yes, because the written leaflet for me would be much of  
24 an aide memoire after the event because again, whether  
25 the family would take everything in at an early stage

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1           would be difficult to say under the circumstances. It  
2           would also -- a leaflet like that would maybe give them  
3           the opportunity of: oh, I should have asked that,  
4           I should have asked that, and to go back with those  
5           types of questions.

6           Q. Would you agree or disagree that giving the family  
7           information such as they may wish to appoint a solicitor  
8           or take legal advice, do you think that would be useful  
9           information for the family?

10          A. Yes, I think it probably would, yes.

11          Q. Is that something that PIRC are willing to work with  
12          a legal representative in dealing with the family?

13          A. Yes, we were willing during my time. I don't  
14          necessarily again think that it's always the best way  
15          because I think there is a difficulty there in building  
16          any sort of understanding or rapport between the  
17          investigators and the family. I think you may on  
18          occasions miss that opportunity.

19          Q. Who do you think is best placed to build the  
20          relationship and the rapport with the family?

21          A. Well, if we are talking about a set of circumstances --  
22          and I think I have said this before, if the family wish  
23          a solicitor and that is the way that they want to do it,  
24          that is absolutely correct as far as I am concerned.  
25          Because it is down to the family and what best suits

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1           them. There is absolutely no doubts that the family  
2           will build a rapport with that solicitor.

3           But I also think it would be beneficial for FLOs to  
4           build a rapport, to get an understanding, a deeper  
5           understanding, of the family's needs. I am not  
6           suggesting you would need to -- or it would be even  
7           correct to try and exclude the solicitor in these  
8           circumstances.

9           Q. Would you like to see, even if there is a solicitor  
10          appointed, for the FLO to continue in their role  
11          building that relationship with the family?

12         A. Yes.

13         Q. Would that give PIRC the most assistance and the least  
14          hindrance in terms of the investigation?

15         A. I think it would, yes.

16         Q. This may be something you are not able to comment on but  
17          do you have any views about whether literature such as  
18          this should advise families about financial matters,  
19          perhaps funding issues, whether there should be funding  
20          issues, whether that would assist PIRC in building  
21          a relationship with the family, and allow the family to  
22          instruct a solicitor if they wished?

23         A. Again, from experience I don't think that sort of  
24          information would be harmful. Again, it would open up  
25          another avenue to support the family. So I don't think

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1           it would be harmful.

2           Q. Can I ask you some questions about race. We have heard  
3           that Mr Bayoh himself was black.

4           A. Yes.

5           Q. And I think if we go back to your Inquiry statement,  
6           please and look at paragraph 421. 420 to 422 really  
7           I am interested in. Here. If we start with 420, you  
8           were asked:

9                     "... prior to 3 May 2015, what experience [you] had  
10           of investigations of deaths in custody or deaths  
11           following police contact in which race was a factor  
12           to investigate. [You] don't recall one."

13                    Does that remain the position to date?

14           A. Within PIRC, yes.

15           Q. Within PIRC. 421:

16                     "I have been asked if PIRC had ever considered the  
17           issue of race within an investigation prior to 3 May~...  
18           or if race became a consideration in an investigation  
19           subsequent to the investigation~... Not that I recall,  
20           no."

21           A. Not that I recall, no.

22           Q. Is that correct?

23           A. Yes.

24           Q. Then 422:

25                     "I have been asked if I considered the investigation

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1 of issues of race to be more challenging for PIRC if  
2 this was the first time that PIRC had been required to  
3 investigate allegations of racism or issues of race."

4 Your answer is:

5 "No, because it's all about gathering evidence and  
6 finding where the evidence leads you. What you're  
7 trying to do is start off by ingathering all information  
8 that may be available. Take statements: see what you  
9 can glean from those statements and see if you find  
10 information or evidence that tends to support that race  
11 or racism played a part in events."

12 A. Yes.

13 Q. So looking wider at the team who were under you, were  
14 you satisfied that they had experience of investigating  
15 deaths in custody or after police contact where race was  
16 a factor?

17 A. Clearly not within their time in the PIRC because  
18 I wasn't aware of any such investigation, no.

19 Q. Were you satisfied that they had that type of experience  
20 from previous work, say with Police Scotland?

21 A. I certainly was of the opinion that they had  
22 considerable investigative experience, sufficient  
23 I would suggest to identify whether or not race was  
24 a factor.

25 Q. Did you have any concerns at that stage that -- although



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1           you have talked here about gathering evidence and  
2           finding where the evidence leads you, did you have any  
3           concerns about their ability to identify what may be  
4           relevant evidence to race?

5           A. My expectation would be when they are conducting  
6           an investigation, that they ingather all of that  
7           information that is available and given to them and is  
8           obvious. Whether that being form of a statement which  
9           would be the normal process, and to submit that to the  
10          inquiry, and that these statements are going to be  
11          considered at length by the senior investigator and his  
12          or her deputy.

13          Q. What if it is not obvious?

14          A. If it is not obvious it is going to be difficult in any  
15          case.

16          Q. So in terms of -- you mentioned statements, would you  
17          expect the lead investigator, the senior investigator,  
18          to be scrutinising those statements, looking for any  
19          adminicle of evidence that may indicate race was  
20          a factor?

21          A. Yes.

22          Q. We have heard evidence that from 3 May 2015 to towards  
23          the end of August, maybe into 2 September 2015, that  
24          PIRC were taking cognisance of race --

25          A. Yes.

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1 Q. -- if issues emerged?

2 A. Yes.

3 Q. But Mr Little has explained he didn't view that as  
4 an active line of investigation. It was taking  
5 cognisance, being mindful, or keeping an open mind. If  
6 things emerged, they would take that forward, but not  
7 an active -- a proactive step by PIRC. Would you agree  
8 with that?

9 A. That would probably be right, yes.

10 Q. But then from end of August, 2 September in particular,  
11 at that point the Crown Office issued a letter of  
12 instruction specifically referring to race, and from  
13 that moment it was absolutely part of the terms of  
14 reference?

15 A. It was part of the terms of reference but I would  
16 suggest that even before that letter was issued that  
17 part of the investigation relating to the officers  
18 concerned, the central officers to this, would be to  
19 ingather their personnel records, their discipline  
20 records, their complaints records, so ultimately if  
21 there had been anything in these records that suggested  
22 a racist or racial element, that that would have been  
23 gathered at that time during the investigation. I don't  
24 think that the letter on 2 September necessarily --  
25 I think it put it on an official footing from Crown, if

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1           we put that way, but it became part of the terms of  
2           reference rather than the general investigation.

3       Q.   Can we look at that letter, if we have it available.  
4           2 September.  Sorry, I don't have the reference at this  
5           precise moment.  If I may, I will come back to that  
6           after the break.  Thank you.  Could we look at  
7           paragraph 160 of your Inquiry statement, please.  It  
8           says:

9                   "I have been asked if I recall Mr Bayoh's race  
10           playing a part in the development of these hypotheses."

11           We have heard evidence about hypotheses:

12                   "Not immediately I don't because it is still early  
13           on.  I am not discounting that, but this is the police  
14           responding to a live incident.  Unless there is evidence  
15           to suggest that there was some racial or racist  
16           motivation to it early doors, yes, you'd be open to it  
17           because, when you're conducting house-to-house  
18           enquiries, you're not just interested what people see;  
19           you are interested in what they hear.  If house-to-house  
20           enquiries or any other witness statement suggested that  
21           there had been inappropriate remarks which would have  
22           been of a racial matter, clearly, at that stage you  
23           would have considered that in more depth.  I honestly  
24           don't think it was at the start.  I think later on it  
25           was considered."

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1 A. Yes.

2 Q. Were you essentially looking for obvious, overt comments  
3 in relation to race?

4 A. At the very early stages of the inquiry, yes, everybody  
5 had to be aware that if those overt comments were made  
6 or heard, or there was any evidence that suggests that,  
7 that that should be highlighted.

8 Q. At 161 you say:

9 "I have been asked if I consider the impact that  
10 Mr Bayoh's race had on events should have been  
11 a hypothesis from the outset of the investigation,  
12 rather than later on. I think you need to follow the  
13 evidence, and I think at that early stage, there was no  
14 evidence. We didn't even know at that stage why  
15 Mr Bayoh had died. We had no idea of the cause of  
16 death, so maybe it would have been better if it had  
17 formed one of the hypotheses early on, and it would have  
18 done no harm to have considered it."

19 A. Yes, I would agree with that.

20 Q. This is your statement, so --

21 A. Yes, my statement, yes.

22 Q. We have heard from Lesley Boal, who was a police  
23 officer, that she was very early thinking that --  
24 whether Mr Bayoh had been treated differently because he  
25 was black. She would have seen this as a hypothesis

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1           about a possible line of investigation, if the police  
2           had been continuing with the investigation. You seem to  
3           suggest here that it should have been a hypothesis from  
4           the outset rather than later. Do you agree it was not  
5           one of the hypotheses at the outset?

6           A. Yes, I think that is correct. Yes.

7           Q. You have said it would have done no harm to have  
8           considered it. Do you have any thoughts on whether by  
9           not considering it at an early stage, harm was being  
10          done?

11          A. I don't -- I don't think so. It's a difficult set of  
12          circumstances you are putting to me here. Clearly we  
13          know that Mr Bayoh is a black man. But we still need to  
14          have evidence to support whether or not that played  
15          a part in the way that the police dealt with him. And  
16          at those early stages there was no overt evidence.  
17          However, I do appreciate the point around -- that it  
18          would probably have been better in hindsight had that  
19          formed part of the hypothesis from day one.

20          Q. Because we have heard that one of the hypotheses from  
21          the very beginning was perhaps that he died of natural  
22          causes, and there was no evidence as such to suggest he  
23          had died of natural causes, but that was a hypothesis  
24          that was being investigated or being -- could have been  
25          considered at the start of any investigation.

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1       A. Well, until the post mortem result is known that is  
2       a possibility, but I don't know whether I would actually  
3       consider that, at that stage, as being a hypothesis.  
4       I think I would want to know what the evidence of the  
5       post mortem was first.

6       Q. So can I maybe just be clear, what is your understanding  
7       of a hypothesis? Because it may be that other evidence  
8       we have heard people have different views?

9       A. Just purely and simply that you start off with a blank  
10      piece of paper, that you consider what may or may not be  
11      pertinent to the investigation, and as you work your way  
12      through evidence will either build on that hypothesis  
13      and it will continue to be a line of enquiry, or  
14      alternatively evidence will rule that hypothesis out.

15     Q. Thank you very much. I have very kindly been given the  
16     reference to the 2 September letter. Could we maybe  
17     look at that. COPFS 02557. This is the letter dated  
18     2 September from Crown Office to the Commissioner. You  
19     will see that on the screen.

20     A. Yes.

21     Q. You will see that -- I should say we've heard evidence  
22     that in the August of 2015 the interim report had been  
23     sent to the Crown.

24     A. Yes.

25     Q. This letter was sent to Kate Frame after that interim

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1 report had been prepared.

2 A. Okay.

3 Q. The letter you see on the screen is a lengthy letter, it  
4 spills into five pages and it's from Les Brown Head of  
5 Criminal Allegations Against the Police Division, CAAPD.  
6 So if we look at page 1, if we can move down that page  
7 towards the bottom of first paragraph it says:

8 "... PIRC would be instructed to carry out  
9 investigations in respect of a number of matters in  
10 order that a properly informed decision be taken by the  
11 Crown as to the most appropriate way to proceed."

12 Then there are numerous bullet points. I can tell  
13 you there are 13 bullet points as part of this letter.  
14 You will see that they start with a request for  
15 a detailed analysis to be provided, and there is  
16 reference at the bottom of first page to independent  
17 experts. There is quite a large number of references to  
18 independent experts. If we could start by looking at  
19 page 4, which is -- the top of page 4 is the 12th bullet  
20 point:

21 "I require confirmation from the Commissioner that  
22 issues of race and whether there is any evidence of  
23 racial motivation is a primary focus in the PIRC  
24 investigation. The investigation should examine whether  
25 there is any evidence that any of the officers involved

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1           has expressed any racist views or opinions in the past,  
2           in particular indicated that officers from within the  
3           Fife area had been investigated for texting racial  
4           slogans and that any of the officers was referred to  
5           him."

6           We've heard evidence about a number of letters of  
7           instruction and this was the first that specifically  
8           mentioned race.

9           A. Yes.

10          Q. So there is a direction, an instruction, here to PIRC in  
11          relation to race, and to -- for PIRC to examine whether  
12          there is any evidence that any of the officers involved  
13          has expressed any racist views or opinions in the past.

14          A. Yes.

15          Q. If we can also look at another letter prior to this  
16          letter, there was -- I won't put it on the screen at the  
17          moment -- there had been a letter from the end of July  
18          from Mr Anwar raising the issue of race with PIRC. It  
19          wasn't part of any terms of reference or letter of  
20          instruction but he had written directly to  
21          the Commissioner.

22          A. Yes.

23          Q. He had raised issues about race. That was from 28 July.  
24          Prior to that there weren't any letters to the  
25          commissioner from Crown Office which referred to race at



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1           all. So when you said a moment ago, earlier,  
2           a few minutes ago, that the matter was already being  
3           handled it could have possibly been raised from the  
4           28 July letter sent by Mr Anwar which found its way into  
5           the management policy log --

6           A. Okay.

7           Q. -- in terms of handwriting from Mr McSporran.

8           A. Right.

9           Q. We have heard evidence from Mr McSporran and Mr Little  
10          that there was no active line of investigation regarding  
11          race in that period up to -- effectively this period  
12          around about the end of July/beginning -- to  
13          2 September?

14          A. If that is their position that must have been correct.

15          Q. All right. Thank you. I would like to move on to  
16          4 June, which is when the officers gave statements.

17          A. Yes.

18          Q. We've heard evidence from Mr Little and Mr McSporran in  
19          relation to what was known as a witness interview  
20          strategy.

21          A. Yes.

22          Q. There are -- it was agreed by them that there were no  
23          questions on that 13-page document which specifically  
24          focused on the issue of race. So there were no  
25          questions written down in that witness interview

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1 strategy if the officers had acted in a certain way  
2 because Mr Bayoh was black or if they would have acted  
3 a different way if he had been white.

4 A. Okay.

5 Q. At that stage there was this entry in the -- a decision  
6 in the management policy log to take cognisance of  
7 issues. We've also heard evidence about the content of  
8 statements that were given to PIRC voluntarily by  
9 the officers after that date. One of the matters that  
10 we've spoken about is the language that was used in the  
11 witness statements and I don't know if you have seen any  
12 of that evidence or heard --

13 A. Yes --

14 Q. -- any of those matters?

15 A. Well, I have and I think parts are covered in my  
16 statement so it was brought up during my interview, yes.

17 Q. So we've heard that certain officers had used the word  
18 "coloured"?

19 A. Yes.

20 Q. Kayleigh Good had made an apparent connection or link  
21 between the fact Mr Bayoh was black with a terrorist --  
22 with this being a potential terrorist incident. There  
23 were a number of references to Lee Rigby, which had been  
24 a recognised terrorist incident.

25 A. Yes.

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1 Q. And a reference in one of the officers' statements to  
2 a phrase "a wee Pakistani doctor"?

3 A. Yes.

4 Q. I am interested in whether you were involved in any way  
5 in analysing those statements or considering the  
6 language used in those statements from the perspective  
7 of considering whether issues regarding race were  
8 emerging?

9 A. No, I wasn't involved in analysis of those statements.

10 Q. Who would you have expected to be doing that type of  
11 work?

12 A. The senior investigator.

13 Q. As far as you know, at any stage was any consideration  
14 given by PIRC to whether any inferences could be drawn  
15 from the use of certain language that may be considered  
16 potentially to have racist connotations?

17 A. When we speak specifically about the language that is  
18 used in the statement, and particularly the word  
19 "coloured", that is offensive as far as I am concerned,  
20 it is certainly not language that I would use. It would  
21 certainly flag up, if it was a member of my staff, that  
22 at the very, very least there was a training  
23 requirement, and had it been a member of my staff using  
24 that type of language I would have addressed it at that  
25 time. So it's not appropriate language.

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1 Q. When you say "a member of your staff", if you --  
2 obviously you had considerable experience as an officer.  
3 If you had been sitting in an interview with an officer  
4 who used that type of language, what would your reaction  
5 have been?

6 A. Just as I say, I wouldn't have been impressed because it  
7 is not the type of language that should have been used.  
8 I might even have made that comment. I might even -- if  
9 I had been conducting the interview I might have  
10 actually made that comment: inappropriate.

11 Q. Would you have considered that an appropriate point at  
12 which maybe to ask further, more probing questions about  
13 race or why that language was being used?

14 A. Yes, I think there probably should have been more  
15 probing questions made in relation to -- not just that  
16 area, but other matters that were discussed during those  
17 statements.

18 Q. What other matters --

19 A. Just generally in clarity. It's some time ago and  
20 I don't actually remember all of the aspects of the  
21 statements but an interview adviser pulls together  
22 an interview plan. That doesn't mean that that is the  
23 only questions that you ask. You are not running  
24 through a script. You would expect experienced officers  
25 and experienced investigators, sorry, to use their

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1 common sense and if there was a lack of clarity or if  
2 there was something that needed expanded upon, you would  
3 expect that to occur.

4 Q. We've looked at the witness interview strategy in  
5 detail --

6 A. Yes.

7 Q. -- with some of the previous witness, and noted that we  
8 have heard evidence that it is legal for police officers  
9 to use force in their operational duties.

10 A. Yes.

11 Q. But in order for that to be legitimate it has to be  
12 justified?

13 A. Yes.

14 Q. And in order to justify it, each individual officer must  
15 explain why it was reasonable, necessary and  
16 proportionate?

17 A. Absolutely, yes.

18 Q. They have to have looked to other less forceful options  
19 and excluded them, either in advance or having tried  
20 them and failed?

21 A. Yes.

22 Q. And they have to use the absolute minimum level of force  
23 that is required to achieve their goal.

24 A. I understand that, yes.

25 Q. We have heard that was a key issue in relation to

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1           the incident regarding Mr Bayoh.

2           A. Definitely.

3           Q. We have also heard that in the witness interview

4           strategy there were no questions -- sorry, I should say

5           before we move on, each officer has to justify each

6           individual use of force.

7           A. Yes.

8           Q. So if there are three baton strikes, each baton strike

9           has to be justified?

10          A. Absolutely.

11          Q. We have heard evidence that there were no questions in

12          the witness interview strategy regarding: why did you

13          use your baton? Why did you use that level of force?

14          Why did you not use a different technique or a different

15          tactic? That type of thing.

16          A. Yes.

17          Q. Does that concern you, that there were no questions in

18          the witness interview strategy about use of force?

19          A. Yes.

20          Q. Why does that concern you?

21          A. For the reasons you have just given, that you would

22          expect an explanation. You would expect a justification

23          around that and if you don't ask that question, either

24          at that interview or indeed if having then compared,

25          considered and analysed the statements, it would

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1           probably have been appropriate to go back at that stage  
2           and make sure those questions were asked.

3       Q.   So even if they hadn't been asked by experienced  
4           investigators or otherwise, for whatever reason, you  
5           think there would have been merit going back and  
6           clarifying that?

7       A.   It's disappointing that they are not asked in the first  
8           place, but there would have been merit in going back and  
9           clarifying, yes.

10      Q.   Thank you.  In relation to potentially racial  
11           stereotypical language, maybe portraying Mr Bayoh as  
12           "massive" or "the biggest male that I've ever seen" --

13      A.   Yes, I think I have made comment on that.  You know, and  
14           again in comparison to at least two of the police  
15           officers, I don't think you could describe him that way.

16      Q.   On the face of it, of that comment, there is nothing  
17           obvious about race.  No words --

18      A.   No.

19      Q.   -- that are automatically offensive --

20      A.   No.

21      Q.   -- for that reason.  But do you think that comment in  
22           itself should also have been a red flag to investigators  
23           in relation to the issue of race?

24      A.   If we are talking about it being stereotypical, which  
25           I agree that it probably is, because it is used when you

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1 listen to media, when you listen to -- read newspapers,  
2 et cetera. Yes, that should probably have been delved  
3 into more deeply.

4 Q. How confident are you that your investigators were  
5 adequately equipped to identify a comment like that as  
6 potentially a racial stereotype?

7 A. Again, they are experienced, there is lots and lots of  
8 experience there. I think it would have been -- sorry,  
9 it wouldn't be unreasonable for them to understand that  
10 that may very well be a stereotypical ...

11 Q. Are you confident that they were in a position to  
12 understand that?

13 A. That is a difficult one for me to answer, isn't it?  
14 I would have hoped they would have been. But if they  
15 haven't asked it, then I would then have my doubts in  
16 some ways.

17 MS GRAHAME: I wonder if that might be an appropriate time  
18 to break.

19 LORD BRACADALE: We will take a 20-minute break now.

20 (11.31 am)

21 (A short break)

22 (11.56 am)

23 LORD BRACADALE: Ms Grahame.

24 MS GRAHAME: Thank you. Before the break we were talking  
25 about the language used in the officers' statements.



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1 A. Yes.

2 Q. And we heard evidence from Kate Frame in relation to  
3 this matter and that I think ultimately, and it will be  
4 a matter for the Chair, that she noticed that analysis  
5 about the language did not feature in the PIRC report.  
6 And that ultimately, as I understand her evidence, she  
7 accepted that considerations around the officers'  
8 language in their statements should have been flagged  
9 within the PIRC report. But she explained that she had  
10 raised this issue with you and that you had taken the  
11 view that they were misconduct matters for  
12 Police Scotland and the report should simply be sent to  
13 Crown Office.

14 Do you remember any conversation with Kate Frame  
15 specifically about the use of language in officers'  
16 statements?

17 A. There was a lot of discussion about the style of the  
18 report, more than the content, I would suggest. There  
19 may very well have been discussion about the language  
20 used. What I don't recall is having an opinion or  
21 otherwise whether there should be a particular paragraph  
22 or section within the report that covered it or not.  
23 No, I do not recall that.

24 Q. Do you remember suggesting to Ms Frame that this was  
25 a matter for Police Scotland because it was an issue for

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1           misconduct rather than an issue that should be contained  
2           in the PIRC report?

3           A. But even if it was a matter for Police Scotland, I don't  
4           see why that would preclude it from appearing in the  
5           PIRC report. So, no, I don't understand that one.

6           Q. Do you have any recollection at all about --

7           A. I said there was so much discussion, more around style  
8           than content, from my memory. I do recall the type of  
9           language that was used because, you know, it does stick  
10          in your mind that, it's not appropriate. I don't  
11          specifically remember that being a standalone discussion  
12          about where that should go in the report or whether it  
13          should not go in the report. If it was a matter of  
14          evidence that had been gained during the investigation,  
15          I don't think I would have had a strong opinion that it  
16          shouldn't have been recorded in the report.

17          Q. Looking back now in fact do you think that should have  
18          been in the PIRC report, the use of language by  
19          officers?

20          A. At the end of the day the statements were going to be  
21          supplied and it was covered in the statements so I don't  
22          see why it shouldn't have been in the report. It would  
23          have been good practice, I think, to put that in the  
24          report.

25          Q. Thank you. Could we look at your Inquiry statement

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1           again, please, paragraph 431. You say -- you are  
2           continuing in your statement in relation to the issue of  
3           race:

4           "I think if the evidence was there, we would have  
5           found it. I don't know how much broader you can make  
6           the investigation. For example, I do not know how you  
7           investigate unconscious bias, for the very fact it's  
8           unconscious. I think you'd have to look at what  
9           training people had had, what their understanding was of  
10          that training they had. Negative stereotyping, all of  
11          that, but that is a very difficult thing to prove or  
12          disprove, I would suggest."

13          I am interested in what you say here about not  
14          knowing how you would investigate unconscious bias?

15         A. I think I was being honest about that, what you would be  
16          looking for first and foremost was overt -- overt  
17          evidence in relation to race, to support whether or not  
18          that race was a key factor in the investigation. The  
19          unconscious bias element of it, as I say, is very, very  
20          much derived from stereotyping, whether that be positive  
21          or negative stereotyping. And to this day, and that is  
22          maybe a fault on my behalf, or something that I lack,  
23          but I am not quite sure other than to have considered  
24          all of the evidence, including the officers' personnel  
25          files, their discipline records, that language in

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1           fairness that was included in statements, how you would  
2           identify unconscious bias in an individual ...

3       Q.   Had you had training in relation to conducting  
4           an investigation where there was perhaps a suggestion of  
5           unconscious bias?

6       A.   No, I hadn't.  No.

7       Q.   Had any of your investigators had that training?

8       A.   Not to my knowledge.

9       Q.   Prior to Mr Bayoh's death?

10      A.   Not to my knowledge.

11      Q.   We heard evidence from Ms Frame, as I have said, and we  
12           asked her questions about training, and she gave  
13           evidence that the responsibility for identifying gaps in  
14           the investigator's training was your responsibility and  
15           she said that you did not raise with her the fact that  
16           further training would be required for investigators in  
17           relation to investigations where race was factor.  She  
18           also said, in response to a question about whether she  
19           had considered putting training in place for this type  
20           of investigation, that professional development of that  
21           lay within the investigation team.

22                Do you have any -- can you confirm, was it your  
23           responsibility to raise issues about training gaps?

24      A.   Yes, I would imagine it would have been, yes, my role,  
25           yes.

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- 1 Q. Had you identified a training gap in relation to  
2 investigations where race was a factor?
- 3 A. No, I hadn't because we hadn't encountered one at the  
4 stage when Mr Bayoh died. And although the organisation  
5 by that time was two years old, I have to go back to the  
6 point that the number of investigations from the  
7 beginning of April 2013 to 2015 had been steady and  
8 that, yes, we were dealing with the training in relation  
9 to scene management, to FLO, to the understanding of  
10 death in custody, to fatal accident inquiries, and  
11 working that in with the other demands. If that is  
12 a failing on my behalf, I need to accept that.
- 13 Q. Do you think that is a failing on your part, looking  
14 back at things now?
- 15 A. I suppose it's a matter of did I give it consideration  
16 and should I have given it consideration? I suppose  
17 until this sort of scenario arises, and not having  
18 had -- this, as I said earlier, is the only death that  
19 I was aware of that race was a consideration, so it  
20 would have been training that -- it's important  
21 training, I am not saying it's not important training,  
22 but would it have been any more important at that time  
23 than understanding that people were aware of their roles  
24 as FLOs or scene managers or the likes? But, as I say,  
25 I accept that if there was a failure in that area, that

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1           that would therefore have to lie at my shoulders.

2           Q. Can I ask you about considering a comparator. Can  
3           we look at paragraph 433, please. This is your Inquiry  
4           statement:

5                        "I have been asked if, when investigating issues of  
6           race, PIRC considered attempting to identify comparator  
7           evidence that might have permitted PIRC to compare how  
8           Mr Bayoh was treated against how other individuals, who  
9           were not black, were treated in similar circumstances.  
10          I don't believe so. I'm not quite sure how you could do  
11          that. I feel that it would have been necessary to  
12          identify incidents which were identical in all aspects  
13          of the events leading to and including the interaction  
14          between the police and Mr Bayoh to draw a meaningful  
15          comparison."

16                       So you've been asked here about the possibility of  
17          identifying a comparator to Mr Bayoh --

18          A. Yes.

19          Q. -- in relation to the circumstances that he found  
20          himself in, but a white comparator and you say:

21                        "I don't believe so."

22                        Was there no consideration given at all by the PIRC  
23          investigators to that possibility?

24          A. Again, I don't think there was, and I think at the end  
25          of the day lines of enquiry that are taken on are lines

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1           of enquiry that you actually believe you can see an end  
2           to. And to repeat what I said in that summary of  
3           evidence, for it to be a scientific comparison, I would  
4           have to suggest that every aspect of it, regardless of  
5           the individual's colour, would have to be almost exactly  
6           the same to make a meaningful comparison.

7           Q. So in your view was that a sort of impossible goal, to  
8           achieve a precise comparator?

9           A. Yes, I believe that is the case and I think that is  
10          maybe why it didn't enter my mind.

11          Q. So you simply did not even consider whether that could  
12          be done?

13          A. No. No, I didn't. No.

14          Q. Can I ask you about something else Ms Frame said to us  
15          in evidence, that -- in relation to questions about  
16          comparator evidence, comparing how Mr Bayoh may have  
17          been treated against someone who was white. She said  
18          that was a consideration as part of the investigation  
19          and she said that she discussed it with a number of  
20          investigators -- she named you -- at the beginning of  
21          the investigation, she said, and there was an indication  
22          that they would take cognisance of this?

23          A. I don't recall that. For the reasons I have just given.

24          Q. Do you remember any discussion with Ms Frame that was in  
25          connection to a comparator or the difficulties you

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1           believed might be experienced by investigators in  
2           finding a comparator?

3           A. I don't -- I don't recall that discussion. I really  
4           don't. But if the discussion had taken place, the  
5           viewpoint I have just given now would have been my  
6           viewpoint then. But I do not recall that discussion.

7           Q. Can we look at paragraph 438, please, and the following  
8           paragraphs. We will go through. I think if I may  
9           I will simply summarise what you say here. If we start  
10          with 438:

11                   "I have been asked if PIRC had any guidance or  
12                   reference materials in relation to investigations  
13                   touching on issues of race. There wasn't a particular  
14                   [standard operating procedure] or memo of understanding  
15                   or anything like that that related to dealing with  
16                   matters that related to race."

17                   We have heard that now there is guidance for PIRC  
18                   investigators doing investigations where race is  
19                   a factor, but there was nothing like that available to  
20                   your investigators?

21          A. No, there wasn't. No.

22          Q. You say at 439 you never sought guidance in relation to  
23           previous investigations or enquiries such as the  
24           Lawrence Inquiry, so did your investigators never  
25           consider whether there was guidance available out there



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1           or documents that could assist?

2           A. I don't know whether John McSporrان did.

3           Q. But there was nothing done by you about seeking out

4           guidance elsewhere?

5           A. No.

6           Q. You say that you never discussed the Lawrence Inquiry,

7           at 440.

8           A. Not that I recall, not during the investigation, no.

9           Q. At 441 you say you never sought guidance from any third

10          parties --

11          A. No.

12          Q. -- in relation to assistance they could provide in

13          relation to --

14          A. No.

15          Q. -- an investigation?

16          A. I think in relation to the approach to the IPCC, where

17          I totally understand that they were probably more

18          experienced in that, I don't honestly recall much

19          coverage of that type of investigation by IPCC featuring

20          in positive feedback.

21          Q. We've heard that there was some guidance

22          in September 2015 but not at the time in May 2015.

23          A. Okay.

24          Q. Were you aware that there was any attempts going on down

25          south to prepare guidance to assist investigators?

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- 1 A. No. No, I wasn't.
- 2 Q. Then at 442 you say:
- 3 "I have been asked if I consider this could have
- 4 assisted PIRC's investigation and permitted PIRC to
- 5 learn from other experience."
- 6 And you say:
- 7 "It may have."
- 8 A. It may have, yes.
- 9 Q. If you were thinking now about an investigation where
- 10 race was a factor, and I appreciate you have retired, do
- 11 you think these sources may have been of benefit to your
- 12 investigators at the time?
- 13 A. As I say, I am not so sure about the IPCC aspect of it.
- 14 A number of the investigators would be more than aware
- 15 of the Lawrence Inquiry, because it was well covered in
- 16 policing circles in years since the Lawrence Inquiry.
- 17 I am not 100% sure just how much similarity in the
- 18 investigations there were. However, I am prepared and
- 19 should accept that there may very well have been matters
- 20 therein that could have been of assistance.
- 21 Q. Thank you. So looking back with hindsight, do you think
- 22 there may have been some merit in looking for these
- 23 sources if they existed?
- 24 A. I don't think I could argue with that. Yes.
- 25 Q. Can we look at 465, please. You were asked if PIRC was:

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1            "... sufficiently equipped to investigate issues of  
2            race relating to deaths in police custody or deaths  
3            following police contact in 2015."

4            And you say:

5            "I thought we were, yes, but maybe there was  
6            an opportunity to seek guidance from people who had more  
7            experience. Maybe I should have considered whether  
8            there was an outside agency that could have assisted.  
9            Maybe that was a fault on my part. I don't know who  
10           I would have turned to. There are other investigative  
11           bodies that probably have faced that and, in hindsight,  
12           it may have been worth turning to them."

13           What investigative bodies were you thinking of?

14           A. Well, it would have to be the likes of IPCC, it would  
15           have to have been the Garda Siochana Ombudsman or the  
16           PSNI Ombudsman, a body like that. I think from my  
17           experience the only type of other organisation that you  
18           might have turned to would have been a police agency  
19           elsewhere, and I am not quite sure whether that would  
20           have been appropriate when we consider independence.

21           Q. Thank you. Can we look at 661 now, please. I think in  
22           this paragraph you were asked about what additional  
23           training PIRC investigators may have benefited from at  
24           the time. 661. You say:

25           "The obvious one, with hindsight, would be a better

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1           understanding around race and what part race could have  
2           played in that investigation, but other than that we had  
3           a breadth of experience across most, if not all,  
4           investigative disciplines."

5           When we spoke to Ms Frame about this she said that  
6           there were practical limitations in relation to  
7           resourcing, both in terms of financial implications but  
8           also releasing investigators from their day-to-day  
9           duties to attend training. Can you tell us a little  
10          more about that?

11         A. That is exactly the set of circumstances, and it goes  
12          back to the discussion around setting the organisation  
13          up, where it was a very, very difficult role to try and  
14          identify what the demand profile would be. And very,  
15          very quickly we realised that the numbers that we were  
16          given were probably smaller than should have been, that  
17          we got far more investigations, for example from the  
18          Crown, than had ever been expected. And, yes, it's  
19          great to be able to train people constantly and in areas  
20          that we could, we did, but the demand profile took over  
21          very, very quickly and it was very, very difficult to  
22          release staff numbers to take on different training.

23         Q. Thank you. As part of the investigation were you aware  
24          of any consideration being given to whether inferences  
25          could be drawn from evidence that was available

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1           regarding the way that family and friends of Mr Bayoh  
2           had been treated in the immediate aftermath of his  
3           death? I am thinking specifically about searches of  
4           houses, recovery of DNA, recovery of clothing from  
5           Martyn Dick, Kirsty MacLeod, Mrs Ahmed and Mrs Rashid,  
6           relatives of Mr Saeed?

7           A. I am not sure what the purpose of that was. Again, that  
8           was Police Scotland that conducted that area of the  
9           investigation. And it had happened before we became  
10          involved in so much as it happened before the terms of  
11          reference were changed. So, as far as drawing  
12          an inference round that, I am not quite sure what  
13          inference I could draw.

14          Q. So is it fair to say no consideration was given to  
15          whether an inference could be drawn in relation to  
16          whether this was an indication of racist or racial  
17          discrimination?

18          A. No.

19          Q. In paragraph 645 of your Inquiry statement you say:

20                 "In no way shape or form did Mr Bayoh's race  
21                 negatively impact ..."

22                 Do you see it there:

23                 "In no way, shape or form did [his] race negatively  
24                 impact on my decision-making. Every line of  
25                 investigation was pursued, as far as I am aware."

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1           On reflection, regarding the questions I have been  
2 asking you about race and the information I have given  
3 you about other evidence, do you wish to reflect on that  
4 statement:

5           "Every line of investigation was pursued, as far as  
6 I am aware."

7       A. That is probably an overstatement I would suggest,  
8 having discussed what we have discussed today.

9       Q. Thank you. The other aspect of the investigation I am  
10 interested in -- this is after the terms of reference  
11 has been extended, and I understand that there was  
12 an active line of investigation pursued regarding  
13 statistics --

14      A. Yes.

15      Q. -- and recovery of data, to look at whether there was  
16 an issue in what was then the area of Fife,  
17 particularly.

18           We have heard that there were some issues about the  
19 analysis and the ability to analyse that and I think  
20 Ms Frame gave evidence that race itself could not be  
21 extracted from the data to look at that in isolation.  
22 In terms of the investigation and the investigators, how  
23 satisfied were you that they were equipped to deal with  
24 statistical analysis?

25      A. Again, that was down to the senior investigator, if he

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1           felt that he or others within the group weren't capable  
2           of that, that is exactly the type of thing I would have  
3           expected him to come to me about.

4       Q. Did he ever come to you about that?

5       A. No, because ultimately that would have been about buying  
6           in a resource to do that, and that was absolutely the  
7           type of oversight role I had at this time. It was  
8           not -- it was totally impractical for me to sit as the  
9           director of investigations, determine every line of  
10          enquiry and every investigation that was ongoing. Hence  
11          the reason you appoint a senior investigator, to take  
12          that responsibility. If that senior investigator during  
13          the investigation hits hurdles or challenges around  
14          something like an analysis of statistics, my expectation  
15          would be that I would be approached to see whether we  
16          could remedy that.

17       Q. Were you ever approached?

18       A. No, not around that.

19       Q. Could we look at 598, please. We've heard evidence in  
20          relation to:

21               "... intelligence held by Police Scotland in  
22               relation to [Mr] Anwar and the badging of that  
23               intelligence as "Refract". I do recall a discussion  
24               around that. The heading's used within the intelligence  
25               system, and I believe that it referred to counter

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1           terrorist-related matters. I think it was held  
2           incorrectly under that heading. Mr Anwar's business was  
3           totally legitimate. I wasn't involved really in any  
4           discussions around that. That again was down to the  
5           senior investigator and his team."

6           I am not wanting to go into the background of that,  
7           we've already got evidence available, but what I am  
8           interested in is whether it was ever considered as part  
9           of the investigation whether inferences could be drawn  
10          in relation to race from the information you had about  
11          intelligence?

12         A. Again, that would form part and did form part of the  
13          overall report. I think the bigger problem there was  
14          not getting to see what that intelligence was, and  
15          I think you would have had to have seen what that  
16          intelligence was before you could have made that  
17          determination. As far as I recall, the PIRC  
18          investigation never got to that extent.

19         Q. Thank you. Can I ask you about lessons learned.  
20          I think you were asked about this in paragraph 161 of  
21          your Inquiry statement. The second Inquiry statement,  
22          421. Sorry, that is the wrong number. But can we go to  
23          paragraph 161. I think that is the wrong Inquiry  
24          statement. Could we look at SBPI 00421, please. We  
25          have 423 on the screen. I don't need to actually look



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1           at this. I will leave it to one side at the moment but  
2           what we have is we have heard evidence in relation to --  
3           I have asked most of the witnesses questions about  
4           whether there was a lessons learned exercise. Some have  
5           called it a debrief.

6           A. Yes.

7           Q. I have asked Mr Little and Mr McSporran. Mr Lewis has  
8           been asked whether there was some sort of official  
9           debrief or lessons learned exercise. Ms Frame, when she  
10          was giving evidence, said that you had felt that  
11          a lessons learned exercise should not be held by PIRC  
12          whilst proceedings were still being considered. Now,  
13          I just wondered if you had a recollection of that?

14          A. I would certainly have had an opinion that a lessons  
15          learned exercise was more relevant at the end of the  
16          investigation. That doesn't, however, mean that during  
17          the investigation if you are clearly making or  
18          identifying learning points, that you wouldn't share  
19          those.

20                 Now, the whole matter around not doing that until  
21          such time as the determination -- by Crown I take it we  
22          mean there -- is made, sorry that doesn't make sense to  
23          me. That decision wasn't made until well after  
24          I retired. I think it would be more likely that the  
25          ability to again set time aside to sit down and debrief

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1           this in its entirety would have been counterproductive  
2           to other ongoing investigations, for example the M9  
3           investigation and other investigations that were ongoing  
4           at that time. So I think it was one of practicality but  
5           if you identify learning points throughout, you capture  
6           those and you make sure that you spread them.

7           Q. Was that something that was done during your time?

8           A. Yes, it was. Yes.

9           Q. So were they essentially abbreviated debriefs or  
10          mini-debriefs in relation to learning points?

11          A. I think it was more about identifying an issue and  
12          discussing it at the time. It would have been  
13          absolutely wonderful if we had had the time and the  
14          capacity to stop at the end of every investigation and  
15          have a complete debrief. I just don't think time-wise  
16          and resource-wise that that was -- I don't think we  
17          could have managed that.

18          Q. So you didn't have the capacity?

19          A. No, we didn't have the capacity, no.

20          Q. Thank you. We have talked a lot about Article 2,  
21          I would like to ask you about Article 14. So Article 14  
22          requires that:

23                 "All of the rights and the freedoms set out in the  
24          Human Rights Act must be protected and applied without  
25          discrimination."

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1 A. Okay.

2 Q. Can I ask, were you and your investigators aware of  
3 Article 14?

4 A. I don't have a great knowledge of Article 14, no.

5 Q. What about your investigators in 2015?

6 A. If I didn't, I doubt that they would.

7 Q. Were you aware that there were obligations, say -- so  
8 States have a general obligation under Article 2, and we  
9 have looked at that in some detail, to conduct an  
10 effective investigation in cases where there has been  
11 a deprivation of life.

12 A. Yes.

13 Q. And that that obligation to carry out that investigation  
14 must be discharged without discrimination, and that is  
15 the Article 14 part.

16 So:

17 "Where there is a suspicion that racial attitudes  
18 induced a violent act, it is particularly important that  
19 the official investigation is pursued with vigour and  
20 impartiality, having regard to the need to reassert  
21 continuously society's condemnation of racism and ethnic  
22 hatred and to maintain the confidence of minorities in  
23 the ability of the authorities to protect them from the  
24 threat of racist violence."

25 Was that something you were aware of in 2015?

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1 A. No, it wasn't. No.

2 Q. Again, this will be a matter for submission but:

3 "When investigating violent incidents, and in  
4 particular deaths at the hands of state agents,  
5 authorities have the additional duty to take all  
6 reasonable steps to unmask any racist motive and to  
7 establish whether or not ethnic hatred or prejudice may  
8 have played a role in the event. Failing to do so would  
9 be to turn a blind eye to those acts."

10 Were you aware of all of that?

11 A. Well, even -- no, no, no. But having said that I think  
12 the investigation -- whether that was actually then  
13 stepped up post 2 September, when Crown made it  
14 an addition to the terms of reference, I think the  
15 investigation attempted to do that.

16 Q. We've heard that the interim report was sent to  
17 Crown Office in August 2015, and that covered the period  
18 up to around about 7 August 2015. That document  
19 essentially presented to the Crown, as we understand it,  
20 the evidence that had been ingathered by PIRC at that  
21 time?

22 A. Yes.

23 Q. It was 351 pages of a pdf, that is what we have.  
24 Although there are multiple references to "black male",  
25 "black guy", "black-coloured", and a number of

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1 references to increased terrorist risk, the threat level  
2 in the UK, there is no mention at all in the interim  
3 report about race, racism, racist, racial  
4 discrimination. There is simply no references to those  
5 words. And no part of report covered race or  
6 discrimination of any kind, not even to raise it and  
7 exclude it.

8 A. Okay.

9 Q. Looking back now in light of what you knew about  
10 Article 2, and what you maybe weren't aware of in  
11 relation to Article 14, do you consider that the  
12 obligations we have been talking about today were met in  
13 relation to your interim report?

14 A. I think, as you say, that that report did contain  
15 mention within the summary of evidence, the body of  
16 evidence, and I think that probably goes back to the  
17 discussion that we had before the break there, that that  
18 information should probably have been drawn out of the  
19 body of the summary of evidence and be given its own  
20 place in a particular section of the report. That would  
21 have made it better.

22 Q. Thank you. Can I move on and ask you about a briefing  
23 note. It's something that you are unlikely to have seen  
24 before, but I would like to ask you about some of the  
25 content which you should be able to help us with.

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1 COPFS 02126A. You will see that is dated  
2 28 February 2020?

3 A. Yes.

4 Q. It's from Alasdair MacLeod Senior Procurator Fiscal  
5 Depute in the Criminal Allegations Against the  
6 Police Division, CAAPD. And it's to a Justin Farrell,  
7 Head of Criminal Allegations Against the  
8 Police Division, CAAPD, copied to Fiona Carnan. And  
9 it's in connection with the death of Sheku Bayoh  
10 Kirkcaldy on 3 May 2015, and it is described as  
11 a briefing note. Do you see that?

12 A. Yes, I do, yes.

13 Q. This is a document prepared by a Fiscal for the head of  
14 the CAAPD department, so I don't imagine you have seen  
15 this before.

16 A. No, I haven't. No.

17 Q. I would like to ask you some questions about comments  
18 that are made here about PIRC and about  
19 the investigation. If we could perhaps start on page 5.  
20 That would be helpful. Page 5 starts:  
21 "The work carried out by the precognition ..."

22 A. Yes.

23 Q. There we are. I am interested in asking about this  
24 section on statements that is mentioned. It says:  
25 "PIRC submitted almost 400 witness statements to the

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1 Crown which were reviewed by the precognoscers."

2 And for those listening, the precognoscers will be  
3 a reference to staff in Crown Office --

4 A. Yes.

5 Q. -- rather than anyone within PIRC.

6 A. Absolutely, yes.

7 Q. They prepared a very detailed summary of each witness  
8 statement. I am interested in the next paragraph:

9 "All the statements obtained from the material  
10 officers were also examined and compared to transcripts  
11 of Airwave messages."

12 Do you see that?

13 A. Yes, I do.

14 Q. So this is work being carried out in Crown Office:

15 "This was to establish if there had been any  
16 deliberate attempt to mislead PIRC investigators about  
17 what they knew about the incident at a certain time,  
18 eg whilst en route to Hayfield Road, perhaps with a view  
19 to justifying the level of force later used. An example  
20 where an officer might have appeared to be misleading  
21 PIRC was found within PC Walker's statement. In his  
22 statement PC Walker said he was made aware by an Airwave  
23 message that 'the weapon had been described as a sword  
24 and the male appeared to be under the influence of  
25 a substance and attacking passing cars~...' The

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1           precognoscers' examinations of the Airwave transcripts  
2           showed no such information was passed to officers  
3           en route to Hayfield Road. The content of officers'  
4           statements was addressed in the Report to  
5           Crown Counsel."

6           Then the next paragraph goes on to say:

7           "PIRC had not compared the material officers'  
8           statements ..."

9           We have been calling them attending officers, the  
10          officers who attended Hayfield Road:

11          "... with the Airwave transcripts and it was one of  
12          the necessary steps taken by the team to establish  
13          whether or not any of the material officers had  
14          attempted to pervert the course of justice."

15          Do you agree that PIRC had not compared the  
16          officers' statements with the Airwave transcripts as  
17          part of the investigation?

18          A. I have to agree with that statement there.

19          Q. Do you agree it was one of the necessary steps that  
20          should have been taken?

21          A. It's a line of enquiry which should have been considered  
22          and undertaken.

23          Q. Do you agree that that was a failing on the part of the  
24          investigation?

25          A. Yes.



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1 Q. Can we look at the accuracy of statements, please. This  
2 relates to a separate matter:

3 "During the precognition process~..."

4 That is the process that the Crown staff are  
5 following:

6 "... an issue was identified in relation to  
7 the accuracy of the statements submitted by PIRC. This  
8 came to light during the precognition of Ashley Wise."

9 So that is when the Crown are speaking to  
10 Ashley Wise?

11 A. Yes.

12 Q. "At page 60 of Volume 1 of the PIRC Report, Wise was  
13 attributed as stating 'The deceased was lying on his  
14 back and that it looked like one of the police officers  
15 was using a baton on the deceased's upper chest, towards  
16 his throat, to hold him down'. Wise provided PIRC with  
17 two statements neither of which contained the above  
18 information. Enquiries with PIRC confirmed that the  
19 original version and the CLUE 2 version both contained  
20 the reference but the paragraph had been omitted in  
21 error when the statement had been copied as it fell  
22 between two pages."

23 Do you have a recollection --

24 A. I do remember this. I do remember this.

25 Q. So you agree that the Wise statement did not contain

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1           that part of --

2           A. That's correct, yes.

3           Q. Then:

4                     "On 24 October 2016 PIRC were asked to provide  
5                     an assurance that all statements submitted to the Crown  
6                     had been checked for accuracy and that there were no  
7                     similar omissions. On 26 October 2016 Mr McSporran at  
8                     PIRC confirmed all statements had been checked and were  
9                     in order."

10                    Then it goes on to say:

11                    "At the beginning of March 2017 there was further  
12                    concern PIRC had not proof-read statements despite  
13                    Mr McSporran's earlier assurances. This followed  
14                    comparison of Wise's manuscript statement and typed  
15                    statement which revealed a number of typos and  
16                    inaccuracies between the two."

17                    Were you aware of this situation in your role?

18           A. I remember the first set of circumstances. I remember  
19           that I think it came from Crown in a letter to  
20           Kate Frame and she asked for me and John McSporran to  
21           have a look at what had gone wrong, and it was  
22           absolutely down to poor proof-reading. Now, the  
23           discussion I had around that was that the statements  
24           should again be compared, the typed statements against  
25           the manuscript statements, and where possible by the

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1 officer or investigator, sorry, who had taken those  
2 statements, and if that wasn't possible because of  
3 sickness or ill-health or holidays, et cetera, that that  
4 should be undertaken by another member of staff who was  
5 identified. And, as that document tells us, on  
6 26 October John McSporran confirmed that that had been  
7 done and that was my belief.

8 Q. Thank you. So there had been an initial failing --

9 A. Yes.

10 Q. -- regarding omissions from Ms Wise's statement?

11 A. Yes.

12 Q. But then confirmation given by Mr McSporran that it had  
13 been dealt with?

14 A. Yes.

15 Q. Can we look at 28 April 2017, the paragraph at the  
16 bottom of the page:

17 "... the Commissioner advised the Crown by letter  
18 that a manual check of all the remaining statements had  
19 been completed with each statement having been  
20 proof-read and compared against the original handwritten  
21 version for accuracy. It is now clear the statement  
22 checking exercise had not been completed at the time of  
23 the Commissioner's letter. On 14 June 2017  
24 Deputy Senior Investigator William Little advised the  
25 Crown by letter that the statement comparison process

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1           had now been completed and enclosed a disc containing 21  
2           statements where omissions had been identified and  
3           rectified."

4           Then it goes on to say:

5           "The initial failure to provide accurate statements  
6           caused significant extra work to be carried out by the  
7           precognoscers. The amended statements required to be  
8           sent to all the expert witnesses who were asked to  
9           confirm if anything contained within amended their  
10          opinion. None of the experts wished to amend their  
11          opinions. Statement folders previously prepared for  
12          Crown counsel also had to be recalled to have statements  
13          removed and replaced with the correct version."

14          I am interested here in this apparent reassurance  
15          having been given by Mr McSporran, the letter then from  
16          the Commissioner saying this work has been undertaken  
17          and completed, but then Mr Little later saying, "It has  
18          now been completed". Were you aware of any of the  
19          circumstances surrounding this?

20          A. I don't specifically remember that, but it's -- it  
21          shouldn't have happened.

22          Q. Would you agree this was a failure in terms of the PIRC  
23          investigation?

24          A. It was certainly a failure in relation to  
25          the administration of the investigation.

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1 Q. Can we look at the rib fracture paragraph, which is just  
2 at the bottom of that page. So:

3 "During the analysis of the statements it was noted  
4 that three of the officers involved in the restraint had  
5 made reference to hearing the deceased fracturing a rib  
6 during the administration of CPR."

7 So that was the statements provided by the officers  
8 on 4 June?

9 A. Okay, yes.

10 Q. And a number of them spoke of hearing a fracture of  
11 a rib. It then goes on to say:

12 "The deceased's ribs appeared to be intact at the  
13 post mortem on 4 May ... however a fracture to his left  
14 first rib was discovered following a further examination  
15 by pathologists on 29 May~... That same day Mr Brown  
16 advised Anwar & Co and PIRC about the deceased's rib  
17 fracture."

18 We have also heard evidence from Dr Shearer about  
19 this matter.

20 A. Okay.

21 Q. That she then went in a second time to investigate this  
22 matter, and discovered that there was a fractured rib.

23 A. Yes.

24 Q. And that was noted on 29 May 2015.

25 A. Okay.

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- 1 Q. So again, that is still prior to the officers'  
2 statements having been obtained?
- 3 A. Yes.
- 4 Q. And Mr Brown, who was the head of CAAPD I believe at  
5 that time, advised the lawyers representing the family  
6 and PIRC about the rib fracture which had been  
7 discovered. Then:
- 8 "In his statement dated 4 June ... PC Walker told  
9 PIRC he heard the sound of a rib cracking when he was  
10 carrying out CPR. At this time PC Walker handed over  
11 an undated pre-prepared statement to PIRC. Notably, in  
12 this statement PC Walker made no reference to hearing  
13 a rib crack during CPR."
- 14 So there was an undated statement from PC Walker  
15 given to PIRC on 4 June --
- 16 A. Okay.
- 17 Q. -- plus his statement to PIRC on 4 June. He mentions  
18 the hearing the rib fracturing on 4 June statement to  
19 PIRC, but there was no reference to that in his  
20 self-panned statement?
- 21 A. Yes.
- 22 Q. And on 29 May, so five days prior to 4 June, PIRC had  
23 been advised about the rib fracture found by Dr Shearer?
- 24 A. Yes.
- 25 Q. Can we move on to the next page, please. There is

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1 reference to the other two officers who heard the rib  
2 fracturing, PC Paton and PC Tomlinson, and then it says:

3 "The Crown carried out extensive further independent  
4 enquiries in relation to the ... rib fracture."

5 It did not lead to his death but it:

6 "... may have illustrated the force and mechanism of  
7 restraint used by the officers."

8 Do you see that?

9 A. Yes, I do.

10 Q. Then let's look at the final paragraph:

11 "The precognoscers found it of interest that  
12 the information about the rib fracture which was only  
13 made known to PIRC on 29 May ... was somehow potentially  
14 being explained away by three of the officers when they  
15 provided statements on 4 June ... After careful  
16 consideration of all the evidence there was insufficient  
17 evidence to make any more of it other than to say it was  
18 suspicious, and potentially called into question the  
19 integrity of the PIRC investigation at that point."

20 Do you have any comments to make about that? Do you  
21 remember the situation arising?

22 A. I remember there was a fractured rib found on a second  
23 examination by the doctors. I don't remember this  
24 carry-on in relation to how the officers would have  
25 known that. I would have thought -- I may be wrong,

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- 1 reading what has been said there, was it put to the  
2 officers during the interview process? I don't know.  
3 Was the fact about the broken rib put to them at  
4 interview? I don't know.
- 5 Q. So do you think it is possible that PIRC investigators  
6 put the existence of a fractured rib to officers during  
7 the statement-taking process on 4 June?
- 8 A. Well, other than that, I don't know how they would, you  
9 know, make that comment within their statements.  
10 I don't know.
- 11 Q. Thank you. I think by 4 June the officers, we have  
12 heard, had had some disclosure in relation to the  
13 post mortem findings. At the post mortem on 4 May.
- 14 A. Yes.
- 15 Q. So they had some information about the post mortem. Do  
16 you know the extent of the information they were given  
17 about the findings of the post mortem?
- 18 A. I believe, again, this is from memory, that the only  
19 information -- and I think I have made my point that  
20 I didn't think any information should have been  
21 passed -- previously was that death hadn't been caused  
22 as a result of baton strike.
- 23 Q. As far as you are aware was that the extent of the  
24 information given?
- 25 A. That was the extent of the information.



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1 Q. In any event on 4 May, when the post mortem was  
2 initially carried out --

3 A. The fractured rib was not known.

4 Q. -- there was no fracture noted. Staying on this page  
5 please, can we look at the "CCTV and timeline" section.  
6 So the Crown analysed the CCTV footage recovered by  
7 PIRC, and if we look at paragraph 2:

8 "Although the footage is of poor quality, by  
9 contrasting with the accounts of material witnesses,  
10 Airwave messages, and calls to Police Scotland the  
11 precognoscers were able to produce a detailed timeline  
12 of events for Crown Counsel. The timeline allowed the  
13 precognoscers to pinpoint with confidence important  
14 markers in the incident such as the arrival times of  
15 police vehicles, the duration of the restraint process  
16 and the moment officers realised the deceased was in  
17 medical difficulty."

18 Looking back now, do you think that is a task that  
19 PIRC investigators should have been carrying out,  
20 collating the CCTV and the Airwaves messages and  
21 suchlike and preparing a more detailed timeline?

22 A. Yes. I actually thought they were. That was central to  
23 understanding what happened at the scene on that day.  
24 And they had CCTV, I am sure they had the Airwaves  
25 transmissions, they had statements of witnesses speaking

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1           to particular actions by the police. That should be at  
2           the core of the continuous analysis of evidence that is  
3           coming in.

4           Q. So, as far as you are concerned, that was a task that  
5           PIRC had carried out as part of the investigation?

6           A. Yes, I believed that had been looked at, yes.

7           Q. Can I ask you to look at the next section,  
8           "Precognitions". We have heard this is part of the  
9           Crown's process, they take not statements, they are  
10          called precognitions --

11          A. Yes, absolutely, yes.

12          Q. -- where they discuss with the witness. And 16  
13          witnesses were identified for precognition.  
14          Precognition started at the beginning of October 2016,  
15          this is by the time they have got the PIRC report. The  
16          final, I should say, PIRC report?

17          A. Yes.

18          Q. And:

19                 "... all except one (Sean Mullen discussed below)  
20                 were completed by 23 November 2016."

21          A. Okay.

22          Q. So if we can look at the next paragraph which is now on  
23          page 8:

24                 "Consideration was given to whether the Crown could  
25                 simply rely on the statements obtained by PIRC but this

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1           was not considered appropriate given the nature of the  
2           decision Crown Counsel was being asked to make. The  
3           Crown were also mindful of Mr Anwar's criticism of  
4           PIRC's approach to statement taking, and particularly  
5           his observation that similar distinct phraseology was  
6           used by a number of independent witnesses."

7           Can you tell me what this was in connection with,  
8           this concern about "similar distinct phraseology"?

9           A. No, that was never brought to my attention.

10          Q. So it may have been something Crown were aware of, but  
11          you personally were not aware of any of that?

12          A. No, and that by then was certainly by the time that my  
13          role had changed considerably.

14          Q. Thank you. Can we move down the page, please, to the  
15          paragraph:

16                 "Although PIRC made reference in their report ..."

17          A. Yes.

18          Q. "... to Sean Mullen and his passenger, Danny Robinson.  
19          It is respectfully submitted they did not fully  
20          recognise their significance. Both PIRC statements were  
21          relatively short and did not reflect the time they were  
22          at the locus. Mullen and Robinson arrived at the scene  
23          at the same time as police vehicle one and watched  
24          events unfold for a total of one minute, 41 seconds from  
25          four different positions on the roadway. The

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1           precognoscers did considerable work to establish Mullen  
2           and Robinson's line of sight from each position. This  
3           information was thereafter inserted into the SPA  
4           composite disk discussed below. Mullen failed to attend  
5           for precognition on a number of occasions despite being  
6           personally served with a citation by PIRC and being  
7           spoken to personally by the precognoscers. He was  
8           eventually precognosced on 20 December 2017. At  
9           precognition the Crown were able to establish further  
10          important details were Mullen. In particular, he spoke  
11          to the deceased ..."

12                 Not spoke to the deceased but he spoke to the  
13          deceased:

14                 "... attempting to kick PC Short whilst she was on  
15          the ground. A fact not contained in his PIRC  
16          statement."

17                 Can I ask you if you had any concerns about the way  
18          PIRC investigated the evidence of Sean Mullen and  
19          Danny Robinson?

20          A. And, again, I don't have an in-depth knowledge of that.  
21          It was either that the correct questions weren't asked  
22          or that these witnesses decided not to provide that  
23          information at the time, would be the only  
24          thing I could -- so either correct questions weren't  
25          asked or they decided that they were not going to

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1 provide that information.

2 Q. If it was that the correct questions hadn't been asked,  
3 would you consider that to be a failing on the part of  
4 the PIRC?

5 A. Yes.

6 Q. If we can move on to Ashley Wise's Snapchat, please. It  
7 says:

8 "PIRC retrieved four Snapchat videos from  
9 Ashley Wise's mobile telephone."

10 We have heard evidence about these Snapchat videos.  
11 It says:

12 "Although PIRC produced a detailed timeline  
13 detailing the content of each clip they did not try to  
14 establish the timings of the clips and therefore did not  
15 recognise their significance."

16 If that is correct, would you consider that to be  
17 a failing on the part of PIRC?

18 A. Yes.

19 Q. "By mapping the arrival times of police vehicles the  
20 precognoscers were able to establish that the first  
21 Snapchat clip occurred at some point between 7.21.47  
22 hours and 7.22.27 hours. Significant, as the restraint  
23 process started at 7.21.08 hours.

24 Then if we can look at ... it then goes on to say:

25 "Following a request by the Crown in November 2017

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1 PIRC evidenced timings for the Snapchat clips, which  
2 were then inserted alongside the CCTV."

3 Do you think that that is something that PIRC should  
4 have been doing prior to sending off the report to the  
5 Crown?

6 A. Yes.

7 Q. Do you think that was a failing?

8 A. Yes.

9 Q. Looking at the bottom of that section, the paragraph  
10 beginning:

11 "Identifying the timing of the Snapchat clip one was  
12 an important piece of work carried out by the  
13 precognition team. It allowed a brief glimpse of the  
14 methods of restraint being used at that time. This  
15 enabled the precognoscers to ask the OST expert for his  
16 opinion on the actions of the police officers at  
17 that particular time."

18 Do you agree that that timing of the Snapchat clip  
19 one would have been an important piece of work for PIRC  
20 to have carried out?

21 A. Undoubtedly.

22 Q. Thank you. Can we look at page 14, please. I am  
23 interested in the section that is called "Airwaves  
24 system":

25 "The precognoscers carried out detailed analysis of

## Transcript of the Sheku Bayoh Inquiry

1           the messages transmitted on the Police Scotland's  
2           Airwaves system. As stated earlier, this was  
3           principally to establish what information was available  
4           to the officers whilst en route to the locus. Following  
5           an instruction by the precognoscers PIRC also  
6           established information could not have been communicated  
7           to officers by any other means other than through the  
8           recorded channels. By comparing PIRC-prepared  
9           transcripts with CCTV footage the precognoscers were  
10          able to establish a crucial message passed at  
11          7.20.49 hours had been attributed by PIRC to the wrong  
12          officer ..."

13                 That was PC Smith:

14                 "... as he had not yet arrived at the locus. PIRC  
15                 were requested to carry out further investigations and  
16                 it was established that the message was most likely  
17                 passed by PC Paton who had pressed his emergency button  
18                 at this time."

19                 Were you aware of this issue?

20           A. No.

21           Q. If that is correct, as described in this --

22           A. Yes, and as you quite rightly say, I think this letter  
23           is dated 2020. So these are things obviously falling  
24           out of the back end of the precognition, the majority of  
25           which I have no knowledge of.

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1 Q. Having looked at this now, do you agree that this is the  
2 sort of detail that PIRC should have been picking up as  
3 part of investigation?

4 A. Yes.

5 Q. Would you agree that failure to do so is a failure in  
6 the investigation?

7 A. I don't think I could say otherwise.

8 Q. Could we look at page 17, please. I think there are  
9 a number of comments in this document as well, where  
10 they say that -- if we look towards the Kirkcaldy Police  
11 Office CCTV and if we look at the last two paragraphs in  
12 that section:

13 "PIRC advised and the precognoscers ..."?

14 A. Yes.

15 Q. "PIRC confirmed they had viewed all footage contained on  
16 all 16 cameras within Kirkcaldy Police Office ..."

17 That was 18 hours footage:

18 "... albeit the cameras were motion-sensitive and  
19 did not record unless activated. PIRC only produced  
20 transcripts for five of the cameras as the other 11  
21 cameras covered cells and contained nothing of  
22 evidential value. The precognoscers viewed all the  
23 footage from the five cameras, comparing same to the  
24 transcripts prepared by PIRC. The transcripts were  
25 found to be accurate and complete to a high standard.



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1           The PIRC examination of the CCTV proved to be both  
2           reasonable and proportionate."

3           So in relation to the CCTV analysis carried out by  
4           PIRC, they seem to have taken the view that that was  
5           accurate and completed to a high standard.

6           A. And would have been my expectations.

7           MS GRAHAME: Thank you. I have one final issue I would like  
8           to ask you about.

9           Would you be content for me to carry on or would you  
10          prefer to ...?

11          LORD BRACADALE: I think we should stop for lunch now and  
12          you can deal with that after lunch. So we will stop for  
13          lunch and sit at 2 o'clock.

14          (12.58 pm)

15                          (The short adjournment)

16          (2.00 pm)

17          LORD BRACADALE: Ms Grahame.

18          MS GRAHAME: Thank you. I would like to go back to  
19          something that we touched on the first day gave  
20          evidence.

21          A. Yes.

22          Q. It was under reference to the briefing paper which was  
23          dated 3 May.

24          A. Yes.

25          Q. And that was addressed for your attention effectively.

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1           Can we look at that for a moment. PIRC 03694. I think  
2           when we looked at it, it's a briefing note for Director  
3           of Investigations, you were actually on holiday on this  
4           date?

5           A. I was, yes.

6           Q. You didn't come back until 5 May?

7           A. 5 May.

8           Q. But it was prepared by Mr Harrower --

9           A. Yes.

10          Q. -- in relation to the events. If we can look at page 2,  
11          and I am interested in paragraph 4. I think we referred  
12          to this earlier. Just the first line really:

13                 "It was reported that as the officers drove into  
14          Hayfield Road they saw the now deceased coming towards  
15          them as the vehicles came to a halt. They could clearly  
16          see he was in position of a knife and was making his way  
17          towards them."

18                 As it goes on:

19                 "Some of the officers, unknown how many at this  
20          stage, drew their police issue batons. At least one of  
21          the officers also drew their PAVA spray and issued  
22          a warning to the now deceased, who continued to come  
23          forward."

24                 I think I asked you about this at the time. If I am  
25          correct, you said that when you came back to work on

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1           5 May you knew that Mr Bayoh did not clearly have  
2           a knife in his hands?

3           A. I think that is my recollection, at some stage on 5 May  
4           that it had been determined that the knife -- a knife  
5           had been found nearby but he did not have a knife in his  
6           hands.

7           Q. Can I ask you to look at something else now, please.  
8           It's part of the management policy log, which is  
9           PIRC 04154, and I am interested in 60 of the pdf, which  
10          is decision 40 in the policy log. We have heard from  
11          Mr McSporran, as I may have already said, that certainly  
12          letters or correspondence emails are inserted in between  
13          the decisions in the policy log?

14          A. Yes.

15          Q. So there is the handwritten decision and the reasons and  
16          then some of the letters appear at the relevant section.

17          A. Yes.

18          Q. This is one of those letters. So I would just like to  
19          look at this. It's a letter from the Criminal  
20          Allegations Against the Police Division, it is dated  
21          18 May 2015, so approximately a couple of weeks after  
22          the events.

23          A. Yes.

24          Q. It's addressed to Ms Kate Frame and I think if we look  
25          at the bottom of page we see it's from Les Brown, who

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1           was the head of CAAPD, and you will see it says there  
2           was a meeting with the Lord Advocate and the family on  
3           14 May and we have looked at minutes from that date --

4       A. Yes.

5       Q. -- in relation to a PIRC meeting that day:

6           "During the meeting, the family and their legal  
7           representative highlighted concerns that the family had  
8           in relation to the circumstances of the death and the  
9           actions of Police Scotland officers, particularly in  
10          relation to the immediate aftermath of the death.  
11          I have received a letter from Solicitors highlighting  
12          a number of issues, and requesting information. I have  
13          summarised these in the attached document and I would be  
14          grateful if you would factor these into the ongoing  
15          investigation and revert to me with the information  
16          requested, particularly in relation to the provision of  
17          documentation."

18          So would you have interpreted this as part of the  
19          instructions from Crown Office?

20       A. Yes.

21       Q. To be incorporated into the investigation?

22       A. Absolutely, yes.

23       Q. Then if we can look at the note at the rear of this  
24       letter, and you see it says:

25          "A request that Solicitors for the family be

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1 provided with ..."

2 Do you see that?

3 A. Yes.

4 Q. It's just a sheet with some points noted on it that is  
5 attached to the letter. If we could look at  
6 paragraph 2:

7 "A request that Solicitors for the family be  
8 provided with the information given to those conducting  
9 the post mortem examination and in particular the  
10 briefing paper prepared~..."

11 It says here:

12 "... prepared by SIO Pat Campbell. Solicitors for  
13 the family have requested that the PIRC investigation  
14 should cover the contents of the information contained  
15 within the briefing paper prepared by the SIO and in  
16 particular why he did not advise PIRC of the  
17 following ..."

18 And I would like to look at the bullet points,  
19 and in particular the fifth bullet point. You will see  
20 it says:

21 "The Report claims that a large knife was being  
22 carried. It appears to be based on a Report rather than  
23 fact."

24 You might remember that in the briefing note I just  
25 asked you to look at it said:

## Transcript of the Sheku Bayoh Inquiry

1            "It was reported that as the officers drove into  
2            Hayfield Road they saw the now deceased coming towards  
3            them as the vehicles came to a halt. They could clearly  
4            see he was in possession of a knife and was making his  
5            way towards them."

6            So that entry in that briefing note which we have  
7            now heard evidence was drafted by Mr Harrower also  
8            refers to "it was reported~..." that he was clearly seen  
9            to be carrying a knife. We know at this time officers'  
10           statements were not available?

11          A. That's correct.

12          Q. I am wondering, from your recollection of events at this  
13           time, was there an investigation into where that report  
14           came from about the police clearly seeing that he was  
15           carrying a knife, and was that part of the  
16           investigation?

17          A. I think from memory there was an instruction from Crown  
18           to try and determine where details of the initial police  
19           contact and the matters surrounding that, I am sure from  
20           memory that formed part of an instruction from Crown,  
21           and I would imagine therefore that that would include  
22           coverage of that bullet point, or similar.

23          Q. Did PIRC investigate where the source -- investigate the  
24           source or where the information came from?

25          A. My understanding is that they made attempts to.

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1 Q. What came of those attempts?

2 A. Again, from memory I don't think it was successful.

3 I may be wrong but I don't think there was success.

4 Q. Did they ever find out --

5 A. Not so far as I am aware, from memory.

6 MS GRAHAME: Thank you very much. Could you give me

7 a moment, please.

8 Thank you very much, I have no further questions.

9 LORD BRACADALE: Thank you. Are there any Rule 9

10 applications? Ms Mitchell and the Dean.

11 Mr Mitchell, would you withdraw to the witness room,

12 please.

13 (The witness withdrew)

14 Ms Mitchell.

15 Rule 9 application by MS MITCHELL

16 MS MITCHELL: There are two issues that I would like to

17 explore with this witness, if that would be allowed.

18 The first issue relates to Mr Mitchell's recollection of

19 lots of conversations being had with Kate Frame, and it

20 was put to him that conversations may have been had

21 around the use of officers' language, in particular use

22 of the word "coloured".

23 What I would like to ask this witness is whether or

24 not there were conversations around the issue of

25 identifying the person's colour of skin and linking it

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1 with terrorism. The reason for that is that would be  
2 an issue of racial profiling and it would no doubt stand  
3 out to this witness. And also that the witness  
4 Kate Frame had said that she had reservations about not  
5 putting this in but was persuaded by his expertise not  
6 to do so, or his experience in fact, and she also  
7 mentioned the fact that there was pressure to get the  
8 report to the Crown.

9 So it's to try and put those specifics to the  
10 witness to see whether or not he has any recollection  
11 around that particular issue.

12 The second and much shorter question relates to  
13 comments that he made twice about the fact that there  
14 was more discussion around style than content, and  
15 I wish to ask him what he meant by that in relation to  
16 the preparation of the PIRC report.

17 LORD BRACADALE: Thank you. If you would like to return to  
18 your seat now.

19 Rule 9 application by THE DEAN OF FACULTY

20 THE DEAN OF FACULTY: My Lord, the single issue on which  
21 I seek permission to ask questions of the witness  
22 relates to the question of status of the officers in the  
23 period of between 7 May and 2 June. Your Lordship will  
24 recall allowing this line of questions with SI Little  
25 and your Lordship will also recall that I, in discussion



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1 with Mr Little, suggested to him that some of the  
2 matters were perhaps more for Mr Mitchell and I seek to  
3 pick those matters up with him.

4 LORD BRACADALE: Thank you.

5 THE DEAN OF FACULTY: I am obliged.

6 Ruling

7 LORD BRACADALE: I shall allow Ms Mitchell to pursue the  
8 first line of questioning in relation to the discussions  
9 as to race. I would not be assisted by a further  
10 discussion about style and content so I shall refuse the  
11 second application. I shall allow the Dean's  
12 application. So if we can start with Ms Mitchell. Can  
13 we have the witness back, please.

14 (The witness returned to the stand)

15 Mr Mitchell, Ms Mitchell who represents the families  
16 of Sheku Bayoh has some questions for you.

17 Questions from MS MITCHELL

18 MS MITCHELL: You were asked earlier by my learned friend,  
19 counsel to the Inquiry, if you remembered having any  
20 conversations with Kate Frame specifically about the use  
21 of language in officers' statements, and you responded  
22 there was a lot of discussion about the style more than  
23 the content. I want to ask you whether or not you  
24 remember a particular conversation, I am going to  
25 highlight from that what Ms Frame said in her evidence

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1           to see if that assists. Did you watch Ms Frame's  
2           evidence.

3           A. Just parts of it.

4           Q. Well, I'll refresh your memory then --

5           A. Thank you.

6           Q. -- in relation to those matters.

7                        So the evidence of Ms Frame was that she saw the  
8           racist terminology, the word "coloured" and the  
9           possibility of his skin colour being linked with  
10          terrorism, and that was quite early on after the  
11          statements had been taken. She said that she instructed  
12          Mr McSporran or that she had a discussion with  
13          Mr McSporran, to be more precise, to make further  
14          enquiries about it. It wasn't until the document was  
15          returned to her in the format that it was about to just  
16          be sent off to the Crown that she realised that there  
17          had been no input in relation to race.

18          A. All right.

19          Q. She then said she had a conversation with you, so this  
20          conversation would be shortly before the document was  
21          going to be sent to the Crown, not only centred around  
22          the word "coloured" but it also centred around the issue  
23          of one of the statements which one could draw  
24          an inference that they were linking terrorism with the  
25          colour of someone's skin. Do you recall any

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1           conversations of that sort?

2       A. No. But having said that, I am not going to sit here  
3       and say that it didn't happen. I just do not remember  
4       a discussion just so specific as that.

5       Q. Would you appreciate that if you had this conversation,  
6       essentially what was being spoken about was an issue of  
7       racial profiling?

8       A. Yes.

9       Q. In that instance wouldn't it have been important to flag  
10      that up as a specific issue?

11     A. Yes, and I did think I said earlier that even if my  
12     answer to Ms Frame was that I felt that it related to  
13     misconduct, that if it was there and in their statements  
14     I did not have a strong opinion or would not have had  
15     a strong opinion about not including it in the report.

16     MS MITCHELL: I have no further questions.

17     LORD BRACADALE: Thank you. If you return to your seat,  
18     please.

19                           Questions from THE DEAN OF FACULTY

20     LORD BRACADALE: Mr Mitchell, the Dean of Faculty represents  
21     the Scottish Police Federation and certain of  
22     the attending officers.

23     THE DEAN OF FACULTY: Mr Mitchell, just a few questions from  
24     me, please, all related to this question of the status  
25     of the officers in between May and June.

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1 A. Yes.

2 Q. This was a Crown-led Inquiry, yes?

3 A. It was indeed, yes.

4 Q. So direction was taken from Crown Office?

5 A. Yes.

6 Q. And in particular from Les Brown, who was head of CAAPD?

7 A. Les Brown had been given to us as our point of contact.

8 Q. Could we have on screen please a document you have  
9 looked at already, PIRC 03710. This is noted as a PIRC  
10 incident message, I think completed by yourself, is that  
11 right, on 7 May?

12 A. That is correct, yes.

13 Q. And if we just scroll down that page, please. We see  
14 there:

15 "I have spoken with Peter Watson who acts for nine  
16 (9) police officers involved in the Kirkcaldy death of  
17 [Mr Bayoh]. Mr Watson has advised the officers not to  
18 give operational statements~..."

19 Whilst their status is, I think that should be  
20 "unknown"?

21 A. I think it's my writing, apologies.

22 Q. "He states that this will be the position until the full  
23 results of the post mortem examination are known."

24 So do you agree with me that what Professor Watson  
25 is saying there to you, as noted on 7 May, is not "We

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1           are giving no statements", it is, "We are not giving  
2           statements until the status is known"?

3       A.   Until the result of the post mortem is known.

4       Q.   Yes, and until the status is known, yes?

5       A.   Yes, but I made it quite clear to him that their status  
6           was of that witness.

7       Q.   Do you agree with me that what Professor Watson is  
8           saying there is not, "We are giving no statements"; "We  
9           are giving no statements until we have got the  
10          post mortem and the status is known"? That is what you  
11          have noted, yes?

12      A.   Yes.

13      Q.   We have looked at this with other witness, but the  
14          question of status is important.

15      A.   Absolutely.

16      Q.   Do you agree with me?

17      A.   Yes.

18      Q.   Okay. I will be corrected if I am wrong, but there is  
19          nothing in writing from PIRC confirming the status of  
20          the officers until 2 June?

21      A.   That is correct.

22      Q.   You agree with that. Okay. You were in the practice of  
23          recording telephone calls, we see that here?

24      A.   Yes, if it was something that was pertinent to the  
25          investigation so that it was listed there, yes.

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1 Q. Indeed we have looked at several of your written notes  
2 of telephone calls already in your evidence. Do you  
3 agree with me there is no sign of any written record of  
4 a telephone call in which you say: I confirmed to  
5 Professor Watson that the status of the officers was as  
6 witness?

7 A. Not so specific as that, yes.

8 Q. Well, anything even coming close to that Mr Mitchell?

9 A. If that is the case, that is the case.

10 Q. Can we have on screen, please, the third page of that,  
11 the same document. This is the email that you refer to.

12 A. Yes.

13 Q. This is 7 May 2015 at 11.29. This is an email  
14 originally from Mr Watson to Mr Hardie and Mr Hardie --  
15 or rather Mr Watson has forwarded it to you as well; do  
16 you agree with that?

17 A. Yes.

18 Q. "I represent all ... [nine] officers ... involved in the  
19 incident ... given to believe that instructions have  
20 been given by you or someone connected with this inquiry  
21 that these officers are to be told that they are  
22 'compelled' to provide statements ... this is not  
23 correct. You should seek advice ... You can ask them to  
24 provide statements but my advice is that they do not do  
25 so until their status is clarified."

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- 1                   Yes?
- 2       A.   Yes.
- 3       Q.   Now, that email is sent to you the minute -- the
- 4           following minute by Mr Watson, as we see if we just move
- 5           the page down a little bit.  So you've got that at 11.30
- 6           on 7 May?
- 7       A.   Yes.
- 8       Q.   Where is your email in response saying: Mr Watson,
- 9           I have told you time and time again their status is
- 10          witness?
- 11      A.   I didn't send one.  I think I had made my position quite
- 12          clear in telephone calls previously.
- 13      Q.   If the position is that you have made it clear to
- 14          Mr Watson that their status is witness and you get that
- 15          email at 11.30 on 7 May saying: I have told them they
- 16          are not to give a statement until their status is
- 17          clarified, why on earth would you not respond by
- 18          a simple one line email saying: I have told you already
- 19          status is witness?
- 20      A.   I didn't think that was appropriate.  That is why.
- 21      Q.   Can you understand why, having sent that email at 11.30
- 22          on 7 May, and having received no response,
- 23          Professor Watson would have been understandably in the
- 24          dark as to what the position is as to status?
- 25      A.   No, I don't, because as I say I had already spoken to

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1           him on more than one occasion and made it clear that  
2           the position was that the officers would be interviewed  
3           as witnesses.

4       Q.   If that is the case, why on earth would he email saying  
5           you saying: I am not telling them to give a statement  
6           until they are status is clarified?

7       A.   I have no idea.

8       Q.   Why on earth would you not respond saying: I have told  
9           you?

10      A.   Because I have already had that discussion.

11      Q.   And yet -- and you say, I think, that that was repeated  
12           thereafter in further telephone calls?

13      A.   Yes.

14      Q.   But no sign of any record, any written record, of those  
15           telephone calls?

16      A.   Any telephone call I had with Mr Watson, yes, it was  
17           either followed up by an email from him or I put  
18           a message into the system.

19      Q.   Do we have any record of any telephone call between you  
20           and Professor Watson saying: status witness?

21      A.   I think -- did I not say in the first one that I had  
22           told him the officers were witnesses?

23      Q.   The one we have just looked at?

24      A.   No, the previous message on the 5th.

25      Q.   You saw in the course of your evidence earlier today



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- 1 a letter from the Commissioner, yes, setting out the  
2 various steps that she said had been taken to obtain  
3 statements?
- 4 A. Yes.
- 5 Q. And you remember there was a total of six?
- 6 A. Yes.
- 7 Q. The fifth was on 7 May and the sixth was on 2 June, yes?
- 8 A. Yes.
- 9 Q. Your position is despite what we have got on the screen  
10 here, status as witness was clear on 7 May yes?
- 11 A. Yes.
- 12 Q. If you were -- whether in your former guise as a police  
13 officer or your latter guise as PIRC investigator, if  
14 you asked a witness for a witness statement and they  
15 refused, you would have noted that in a notebook or on  
16 a file, yes?
- 17 A. Not necessarily, no.
- 18 Q. Okay. Did you or anyone at PIRC after 7 May and before  
19 2 June approach any of the officers asking them for  
20 a statement?
- 21 A. After ...?
- 22 Q. After 7 May and before 2 June?
- 23 A. No, I didn't nor did John McSporran but we hear that  
24 DCI Hardie did on behalf of Mr McSporran.
- 25 Q. Who was DCI Hardie?

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- 1 A. He was a serving police officer.
- 2 Q. A police officer?
- 3 A. Yes.
- 4 Q. What does the I in PIRC stand for?
- 5 A. I appreciate that, this was around travel distances  
6 et cetera, et cetera. Finite resources, and trying to  
7 make the best use of what we had.
- 8 Q. So again, did anyone from PIRC after 7 May and before  
9 2 June ask any of these officers for a statement?
- 10 A. No.
- 11 Q. Despite the fact that you claim their status as witness  
12 had been made clear?
- 13 A. I don't claim it. It's a matter of fact.
- 14 Q. Let's look at what happened on 2 June, can we please?
- 15 A. Yes.
- 16 Q. PIRC 03726. Again, this is an incident message.  
17 Les Brown, do you see that?
- 18 A. Yes.
- 19 Q. Scroll down, please. Do we see before we look at the  
20 text in the box this is a document prepared by you?
- 21 A. Yes, indeed, yes.
- 22 Q. "I telephoned Mr Les Brown, CAAPD, to inform him that  
23 following discussion with Mr David Kennedy  
24 Police Scotland Federation and a subsequent meeting  
25 between Mr Kennedy and Mr Peter Watson solicitor acting

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1           on behalf of the police officers involved in the arrest  
2           process it had been suggested by the Federation that the  
3           officers would make themselves available for interview  
4           if ..."

5           Scroll down, please:

6           "... their status was confirmed as of that  
7           a witness.

8           "Mr Brown ... agreed to consider the matter, seek  
9           further direction from [Crown Office] and respond."

10          A. Yes.

11          Q. Yes?

12          A. Yes.

13          Q. That is at 10.05 on 2 June 2015, yes?

14          A. Yes.

15          Q. So on 2 June, when you speak with Mr Kennedy,  
16          Federation, and Mr Watson, solicitor for the nine  
17          officers --

18          A. Yes.

19          Q. -- who say to you: we need clarification of status, your  
20          response, Mr Mitchell, is not: how many times do I need  
21          to tell you? Your response is: let me phone Les Brown,  
22          yes?

23          A. No, I think I agreed that that would be sensible for me  
24          to respond saying yes they would be treated as  
25          witnesses. However, Mr Les Brown was our point of

## Transcript of the Sheku Bayoh Inquiry

1 contact within Crown, as a matter of a courtesy I just  
2 sent him a message.

3 Q. What you've noted here Mr Mitchell -- can we go back up  
4 the screen, please, what you have noted here  
5 contemporaneously:

6 "... the officers would make themselves available  
7 for interview if~..."

8 Scroll down please:

9 "... their status was confirmed as that of  
10 a witness."

11 A. That is correct.

12 Q. So you are sitting there with a solicitor and the head  
13 of the Federation and they are saying to you the  
14 officers will make themselves available if status is --

15 A. Sorry, you say I am sitting there with them?

16 Q. Well, you are in a discussion with them, yes?

17 A. Not at that time, I had had the discussion with them by  
18 then, that was post -- they had gone, it was a telephone  
19 call that I received.

20 Q. Yes, when?

21 A. Before I sent that message to Les Brown.

22 Q. When? That day?

23 A. I believe so, yes.

24 Q. Yes, right okay. So you've got a conversation with them  
25 that day?

## Transcript of the Sheku Bayoh Inquiry

- 1 A. I had had a conversation with them that day, yes.
- 2 Q. And they say to you very clearly, and you've noted it --
- 3 A. Yes.
- 4 Q. -- we will submit to statement if status is confirmed?
- 5 A. Yes.
- 6 Q. And your response is not: I have told you already,
- 7 status is witness. Your response is: I need to speak to
- 8 Les Brown and that is exactly what I will do, yes?
- 9 A. No, I don't think that was my response. I think
- 10 I responded saying: yes, they are witnesses, and out of
- 11 courtesy I let Les Brown know that, and I did query
- 12 whether the Crown had a concern around that. Now, if
- 13 that had been the case and the Crown had come back and
- 14 said: no, things have changed and we -- well, at the end
- 15 of the day Mr Watson would have been told that, but that
- 16 wasn't the position.
- 17 Q. "Mr Brown ... agreed to consider the matter, seek
- 18 further direction from [Crown Office] and respond."
- 19 A. Yes.
- 20 Q. Yes. You can't seriously be contenting in a Crown-led
- 21 Inquiry, Mr Mitchell, that the question of status was
- 22 confirmed in light of this document until Mr Brown
- 23 confirmed what the status was?
- 24 A. Rightly or wrongly, sir, I took that decision that they
- 25 were witnesses. Now, if the situation had been that

## Transcript of the Sheku Bayoh Inquiry

1           Mr Brown had come back and said that things have changed  
2           dramatically, and we no longer consider them to be  
3           witnesses, I would have had to go back to the Federation  
4           and back to Mr Watson and make that clear to him.

5           My concern at that moment in time was missing the  
6           opportunity to get important statements on paper from  
7           those officers. And whether that is a right or wrong  
8           decision, it's the decision I made.

9           Q. Let's try and tie this together can we? As at 7 May --

10          A. Yes.

11          Q. -- in the document that you prepared, you know, and you  
12          know from the email, that Peter Watson is saying --  
13          Professor Watson is saying: I need to know the status,  
14          yes?

15          A. Yes.

16          Q. You don't respond to that by email, we are agreed on  
17          that?

18          A. You know, I wish now that I had put something in writing  
19          but the long and the short of it is I was speaking to  
20          the gentleman, the gentleman on the telephone, and I was  
21          making my point as clear as I possibly could around his  
22          clients' status.

23          Q. My question was you don't respond to that email --

24          A. No, I didn't respond to the email. No, I didn't, you  
25          are right.

## Transcript of the Sheku Bayoh Inquiry

1 Q. You say that there was further telephone conversation  
2 but you are unable to give us any written record of any  
3 such telephone conversation, yes?

4 A. There was one -- I think -- is that not ... that message  
5 (inaudible). I spoke with Mr Watson out of -- I phoned  
6 him back and I said to him: I know what you are saying  
7 about these officers not providing, however we are going  
8 to have them approached directly. I told him that.

9 Q. You are unable to give us any written record of  
10 a telephone conversation in which you confirm status?

11 A. Okay, I will agree with that.

12 Q. Okay. On 7 June Mr Kennedy of the Federation calls you  
13 asking for confirmation of status and your response  
14 is: I need to speak to Les Brown?

15 A. On 2 June?

16 Q. 2 June?

17 A. Yes.

18 Q. And --

19 A. No, I didn't say that to David Kennedy, that I needed to  
20 confirm. I responded very quickly saying: yes, they are  
21 witnesses. I then spoke -- or sent an email to  
22 Les Brown, as I say through courtesy. If he had come  
23 back and said: no, the position has changed, I would  
24 have had to go back to Peter Watson but that wasn't the  
25 case.

## Transcript of the Sheku Bayoh Inquiry

- 1 Q. As you indicated in the document still on screen you  
2 would do:
- 3 "Mr Brown ... agreed to consider the matter, seek  
4 further direction ... and respond."
- 5 Mr Brown then came back to you and said status as  
6 witness, yes?
- 7 A. Yes.
- 8 Q. You then passed that on to Professor Watson, yes?
- 9 A. I'm not sure about that. I don't think -- I think the  
10 situation was it had been confirmed that they were  
11 witnesses, and it had only been if Les Brown had come  
12 back and said: no, that is not the position, that  
13 I would have gone back to Mr Watson.
- 14 Q. Presumably you accept -- we can look at the documents if  
15 we need to but presumably you accept that after Mr Brown  
16 came back to you, as you agree he did --
- 17 A. Yes.
- 18 Q. -- you passed that on to Professor Watson?
- 19 A. If that is it and I am mistaken, yes, okay.
- 20 Q. You did that later that day, yes?
- 21 A. Okay, yes.
- 22 Q. And very shortly after that, agreement was given that  
23 the officers would attend for statements, yes?
- 24 A. Okay.
- 25 THE DEAN OF FACULTY: Thank you. I am obliged, my Lord.



## Transcript of the Sheku Bayoh Inquiry

1 LORD BRACADALE: Thank you very much, Mr Mitchell, for  
2 coming to give evidence to the Inquiry. I am very  
3 grateful for your time over a number of days. The  
4 Inquiry is about to adjourn and you will then be free to  
5 go.

6 A. Thank you, my Lord.

7 LORD BRACADALE: The Inquiry will adjourn.

8 (2.35 pm)

9 (The Inquiry adjourned)

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# Transcript of the Sheku Bayoh Inquiry

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