

# Transcript of the Sheku Bayoh Inquiry

Tuesday, 5 March 2024

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(10.00 am)

LORD BRACADALE: Good morning, Ms Frame. Will you take  
the oath.

MS KATE FRAME (sworn)

LORD BRACADALE: Ms Grahame.

Questions from MS GRAHAME

MS GRAHAME: Thank you.

Good morning, Ms Frame.

A. Good morning, Ms Grahame.

Q. You are Kate Frame?

A. Yes.

Q. What age are you?

A. 64.

Q. You worked with Crown Office, I understand, for  
28 years?

A. I did, yes.

Q. You were a Fiscal, a qualified lawyer --

A. Yes.

Q. -- for that period of time. And at the end of your  
career you worked as Head of Criminal Allegations  
Against the Police Division?

A. I did, yes.

Q. Is that called CAPD?

A. It is.

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1 Q. We have heard of someone called Les Brown and we have  
2 seen some correspondence from Mr Brown. My  
3 understanding was that he took over as head of CAPD; is  
4 that correct?

5 A. That is correct.

6 Q. Did he actually take over from you?

7 A. I think he did, yes.

8 Q. What did that work involve, being the head of CAPD?

9 A. Receiving allegations about the police, various  
10 allegations in relation to their interaction with the  
11 public, and complaints that had been made about them of  
12 a criminal nature.

13 Q. Was that all criminal allegations, as it says in the  
14 title?

15 A. Yes.

16 Q. So things like excessive use of force, that type of  
17 thing?

18 A. Yes.

19 Q. Assaults maybe?

20 A. Yes, indeed.

21 Q. Thank you. Then, as I understand it, you became the  
22 Police Investigations and Review Commissioner from  
23 August 2014?

24 A. Yes.

25 Q. And you held that role until August 2019?

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1 A. That is correct.

2 Q. Am I right to say you then retired?

3 A. Yes, I did.

4 Q. Thank you. Just to clear something up, some people in  
5 the past have talked about the Police Investigations and  
6 Review Commission but my understanding is that is not  
7 correct?

8 A. It is not.

9 Q. Actually it's the Police Investigations and Review  
10 Commissioner?

11 A. That is correct, yes.

12 Q. So when we talk about the PIRC, we are actually making  
13 a reference to the role of Commissioner?

14 A. Yes.

15 Q. Rather than a body known as the Commission?

16 A. That is correct, yes.

17 Q. That was your role, you were the Commissioner?

18 A. I was.

19 Q. Thank you. In May 2015, which is obviously the  
20 timescale we are looking at here, you were  
21 the Commissioner at that time?

22 A. Yes.

23 Q. What did your role as Commissioner actually cover? What  
24 did it involve?

25 A. Well, it was the strategic oversight in relation to both

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1           the complaint handling review section and the  
2           investigations team.

3       LORD BRACADALE: Ms Frame, I wonder if you could pull the  
4           microphone a little closer to you please.

5       A. Certainly.

6       MS GRAHAME: So it was the strategic oversight~...?

7       A. Of the complaints handling review business and also the  
8           independent investigations section.

9       Q. Thank you. Did it involve work -- I think in your  
10           statement you talk about it involved planning and  
11           direction?

12      A. Yes.

13      Q. What did that actually consist of?

14      A. Planning the business, and some of that involved the  
15           resourcing of the organisation, and reviewing the powers  
16           that were available in the legislation.

17      Q. When you mention direction in your statement, what did  
18           that cover?

19      A. Well, the strategic direction of the organisation and  
20           the corporate objectives, and the business planning  
21           around that.

22      Q. What were the corporate objectives, do you remember now?

23      A. Sorry, I don't.

24      Q. Can you think of anything that would have amounted to  
25           one corporate objective, can you give us an example?

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- 1 A. Well, to undertake effective and independent  
2 investigations.
- 3 Q. Thank you. We will come on to this in a moment but  
4 we've heard that investigations carried out by PIRC had  
5 to be Article 2-compliant?
- 6 A. Yes.
- 7 Q. Thank you. So in terms of your role as Commissioner,  
8 you weren't a hands-on investigator?
- 9 A. No, there were a team of investigators, with trainee  
10 investigators, then investigators,  
11 deputy senior investigators, senior investigators,  
12 a head of investigations, and then the director of  
13 investigations.
- 14 Q. We've heard that you were obviously at the top as  
15 Commissioner, and that in terms of the top of the  
16 investigations team, that there was the director, who  
17 was John Mitchell --
- 18 A. Yes.
- 19 Q. -- in May 2015. There was then Irene Scullion, who was  
20 the head --
- 21 A. Yes.
- 22 Q. -- of investigations, and then senior investigators  
23 included people like Richard Casey?
- 24 A. Yes.
- 25 Q. And Mr McSporran?

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- 1 A. That is right.
- 2 Q. And then the deputy senior investigators included
- 3 Mr Little?
- 4 A. Yes.
- 5 Q. And Mr Harrower?
- 6 A. Yes.
- 7 Q. Thank you.
- 8 A. I think there was a third senior investigator as well,
- 9 a Mr Mitterer.
- 10 Q. We have heard his name as well. I don't know if you
- 11 have had any opportunity to see evidence from other
- 12 witnesses?
- 13 A. I have seen clips on the news website.
- 14 Q. You may although it may -- you may not have, seen a blue
- 15 folder being referred to. I see it is in front of you
- 16 on the desk.
- 17 A. Yes.
- 18 Q. Just to explain the set-up here, when I ask you to maybe
- 19 refer to a document or a paragraph in your statement, it
- 20 will come up on the screen in front of you?
- 21 A. Okay.
- 22 Q. That is so everyone in the room can see what I am
- 23 referring to?
- 24 A. Thank you.
- 25 Q. But in addition to that you have a hard copy of your

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1 statement and anything else which will be in the blue  
2 folder. Now, please feel free -- if you are one of  
3 those people who prefer hard copies, please feel free to  
4 refer to that. If you are comfortable looking at the  
5 screen, we can go through it that way. But if there is  
6 anything that I don't refer to that doesn't come up on  
7 the screen that you think might be of help in explaining  
8 a position or what happened, please feel free to look  
9 through your hard copy, and if you mention the paragraph  
10 number we can bring that up.

11 A. Thank you.

12 Q. The other thing that occasionally happens is witnesses  
13 will sometimes say: oh, there was an email or there was  
14 a document that would be very helpful to the Chair, if  
15 I don't have that available to put on the screen we can  
16 get it at the next break or overnight.

17 A. Okay.

18 Q. Please feel free to let me know if there's anything like  
19 that.

20 Let's look first of all at your Inquiry statement  
21 which is SBPI 00447 and you will see that has come up on  
22 the screen. This is the Inquiry -- the witness  
23 statement you have given to the Inquiry, and it was  
24 taken by a member of the team over a number of days. If  
25 we look at the final page you will see that this is

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1           173 pages long.

2           A. Yes.

3           Q. If we go to the bottom of that page, right to the  
4           bottom, please, you will see that there is an area for  
5           signature --

6           A. Yes.

7           Q. -- of the witness. Now, on the screen you will see that  
8           your signature has been redacted so no one can see that.  
9           It's dated 22 January of this year.

10          A. Yes.

11          Q. But on your copy I think you should be able to see that  
12          you have actually signed every page of the statement.

13          A. Yes, I see that.

14          Q. Thank you. If we look at the final paragraph, which is  
15          795:

16                 "I believe the facts stated in this witness  
17                 statement are true. I understand that this statement  
18                 may form part of evidence before the Inquiry and be  
19                 published on the Inquiry's website."

20                 You understood that to be the case when you signed?

21          A. I did, yes.

22          Q. I would like to begin by asking you about a couple of  
23          documents that we've heard evidence about already. So  
24          I won't go through them in a lot of detail with you, but  
25          they should be documents you are familiar with. The



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1 first is PIRC 04446, and as I say you have been asked  
2 about had in your Inquiry statement. You see on that  
3 page there it says -- it's dated 12 November 2012, so  
4 it's prior to you come coming into the role of  
5 Commissioner --

6 A. Yes.

7 Q. -- in 2014, and actually prior to PIRC being created,  
8 which we have heard was on 1 April 2013?

9 A. Yes.

10 Q. If we can look down the page, please, it's headed up:

11 "Police Investigations and Review Commissioner.

12 "Operational model.

13 "Response to Article 2 investigations."

14 And if we can turn on to page 2, do you recognise  
15 this document?

16 A. Yes, I do.

17 Q. The section I am interested in is at paragraph 5 and it  
18 starts, we see it on the bottom of the screen:

19 "The Human Rights Act 1998 and obligations imposed  
20 under Article 2 apply equally to [Police Scotland,  
21 Crown Office] and PIRC."

22 We've heard evidence from John Mitchell that it  
23 applied equally to all three of those organisations, if  
24 I can call it that?

25 A. Yes, that would be my understanding too.

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1 Q. Thank you. John Mitchell explained where Article 2 is  
2 engaged all three had a duty to ensure that they  
3 conducted themselves in a manner consistent with the  
4 five procedural obligations that the courts have held to  
5 exist.

6 A. Yes.

7 Q. Is that also your understanding?

8 A. It is, yes.

9 Q. And then there are five procedural obligations listed in  
10 this document. First of all:

11 "The investigation must be independent insofar as it  
12 should have no hierarchical or institutional connection  
13 to those implicated.

14 "The investigation must be effective.

15 "The investigation must be reasonably prompt.

16 "There must be a sufficient element of public  
17 scrutiny.

18 "The next of kin must be involved to an appropriate  
19 extent."

20 So those are the five procedural obligations and  
21 they are set out in this document?

22 A. Yes.

23 Q. As I understand it, to have an Article 2-compliant  
24 investigation, which was the aim of PIRC, is that those  
25 five procedural obligations will be satisfied?

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1 A. Yes, that's right.

2 Q. Thank you. That document remained in force in May 2015,  
3 as I understand?

4 A. Yes, it did.

5 Q. Then can we very quickly look at the second document,  
6 which is PIRC 04453 and this is a memorandum of  
7 understanding and it's between the Crown Office and  
8 the Commissioner.

9 A. Yes.

10 Q. If we could look at page 2 of this document --  
11 and I should say without needing to go to the last page  
12 on the screen, this was signed by both the Crown and  
13 the Commissioner in December of 2013.

14 A. Yes, and it was shared with me when PIRC came into  
15 being, as the head of the Criminal Allegations Against  
16 the Police Division.

17 Q. So in your role as head of CAPD, you actually had sight  
18 of this before you even became the Commissioner?

19 A. I did, yes.

20 Q. Thank you. I am interested in looking at page 2, and  
21 primarily about section 2, paragraph 2.1, please. There  
22 we are. We have heard some evidence about this, there  
23 is reference here to:

24 "Section 33A of the 2006 Act details the general  
25 functions of the Commissioner as follows~..."

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1           So at the time this document was entered into you  
2           weren't the Commissioner at that time?

3           A. No, I wasn't.

4           Q. Although you did subsequently become the Commissioner?

5           A. Yes.

6           Q. Did you have some input into this document in your role  
7           in Crown Office?

8           A. I think I saw a draft before it was signed off by the  
9           Crown agent.

10          Q. All right. Thank you. We will see -- I don't need to  
11          look at paragraph (a) but we have heard something about  
12          paragraph (b). And this is about directions from  
13          a prosecutor, so it's a Crown-led investigation and we  
14          have heard there is a distinction to be drawn between  
15          a Chief Constable referral and a Crown-led  
16          investigation?

17          A. Yes.

18          Q. So this is section (b) or subsection (b) I should say  
19          relates to the Crown-led, and:

20                 "(i) To investigate any circumstances in which there  
21                 is an indication that a person serving with the police  
22                 may have committed an offence."

23                 Then:

24                 "(ii) To investigate, on behalf of the relevant  
25                 procurator fiscal, the circumstances of any death

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1           involving a person serving with the police which that  
2           procurator fiscal is required to investigate under  
3           section 1 of the Fatal Accidents and Sudden Deaths  
4           Inquiry (Scotland) Act 1976~..."

5           A. Yes.

6           Q. Just so everyone is clear, if there is a death in  
7           custody or a death after police contact, that would be  
8           something that the Fiscal would be required to  
9           investigate?

10          A. Yes.

11          Q. Regardless of whether there are any allegations of  
12          criminal activity?

13          A. That is right, yes.

14          Q. So we've heard some evidence that (b)(i) relates to  
15          possible criminal activity and (b)(ii) relates to  
16          investigating the circumstances of a death?

17          A. Yes.

18          Q. Would you agree with that?

19          A. I would, yes.

20          Q. Let's look at (b)(i) first of all:

21                        "To investigate any circumstances in which there is  
22                        an indication that a person serving with the police may  
23                        have committed an offence."

24                        That is a criminal offence?

25          A. Yes.

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- 1 Q. Where it says:
- 2 "... an indication that a person serving with the
- 3 police may have committed an offence."
- 4 Could you help me understand what level or degree of
- 5 evidence would be required to meet that test or that
- 6 threshold under (b) (i)?
- 7 A. Well, as part of that, if we were advancing to consider
- 8 the allegation, there would naturally be a time where
- 9 you consider whether the person was a witness or
- 10 a suspect, and to move to the threshold of a suspect you
- 11 would require a reasonable suspicion that they were
- 12 involved or that they were involved in the crime.
- 13 Q. Right. We've heard some evidence already from others,
- 14 I have asked witnesses about this changing of status
- 15 from witness to suspect.
- 16 A. Yes.
- 17 Q. And a number of witnesses have referred us to a test
- 18 called were there reasonable grounds for suspecting --
- 19 A. Yes.
- 20 Q. -- that the witness or the officer had committed
- 21 a criminal offence?
- 22 A. Yes.
- 23 Q. So they have referred to this phrase "reasonable grounds
- 24 for suspecting".
- 25 A. Yes.

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- 1 Q. I am wondering in paragraph (b) (i) where it says:
- 2 "... an indication that a person serving with the
- 3 police may have committed an offence."
- 4 To what extent does that differ from "reasonable
- 5 grounds for suspecting" an officer had committed
- 6 a criminal offence?
- 7 A. At the stage of indication it would be an investigation
- 8 where the person wouldn't necessarily be a suspect.
- 9 Q. So an indication means you don't have to be a suspect?
- 10 A. That's right.
- 11 Q. So an indication can be less than "reasonable grounds to
- 12 suspect"?
- 13 A. Yes.
- 14 Q. Can you help the Chair understand what type of evidence
- 15 may be an indication rather than reasonable grounds for
- 16 suspecting?
- 17 A. The starting point would be an allegation and something
- 18 to support that.
- 19 Q. When you say something to support, can you help us
- 20 understand what that would be?
- 21 A. Another adminicle.
- 22 Q. Would that be one witness?
- 23 A. It could be.
- 24 Q. What else could it be?
- 25 A. Potentially -- I was going to say CCTV footage but if it

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1           was on CCTV footage it probably would be accepted as  
2           supporting the allegation, if the allegation was seen to  
3           play out on the CCTV.

4       Q.   Right.  So it could be a witness, it could be CCTV.  Any  
5           other examples you can think of at this stage?

6       A.   I am sorry, I can't -- I can't remember.

7       Q.   So indication is something less than reasonable grounds  
8           to suspect.  So there is a difference between those two.  
9           Can you help me understand what PIRC would do if they  
10          start off looking at a (b) (ii), investigating  
11          circumstances of a death --

12      A.   Yes.

13      Q.   -- and at some point in the course of that investigation  
14          there is an indication that a person serving with the  
15          police may have committed an offence?

16      A.   There would be the option of going back to the Crown to  
17          seek alternative direction in relation to that.  And to  
18          let them know that there had been that indication, so  
19          that they were aware of what the investigation had  
20          uncovered.

21      Q.   What difference did it make to a PIRC investigation if  
22          it was under (b) (ii) or (b) (i) in terms of the  
23          practicalities of that?

24      A.   Very little, I would suggest, because given the nature,  
25          particularly of a death in custody there would be a full



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- 1 investigation, and if the investigation revealed  
2 criminality, then we would just advance that as  
3 a criminal investigation. So the full circumstances  
4 would be explored.
- 5 Q. So can you then explain, if the status of someone is --  
6 if we are in a situation where it's either -- say  
7 a (b)(ii) and the person is being treated as a witness.
- 8 A. Yes.
- 9 Q. And then a situation arises where it now appears there  
10 is an indication that the person may have committed  
11 an offence, one option is to go to the Crown and ask for  
12 your terms of reference or your direction to be changed.  
13 What happens to the status of the person?
- 14 A. Their status if there is the reasonable grounds to  
15 suspect would change to being a suspect, if we had  
16 reached that level.
- 17 Q. So you have said that indication is some sort of  
18 adminicle of evidence exists that would amount to  
19 an indication but you have also said if there is  
20 reasonable grounds to suspect their status would change.  
21 So can a person's states change if there is something  
22 akin to an indication as opposed to something akin to  
23 reasonable grounds to suspect?
- 24 A. I would suggest that the reasonable grounds to suspect  
25 would be a little more than an indication.

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1 Q. Can you give us an example, so we can understand what  
2 are reasonable grounds to suspect; what would you need  
3 for the reasonable grounds to suspect threshold to be  
4 met so as to change a person's status from witness to  
5 suspect?

6 A. I think there would require to be the circumstances  
7 which would cause a reasonable person to have that  
8 suspicion.

9 Q. How does that differ from an indication?

10 A. There's probably little in it.

11 Q. It may be that there is a definition of reasonable  
12 suspicion that presupposes the existence of facts or  
13 information which would satisfy an objective observer  
14 that the person concerned may have committed the  
15 offence. I am wondering if that is far removed from  
16 an indication or not?

17 A. From my own perspective it's perhaps marginal but  
18 slightly more.

19 Q. Right. Are you looking for corroboration with  
20 reasonable grounds --

21 A. No.

22 Q. No?

23 A. No.

24 Q. So it can be on the basis of one witness, reasonable  
25 grounds to suspect?

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- 1 A. It could be.
- 2 Q. And that could also be the case with an indication?
- 3 A. Yes.
- 4 Q. Or it could be CCTV?
- 5 A. Yes.
- 6 Q. Can you think of an example which will assist the Chair  
7 in understanding that marginal difference?
- 8 A. I am trying to think back to specific examples, and  
9 right now I can't.
- 10 Q. Well, if something does come to you, during the course  
11 of today, you can share that with us.
- 12 A. Thank you.
- 13 Q. Under (b) (i) presumably if the prosecutor asks PIRC to  
14 investigate in circumstances where there is  
15 an indication that a person may have committed  
16 an offence, at that stage if that investigation comes  
17 into PIRC under (b) (i) does that automatically mean that  
18 the officer is a suspect?
- 19 A. Again, I think that would depend on the circumstances  
20 that were available.
- 21 Q. So it could be a case where the indication is actually  
22 quite a substantial body of evidence?
- 23 A. Yes.
- 24 Q. Or not.
- 25 A. Slightly weaker --

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1 Q. Would it be a question of degree? Sorry, I didn't hear  
2 that.

3 A. Yes, slightly weaker. It could be either a lot of  
4 evidence that makes it very clear or it could be weaker  
5 than that.

6 Q. So it would depend on an assessment of the evidence that  
7 was available?

8 A. Yes.

9 Q. If it amounted to reasonable grounds for suspicion, then  
10 that person could have their status changed to suspect?

11 A. That's right.

12 Q. Thank you. Could we move on to section 5 on page 4. In  
13 particular, I am interested in 5.4 which is at the --  
14 sorry, 5.5 which is at the bottom of the screen.

15 Again, we see here that:

16 "PIRC investigations are intended to comply with the  
17 five principles of effective investigation outlined by  
18 ECHR namely; independence, adequacy, promptness and so  
19 far as possible public scrutiny and victim involvement."

20 We have heard that that effectively mirrors what was  
21 said in the previous document that we looked at?

22 A. Yes, it does.

23 Q. So again, a reference to the five --

24 A. Principles, yes.

25 Q. -- obligations under the Article 2. What I intend to do

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1           when I ask you questions today is really to look at some  
2           of these principles and ask you questions about each  
3           area.

4           But first of all in relation to the events on  
5           3 May 2015, we have heard that that was a bank holiday  
6           weekend.

7           A. Yes.

8           Q. It was a Monday holiday, and not everyone was in the  
9           office working, some were on call. Some were away on  
10          holidays, having a holiday weekend. I wonder if you  
11          could explain to the Chair when was your first  
12          attendance at the office that -- after Mr Bayoh had  
13          died?

14          A. On the 4th -- the Monday, the Monday which was the bank  
15          holiday. I was in for a short time, and I appreciate  
16          that I actually went back in the following day as well,  
17          for a very brief time, literally for the briefing and  
18          then left.

19          Q. Right. We've heard that Mr Harrower was the lead  
20          investigator on the 3rd, he was on call.

21          A. Yes.

22          Q. It was him with a team from PIRC who went to Kirkcaldy  
23          Police Office on the Sunday.

24          A. Yes.

25          Q. We have heard that then Billy Little was lead

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- 1           investigator on the Monday.
- 2       A. Yes.
- 3       Q. That was the 4th. Did you see Mr Little on the 4th when  
4           you were briefly in the office?
- 5       A. Yes, I did. On the 4th I was in for longer than I was  
6           on the 5th. I actually had confused the days, I am  
7           sorry, and I had thought I was only in on the Monday,  
8           but I appreciate now, having looked back at my own  
9           records, that I was back in on the Tuesday.
- 10      Q. Right. When you say you were back in on the Tuesday,  
11           was that for part of a day or a full day?
- 12      A. No, it was simply for the briefing, the update.
- 13      Q. And then when did you return to the office for a full  
14           day?
- 15      A. That would be the following week.
- 16      Q. So for the remainder of that week were you aware that  
17           Mr McSporran had essentially taken over the lead  
18           investigator role?
- 19      A. No, I didn't appreciate that until I returned to the  
20           office.
- 21      Q. So were you aware that Mr Harrower had gone in on the  
22           Sunday and then Mr Little had taken over as lead  
23           investigator on the Monday?
- 24      A. Yes.
- 25      Q. Thank you. Am I right in saying that there are -- at

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- 1           that time at least there were actually two offices?
- 2       A. Yes, that is right.
- 3       Q. Can you explain that to the Chair?
- 4       A. The investigations team were located in Hamilton House
- 5           and my understanding is that the review team were
- 6           originally based there and when the organisation was
- 7           expanded they actually moved to Bothwell House and the
- 8           investigations team took over a larger section of
- 9           Hamilton House, and the Corporate Services division was
- 10          also located in Bothwell House.
- 11       Q. As Commissioner were you based in Bothwell House or
- 12          Hamilton House?
- 13       A. In Bothwell House.
- 14       Q. You were in Bothwell House and the investigations team,
- 15          they were in~...?
- 16       A. They were in the other building.
- 17       Q. Hamilton House?
- 18       A. Yes.
- 19       Q. Geographically was there much between those buildings or
- 20          were they close together?
- 21       A. No, they were located fairly close together.
- 22       Q. When you went in on the 4th, the Monday, the bank
- 23          holiday --
- 24       A. Yes.
- 25       Q. -- did you go to your office in Bothwell House or to

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- 1           Hamilton House?
- 2           A. I went initially to my office, and then went up at some  
3           point to the investigations team.
- 4           Q. At Hamilton House?
- 5           A. At Hamilton House, yes.
- 6           Q. When you were in on Tuesday, again was that to your  
7           office or to Hamilton House or both?
- 8           A. To both.
- 9           Q. To both. Was it something that you commonly did, where  
10          you moved between the buildings?
- 11          A. Yes.
- 12          Q. I'd like to -- when did you find out about the death of  
13          Mr Bayoh?
- 14          A. On the Sunday -- well, I heard reporting of the incident  
15          on the Sunday morning, quite early on. I wasn't aware  
16          that there had been a death at that stage. I think that  
17          related to the injury of a police officer that was being  
18          covered in the media at that stage.
- 19          Q. We've heard from other witnesses at the Inquiry that  
20          there was a media story on the radio that a female  
21          officer had been stabbed?
- 22          A. Yes.
- 23          Q. We've heard that wasn't the case but that that was  
24          an initial story that had gone out on the radio; is that  
25          what you are referring to?



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1       A. Yes, I can't remember the actual injury, I just remember  
2       that there was coverage that an officer had been injured  
3       in the course of her duties and taken to hospital.

4       Q. Thank you. So when did you hear of Mr Bayoh's death?

5       A. At around lunchtime when Mrs Scullion contacted me.

6       Q. Was that on the Sunday?

7       A. Yes.

8       Q. Is that Irene Scullion who was the head of --

9       A. Yes, it is.

10      Q. -- investigations? We will maybe come on to that later  
11      on. But first of all, to go back to the five principles  
12      can I ask you about the first of those principles,  
13      independence. I have asked previous witnesses who were  
14      working at the time about any contact or prior contact  
15      they had had with officers who were part of the  
16      investigation initially. Now, having looked at your  
17      statement I don't -- I think there was nothing of note  
18      as such in terms of the contact you had had, either as  
19      Commissioner or in your former role as head of CAPD,  
20      with any of the police officers who were part of the  
21      initial investigation into Mr Bayoh's death. But  
22      can I just check with you, did you have any prior  
23      contact or knowledge of ACC Nicolson, Ruairaidh Nicolson?

24      A. Yes, I had met him before.

25      Q. When you say you had met him, what sort of meeting or

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- 1 meetings had you had with him.
- 2 A. He had been involved in an investigation, part of which  
3 he was conducting in one of the offices -- not in one of  
4 the offices, in the geographical location where I was at  
5 the time, and he discussed various aspects of the  
6 investigation.
- 7 Q. And Garry McEwan, had you --
- 8 A. No, I hadn't met him.
- 9 Q. Lesley Boal?
- 10 A. Yes, I had met her in connection with some policy  
11 matters.
- 12 Q. The SIO was Pat Campbell. Did you know him?
- 13 A. Similarly I had met him, again in connection with  
14 various policy matters.
- 15 Q. Of any of these officers, had you had anything amounting  
16 to significant contact or prolonged contact?
- 17 A. No, it was limited in relation to all three.
- 18 Q. Was this when you were head of CAPD?
- 19 A. No, in relation to each them it was in connection with  
20 just general operational business as part of the Crown  
21 Office and Procurator Fiscal Service.
- 22 Q. So in terms of any of them what was the most recent  
23 contact you had had with any of them prior to  
24 3 May 2015?
- 25 A. A number of years.

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- 1 Q. We have heard evidence about the impact of if I can  
2 summarise it as limitations on the resources available  
3 to PIRC --
- 4 A. Yes.
- 5 Q. -- in May 2015. We've heard that in any investigation  
6 there may be a need to rely on Police Scotland officers  
7 to assist, for example, with house-to-house enquiries.
- 8 A. Yes.
- 9 Q. We have heard evidence that, at least initially until  
10 PIRC arrive, that police officers -- there is  
11 an expectation that they will secure the scene and deal  
12 with matters at that initial stage?
- 13 A. Yes.
- 14 Q. Is that your understanding?
- 15 A. Yes, there is a responsibility or an expectation, as you  
16 say, in relation to the level of cooperation in  
17 connection with the securing of evidence and the scene,  
18 and also the initial operational response.
- 19 Q. Did you have any concerns -- thinking about independence  
20 of the investigation, did you have any concerns at that  
21 stage about the impact that reliance on Police Scotland  
22 had on the independence of a PIRC investigation?
- 23 A. I think from a public perception it was difficult.  
24 However, the way that these incidents are reported in  
25 Scotland generally to the police, they will be the first

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1           on the scene and then Crown Office can take the decision  
2           and make an assessment as to whether PIRC should become  
3           involved.

4       Q.   Looking back now, with the benefit of hindsight, can you  
5           see any routes or any ways that that could be improved  
6           to minimise or avoid the need to rely on Police Scotland  
7           officers once PIRC have been instructed to investigate?

8       A.   If there were PIRC investigators available close by to  
9           minimise the time that Police Scotland officers were  
10          left in charge of the scene, for example, that would  
11          assist in reducing that reliance.

12      Q.   Minimising that geographical location, are you thinking  
13          having PIRC investigators spread around the country?

14      A.   Well, potentially satellite offices, yes.

15      Q.   Was that something you considered when you were  
16          Commissioner?

17      A.   It was discussed but the resources for that just were  
18          not available to us, to put that into being.

19      Q.   If there was such a thing as satellite offices for PIRC  
20          investigators, you think that would benefit or reduce  
21          the delay in investigators attending a scene, or do you  
22          think it would reduce the need to rely on  
23          Police Scotland officers, or both?

24      A.   Potentially both because you would expect the PIRC  
25          investigators to be on the scene more quickly, and

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1           thereafter to be in a position to take charge and direct  
2           any investigation from that point.

3           Q. Thank you. The other thing that you mention in your  
4           statement is that resources were a matter of concern to  
5           you and they were underestimated from the outset.

6           You've talked about resources being part of your remit  
7           as Commissioner?

8           A. Yes.

9           Q. I am interested in to what extent you formed the view  
10          that resources were inadequate from the outset?

11          A. I thought given the geographical spread and the  
12          potential for the volume, and certainly as time went on  
13          the complexity of the cases that were being referred,  
14          that the demand would outstrip the resources.

15          Q. Do you remember when you took over in 2014 to what  
16          extent was it anticipated that PIRC would be handling  
17          investigations and what number of investigations was it  
18          anticipated they would deal with?

19          A. I can't remember the precise number apart from what  
20          Crown Office thought, and my understanding was that they  
21          anticipated that there was going to be less than  
22          a handful, so less than five referred per year, and in  
23          my last year my recollection is that there were 36 Crown  
24          directed investigations referred.

25          Q. On top of the Crown directed investigations, were there

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- 1           also Chief Constable direct --
- 2       A. Yes, there were Chief Constable referrals and also
- 3           referrals from the SPA, the Scottish Police Authority.
- 4       Q. You have explained to us earlier that you retired
- 5           in August 2019?
- 6       A. Yes.
- 7       Q. When you say your last year, are you talking about that
- 8           period 2018 to 2019?
- 9       A. Yes, the financial year 2018/2019, yes.
- 10      Q. When did the financial year end?
- 11      A. In April of that year.
- 12      Q. So it would have been April 2018 to April 2019?
- 13      A. Yes.
- 14      Q. And there were 36, did you say?
- 15      A. That's right, yes.
- 16      Q. Crown-led. Recognising that there were concerns about
- 17           resources, and the adequacy of resources, can you
- 18           explain to us what discussions you had about funding or
- 19           improving those resources once you were in role?
- 20      A. Yes, there were regular discussions with the Scottish
- 21           Government sponsor team. We met with them, I think it
- 22           was quarterly, and they were provided with updates in
- 23           relation to the volume and also the types and
- 24           complexities of cases that were being referred.
- 25      Q. At what stage did you start asking for additional

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1 resources?

2 A. I think the first evidenced budget bid that I put in was  
3 in -- I think it was either August or October 2015. We  
4 had been told before that my predecessor had applied for  
5 resources in the first year of the organisation's  
6 existence, and sought further funding for the  
7 investigation team and at that stage some money was  
8 provided, it was for fixed-term investigators, I think  
9 three fixed-term investigators were to be funded and  
10 the Commissioner was advised that the other three had to  
11 be found from within the PIRC's own budget.

12 At that time he was also advised that it was  
13 extremely unlikely that there would be any further  
14 increase in the grant in aid for a further two years.  
15 So the general feeling within the management team at  
16 that stage was that there was an extreme unlikelihood  
17 that any funding would even be considered before  
18 the two years were up, and in fact within my first  
19 certainly month of the appointment one of the first  
20 meetings I had was with the Scottish Government sponsor  
21 team to look at business efficiency in recognition of  
22 the fact that this funding had been provided.

23 So in 2015 I appreciated that I was moving ahead of  
24 their anticipated schedule, and sought funding at that  
25 stage, and my recollection is that the funding that was

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1           provided was sufficient to employ the six fixed-term  
2           investigators that we had previously had on our books,  
3           and I think there was money for two further  
4           investigators, so an uplift of a further two, and  
5           I think money for two trainees as well.

6           Q. Right. So let's just recap in relation to that. You  
7           come into post in August 2014?

8           A. Yes.

9           Q. At that stage your predecessor had been to the Scottish  
10          Government to ask for additional funding already?

11          A. That's correct.

12          Q. Three fixed-term investigators, funding had been given  
13          for those, and a recognition that PIRC would have to  
14          find space or resources within their own existing budget  
15          for the other three that were requested?

16          A. Yes.

17          Q. So he had requested six, got funding for three. And  
18          PIRC had to find a space for -- money for three  
19          themselves. You came in in August 2014 but then within  
20          a month had a meeting about business efficiencies with  
21          the Scottish Government?

22          A. Yes.

23          Q. We've then heard that Mr Bayoh died in May 2015?

24          A. Mm-hmm.

25          Q. And we've also heard that around about the July there



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1           was the M9 fatal crash?

2       A.   Yes.

3       Q.   And I think Mr Little amongst others have talked about

4           the demand on resources at that time for PIRC was

5           significant?

6       A.   Yes.

7       Q.   You said that in 2015 you went -- I think you went back

8           to ask for more funding?

9       A.   I did.

10      Q.   Was that before or after Mr Bayoh died?

11      A.   I think it was just after.

12      Q.   Before the M9 crash?

13      A.   I think it was after both of those.  So it was either --

14           from memory it was either the August or the October

15           I submitted the bid.

16      Q.   So within about a year of you taking up your role?

17      A.   Yes.

18      Q.   And as a result of that bid for additional funding, you

19           were given funding for six investigators -- three you

20           had already had but six in total -- two further

21           investigators and two trainees?

22      A.   Yes.

23      Q.   Was that in recognition of the demand on resources that

24           PIRC were suffering from at that time in 2015?

25      A.   Yes.  There was a considerable amount of evidence put

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1 forward and it took quite a lot of work, both in the  
2 investigations team to compile that and also to provide  
3 an illustration, I suppose, of the complexities of the  
4 case, because numbers are one thing, but the actual  
5 level of investigation for some, in particular the  
6 Crown-led investigations, was significantly more in most  
7 cases than the referrals that we received.

8 Q. So they were generally the more complex investigations  
9 anyway?

10 A. Yes.

11 Q. And you have said by your -- the year from 2018 to the  
12 end of the financial year in 2019 you had 36 --

13 A. Crown-led.

14 Q. -- Crown-led?

15 A. Yes. I think in total that year there were 67  
16 investigations.

17 Q. What had been your estimation or what was the estimation  
18 of the workload for PIRC when you took over the role in  
19 2014 in terms of the number of investigations in total?

20 A. I can't remember -- I don't know if I ever saw the  
21 figures for the estimated volume. I know that there had  
22 been considerable difficulties in assessing that volume,  
23 simply because the different police forces had recorded  
24 matters that would, in the new era, if we could call it  
25 that, would be referred to the PIRC. So there was

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1 a discrepancy in how those matters were recorded, there  
2 was also a discrepancy in various approaches by  
3 different forces as to when they would have brought in  
4 other forces to investigate matters that would now come  
5 to the PIRC.

6 Q. We heard evidence from one witness who said the prior  
7 legacy forces, before Police Scotland came into  
8 existence in April 2013, had assessed numbers  
9 differently, and it made it difficult to work out what  
10 the overall estimate would be for --

11 A. That is right. And I think it was recognised there was  
12 that difficulty in coming up with a finite number that  
13 could be anticipated, and on that basis the Scottish  
14 Government, their view was that the first few years  
15 would be an opportunity to assess the consistency and  
16 the level of demand so that obviously funding could be  
17 increased if required.

18 Q. So essentially once you came into position an assessment  
19 was done and further resources were actually sought --

20 A. Yes.

21 Q. -- the following year.

22 A. Indeed. I should say that in relation to the funding  
23 that was provided, even though -- or my recollection is  
24 that even though it was sought in August  
25 or October 2015, because of the spending review, my

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1           recollection is the money was not provided until the  
2           following year, so March 2016.

3           Q. Right. We've also heard evidence that at a point in  
4           time of the investigation into Mr Bayoh's death, that  
5           in fact the case handling -- members of the case  
6           handling review team were used as the -- to bolster the  
7           investigation team numbers. Do you remember that?

8           A. Yes, I do remember that, because on my return to the  
9           office Mr Mitchell and I sat down to assess what we  
10          could do to supplement the investigation team. There  
11          were effectively two options that we considered, one  
12          that was put on the table but one which I thought was  
13          fundamentally naive would have been the secondment of  
14          police officers. We both, I think, considered that that  
15          would compromise the independence of the organisation,  
16          so the only other option that we came up with was to  
17          second effectively or designate the complaint handling  
18          review team members, which we were successful in doing.

19          Q. We've heard that around six of them were then sent out  
20          with an investigator?

21          A. That is right. I think they undertook -- from memory  
22          I think they undertook the house-to-house enquiries.

23          Q. Right. And although they didn't necessarily have  
24          investigation experience, they could effectively  
25          corroborate what was being done by the investigators?

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- 1 A. That's right.
- 2 Q. Sticking with the issue of independence, we've also  
3 heard some evidence that connects to the post mortem  
4 that was carried out on Mr Bayoh. I appreciate you say  
5 that this happened on 4 May, you've said you were in the  
6 office for a brief period during that day. I think in  
7 your Inquiry statement you do say that you had spoken to  
8 is it Dave Green from Crown Office?
- 9 A. Yes, Mr Green, yes.
- 10 Q. And you were aware of the family's wishes to -- by  
11 that am I understanding you understood and you were  
12 aware that Mr Bayoh's family wished his mother to come  
13 up from London --
- 14 A. I remember --
- 15 Q. -- prior to identifying the body at a post mortem?
- 16 A. Yes, I think my recollection is that it was family  
17 members. I don't recall it being tied to just the  
18 mother coming.
- 19 Q. Was the mother to be part of that group --
- 20 A. Yes.
- 21 Q. -- as well as others?
- 22 A. Yes, I understood that to be the case.
- 23 Q. How did you become aware of the family's wishes?
- 24 A. I think that information was shared with me by  
25 Mr Little.

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- 1 Q. When was that, do you remember?
- 2 A. That would be on the morning of the 4th.
- 3 Q. When you were in the office or on the telephone?
- 4 A. In the office. I recall he actually came down to my  
5 office.
- 6 Q. Was that your office in the other building?
- 7 A. Yes.
- 8 Q. Was that prior to the post mortem having been carried  
9 out?
- 10 A. Yes, it was.
- 11 Q. Tell us about your discussion with Mr Green at  
12 Crown Office.
- 13 A. Well, I was aware from Mr Little that Crown Office, and  
14 I didn't know precisely who, had been made aware of this  
15 issue, and I wanted to ensure that he, as the head of  
16 the -- what was deaths unit before this, was aware of  
17 the circumstances so that that could be considered.
- 18 Q. What did you tell Mr Green?
- 19 A. My recollection is that I told him that the family had  
20 indicated that they wanted other family members present  
21 before any post mortem went ahead.
- 22 Q. What was his response?
- 23 A. I think he was trying to balance the need for -- well,  
24 to see if a cause of death could be ascertained, against  
25 that. But the eventual outcome was that the post mortem

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- 1           had been arranged by that time and was to continue.
- 2           Q. Did you -- what efforts did you make to persuade him to  
3           delay the post mortem?
- 4           A. I tried -- well, I did explain to him that the family's  
5           wishes were for it to be delayed until other family  
6           members had arrived. Unfortunately there was no  
7           indication of when that would happen, so I suppose his  
8           view was how long was the post mortem to be delayed for,  
9           and we didn't have that information.
- 10          Q. Is that information that you could have obtained?
- 11          A. Well, I had understood that that information had been  
12          sought but hadn't been provided.
- 13          Q. How did you understand that?
- 14          A. I think again that was from conversation either with  
15          Mr Little or another member of the investigation team,  
16          I don't recall precisely who.
- 17          Q. Was that conversation in your office or was it in the  
18          other building?
- 19          A. I think that could have been in the other building.
- 20          Q. When you say it may have been Mr Little, it may have  
21          been someone else, who else could it have been?
- 22          A. Other members of the investigation team who were present  
23          that morning.
- 24          Q. Was there any attempt to speak to the FLO? We have  
25          heard from Mr Lewis that he was appointed as family

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1 liaison officer on the 4th. Was there any attempt to  
2 involve the FLO to see if you could get more information  
3 from the family?

4 A. I don't recall being aware that Mr Lewis at that stage  
5 had been appointed as the FLO.

6 Q. How long were you in the office that day, do you  
7 remember?

8 A. I would say a couple of hours.

9 Q. You spoke to Mr Little in your office?

10 A. Mm-hmm.

11 Q. And you may have spoken to others in the other office?

12 A. Yes.

13 Q. Was it Hamilton?

14 A. Yes, Hamilton House.

15 Q. Do you remember the identification of any other  
16 investigators you spoke to apart from Mr Little?

17 A. Who were present that morning?

18 Q. Yes, on the 4th.

19 A. I don't now. No, I am sorry, I don't.

20 Q. All right. Can I ask you about something else we have  
21 heard some evidence about, and I think you have been  
22 asked about this in your Inquiry statement. We have  
23 heard that there were a number of police officers  
24 present at the post mortem. This took place on the 4th  
25 of May, and we've heard from Mr Little about this.



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- 1 I think you say in your statement that wasn't common,  
2 for police officers to be present?
- 3 A. Well, yes, I should perhaps clarify that.
- 4 Q. I wondered if you would.
- 5 A. Yes, it wasn't common in PIRC -- in fact it had never  
6 happened that I was aware of in a PIRC investigation,  
7 but in being asked about police officers being present  
8 at post mortems, they frequently were present at  
9 post mortems when I was a Fiscal.
- 10 Q. So leaving aside the involvement of police officers who  
11 may be part of an investigation when you were  
12 a Fiscal --
- 13 A. Yes.
- 14 Q. -- and just focusing on a PIRC investigation, are you  
15 saying that it had never happened as you were aware?
- 16 A. I wasn't aware of it ever having happened before.
- 17 Q. Thinking about this requirement of independence of the  
18 PIRC investigation, would you have had -- did you know  
19 on the 4th before the post mortem was due to take place  
20 that there would be police officers present?
- 21 A. I can't remember that.
- 22 Q. Had you known, would you have had concerns?
- 23 A. Yes.
- 24 Q. Can you explain to us why?
- 25 A. Well, I ... I would have thought it was inappropriate

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1           for the police officers to be present, potentially as  
2           members of that division -- Fife Division were involved  
3           in the incident.

4           Q. If you had been in a situation where you had known and  
5           been aware that officers were present, what were your  
6           expectations of your investigators? What would you have  
7           expected them to do at the post mortem if they were  
8           present and realised officers were there?

9           A. I think they could have raised concerns but my  
10          understanding is that at post mortems they are convened  
11          at the hand of the Crown, and anyone present is there  
12          under the direction of Crown Office.

13          Q. In terms of PIRC and the obligation for independence and  
14          securing that independence, what expectations would you  
15          have had of your investigators about protecting that  
16          independence?

17          A. I think it potentially should have and it may well have  
18          been raised or challenged with the Crown.

19          Q. So if there was an investigator there, we have heard the  
20          lead investigator was there, would you have expected  
21          them to raise that with the Crown? We have heard that  
22          a Fiscal was there, Mr Ablett was present, so would you  
23          have expected them to --

24          A. I would have expected some discussion around that, yes.

25          Q. Thank you. Would it surprise you to know that there

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- 1           were no concerns raised at that time by people from  
2           PIRC, investigators from PIRC?
- 3       A.   Yes, it would.
- 4       Q.   And you would be concerned, why?
- 5       A.   Again, because of the question of any interference with  
6           the independence.
- 7       Q.   Thank you. We've also heard evidence that later that  
8           day, at least later that day there was a discussion  
9           about disclosing some of the preliminary findings of the  
10          post mortem to police officers. You are nodding.  
11          I think you have been asked about this in your  
12          statement. Can I ask you, again thinking about this  
13          from the perspective of independence, can you tell us  
14          about any concerns you have about that?
- 15      A.   I think the senior investigator found himself in a very  
16          difficult position, but from my perspective it would  
17          have been preferable for that not to have been shared.
- 18      Q.   When you say it would have been preferable not to have  
19          been shared, if you had been in that position what would  
20          your instruction have been?
- 21      A.   Well, I wouldn't have shared it with them.
- 22      Q.   Can you explain why you would have taken that view, not  
23          to share that information?
- 24      A.   Because that formed part of the PIRC investigation, and  
25          was not information for the police or Police Scotland.

## Transcript of the Sheku Bayoh Inquiry

- 1 Q. The officers who were under investigation?
- 2 A. Well, generally I would have taken the view that  
3 Police Scotland should not have been party to that at  
4 that time.
- 5 Q. We've also heard that by 4 May and the date of the  
6 post mortem no information had come from the officers  
7 regarding basic facts, initial accounts, no statements  
8 had been taken. Is that something that would have  
9 caused you concern about sharing or disclosing  
10 information about the post mortem prior to obtaining  
11 statements?
- 12 A. Yes.
- 13 Q. What would your concerns have been about that?
- 14 A. Potentially that the officers could have tailored their  
15 statements.
- 16 Q. When you say they could have tailored their statements,  
17 what do you actually mean?
- 18 A. Well, they could have adapted them in light of the  
19 information that they had been provided.
- 20 Q. That is something you would have wanted to avoid,  
21 presumably?
- 22 A. Yes.
- 23 Q. Can I move on to the question of adequacy. That is  
24 a big word, and we have heard that on 5 May that  
25 Crown Office sent the first letter of instruction to

## Transcript of the Sheku Bayoh Inquiry

- 1           PIRC, so this would be the Tuesday.
- 2           A. Yes.
- 3           Q. I think you have said you were in at some point for  
4           a period.
- 5           A. Mm-hmm.
- 6           Q. So on that day the Crown Office terms of reference  
7           expanded to include the whole circumstances. Up until  
8           that point there had been -- it had been split, some  
9           have called it a parallel investigation but there had  
10          been -- the early matters leading up to Hayfield Road  
11          were dealt with by Police Scotland, and from  
12          Police Scotland -- sorry, from Hayfield Road onwards  
13          PIRC were dealing with the matter?
- 14          A. Yes.
- 15          Q. But on 5 May the whole thing was combined and PIRC took  
16          over?
- 17          A. Mm-hmm.
- 18          Q. Are you aware of that?
- 19          A. I am, yes.
- 20          Q. We know that Billy Little was lead investigator on the  
21          4th but John McSporrnan came back to work on the 5th and  
22          within a period of time he was lead investigator. He  
23          was also a senior investigator at that time, as  
24          I understand it?
- 25          A. Yes.

## Transcript of the Sheku Bayoh Inquiry

1 Q. Billy Little was a deputy senior investigator at that  
2 time?

3 A. Yes, I think that is right, yes.

4 Q. We have heard that police had delivered statements that  
5 were taken when they were in charge of the investigation  
6 in the lead-up to Hayfield Road, and we heard evidence  
7 from Mr McSporran that PIRC were then in the process of  
8 obtaining statements themselves from certain witnesses.  
9 That was on 5 May.

10 A. Mm-hmm.

11 Q. I asked him about a couple of statements in particular,  
12 that were taken on 5 May, one from Ashley Wise and one  
13 from Kevin Nelson. And they were both described as  
14 eyewitnesses, at that time at least they lived in  
15 Hayfield Road, in the area of where the incident had  
16 occurred.

17 A. Okay.

18 Q. Mr McSporran gave evidence that in relation to those two  
19 statements they were taken by PIRC investigators in the  
20 evening, I think they started at 7/7.20 but he would  
21 have expected by the morning of the 6th that those two  
22 key statements would have been brought to his attention,  
23 and he remembered reading then. He would have had  
24 copies of those statements.

25 So I looked with Mr McSporran at what was available

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- 1           to PIRC on 6 May. And part of that body of evidence  
2           that was being gathered in included the statements of  
3           Ashley Wise and Kevin Nelson, do you remember their  
4           names?
- 5           A. I vaguely remember their names. I wouldn't be able to  
6           say what they spoke to.
- 7           Q. That is fine. So I looked with Mr McSporrán at a sort  
8           of snapshot, if you like, of where the investigation was  
9           on 6 May. So not in the initial days but three days  
10          after the death of Mr Bayoh.
- 11          Perhaps we could look first of all at Ashley Wise's  
12          statement. That hopefully will refresh your memory. It  
13          is already on the screen. See at the top it says  
14          Ashley Wise, and then it's taken on 5 May at 7.20 in the  
15          evening by investigator Alex McGuire. Do you remember  
16          him?
- 17          A. Yes, I do.
- 18          Q. He was there in the presence of DSI Margaret  
19          Ann Headrick, so he is in the presence of -- do you  
20          remember Margaret Headrick?
- 21          A. I do, yes.
- 22          Q. I would like to go through some of that statement with  
23          you. Just give me a moment. I am interested in pages 2  
24          and 3 effectively. So if we can start with page 2.  
25          Now, I am not going to go through every single

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1 paragraph, I am going to begin at paragraph 6 which  
2 starts:

3 "What it looked like to me ..."

4 I am not going to go through every single paragraph  
5 the statement, I am going to extract certain elements of  
6 it and I'll go on and develop some questions with that  
7 in mind. So paragraph 6 which begins:

8 "What it looked like to me was that I saw a police  
9 officer striking the man on his legs to get him down.  
10 I am not sure whether he was completely lying down on  
11 the ground or was going down at that point. There was  
12 at least six police officers lying on top of him. They  
13 were crossing over him from both sides. They pretty  
14 much covered his whole body. It was only when they  
15 moved that I could see his arm and definitely knew it  
16 was a black man. It looked like one officer was using  
17 a baton to hold the man down. It was on his upper chest  
18 towards his throat."

19 Then, looking at the next paragraph:

20 "When the man was on the ground with the police  
21 officers on top of him I could see him struggling with  
22 them."

23 And they put tape around his feet and legs:

24 "When the man was on the ground I heard him  
25 screaming. It was a horrible sound. It sent chills



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1 through me. I heard the man shout to the police to get  
2 off him. They never moved from him at that point.

3 "I think the black man was on his back when lying on  
4 the ground. I am not sure if he was moved whilst on the  
5 ground. I saw him lying on the ground. I could see his  
6 wrists were restrained. His hands/arms were in front of  
7 him. The police officers were still lying on top of  
8 him."

9 There seemed to be a pause or a break.

10 If we can move on to the next page, page 3, second  
11 paragraph:

12 "I think the police officers were lying on top of  
13 him a long time. I think it was at least five minutes  
14 they were lying on top of him. It may have been about  
15 ten minutes. This includes the time when he was being  
16 taped to his legs. At all times he was surrounded by  
17 police officers. There were at least six Police  
18 officers around him at all times."

19 So can you see the sort of content, very briefly,  
20 I am just giving you the content of --

21 A. Yes.

22 Q. Ashley Wise's statement. Do you remember that statement  
23 now that I have read those passages out to you?

24 A. No, I don't.

25 Q. No. Then let's look at -- can we look at the

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1 Kevin Nelson statement, please, PIRC 00019. You will  
2 see this is Kevin Nelson. It is taken on 5 May at  
3 7 o'clock in the evening by Investigator  
4 Kareen Pattenden. Do you remember her?

5 A. Yes, I do.

6 Q. And DSI Brian Dodd. Do you remember him?

7 A. Yes.

8 Q. If we can look at page 2, please, of his PIRC statement.  
9 I am looking towards the bottom, the third paragraph  
10 from the bottom of page 2 and it starts:

11 "When this male started walking along the road he  
12 appeared to be acting as if the police were not talking  
13 to him. He ignored everything that was being said. My  
14 view was clear, I would say the male was about 30 yards  
15 from me and at this time he did not appear to be  
16 carrying anything in either of his hands."

17 He heard a male officer shouting "get down".

18 Then can we move on to page 3, please. I want to  
19 start with the paragraph you see at the bottom of  
20 the page:

21 "The black male then stepped forwards towards the  
22 female officer and appeared to lunge at her with his  
23 left fist towards her face, head area. I believe he  
24 struck at her with his closed fists at least 3 times.  
25 I heard her scream out, so I cannot be positive but

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1 I believe at least one of these fists struck her."

2 He then left his window, he went to the front garden  
3 to have a closer look. It took him 10 to 20 seconds.

4 Then the next paragraph:

5 "In this time the black male now appeared to be face  
6 down on the pavement to the left of my house on my side  
7 of the street. I could no longer get a clear view of  
8 this male, there appeared to be five or six male police  
9 officers attempting to restrain him. All of these  
10 officers were dressed in uniform~... I observed one  
11 officer appeared to be kneeling on the ground with the  
12 weight of his upper body by use of his arms to the black  
13 male's shoulder/back of neck area. I would not be able  
14 to describe this police officer. The other police  
15 officers appeared to be laying across the black male's  
16 body~..."

17 So there are five or six male officers attempting to  
18 restrain him, one is:

19 "... kneeling on the ground with the weight of his  
20 upper body by use of his arms to the black male's  
21 shoulder/back of neck area~... The other officers  
22 appeared to be laying across the black male's body~..."

23 Do you see that? Now that I have shown you that, do  
24 you remember this statement?

25 A. I do, yes.

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1 Q. This is the -- Mr McSporrان had this available to him on  
2 6 May, so this is before you have any statements from  
3 the police officers, there is nothing at all from them  
4 at that stage. But you have these two statements from  
5 eyewitness, and you may recall Ashley Wise was the  
6 witness who took the Snapchat footage?

7 A. Oh, yes.

8 Q. Which was available as well. We have heard evidence  
9 that officers, police officers, have the legal right to  
10 use force?

11 A. Yes.

12 Q. And even deadly force in certain circumstances?

13 A. Yes.

14 Q. But in order for that use of force to be legitimate,  
15 that they have to justify that?

16 A. Yes.

17 Q. We've heard evidence that justification for use of force  
18 is by showing that it's reasonable, necessary and  
19 proportionate?

20 A. Yes.

21 Q. Officers have to use the absolute minimum force that  
22 they can --

23 A. Yes.

24 Q. -- to achieve their objective?

25 A. Yes.

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1 Q. And they have to have precluded other less forceful  
2 options?

3 A. Yes.

4 Q. Either having tried and failed or having ruled them out,  
5 depending on the reasons and the circumstances?

6 A. Yes, I am aware of that.

7 Q. At this stage on 6 May there is absolutely no  
8 justification being provided by the officers for any use  
9 of force. What PIRC do have on 6 May are these two  
10 statements from Ashley Wise with her Snapchat footage  
11 and Kevin Nelson. As I have shown you, Ashley Wise has  
12 spoken about one officer -- looking like one officer was  
13 using a baton to hold the man down on his upper chest  
14 towards his throat, and officers lying on top of him for  
15 five minutes, maybe ten minutes, and Kevin Nelson  
16 talking about the man walking along the road ignoring  
17 what was being said, not holding anything in his hands.  
18 He spoke about him being face down on the pavement with  
19 five or six male officers attempting to restrain him,  
20 one kneeling on the ground with the weight of his upper  
21 body by use of his arms to the back of the male's  
22 shoulder or back of neck area. And the other officers  
23 laying across the black male's body. So I have  
24 condensed those but that is the sections.

25 A. Yes.

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- 1 Q. We also have heard evidence that there was a statement  
2 from DC Connell, who was a police officer who had  
3 attended the scene at Hayfield Road, and he had found  
4 a knife some distance from where the incident occurred.
- 5 A. Yes.
- 6 Q. And Mr McSporran talked about -- it appeared to him at  
7 that stage there was an inference that perhaps Mr Bayoh  
8 was not in possession of a knife at that time --
- 9 A. Yes.
- 10 Q. -- when it happened. We've also with Mr McSporran  
11 looked at the officer safety training manual that was  
12 in place in 2015 and it was actually a 2013 manual.  
13 I wonder if we can look at that. PS10938. If we could  
14 look at page 29 of the pdf which is page 23 of the  
15 manual. There we are. This is module 1, "Medical  
16 conditions and considerations". We have heard evidence  
17 that this is the manual that was used for officer safety  
18 training at the time that this incident took place.
- 19 A. Okay.
- 20 Q. I would just like to go through some of this with you.  
21 So officers are obviously, in their training and in  
22 their re-certification training, taught about safe  
23 methods of restraint, safe ways that they can use force?
- 24 A. Yes.
- 25 Q. We have heard that a number of the investigators were

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1 former police officers and had had that type of  
2 training. If we can look at the page on the screen,  
3 "Medical conditions and considerations":

4 "Two specific medical conditions, namely,  
5 positional asphyxia (restraint-related asphyxia) and  
6 excited delirium must be recognised by police officers  
7 when dealing with a subject."

8 I am particularly interested in the  
9 positional asphyxia. This is part of the training  
10 delivered to officers at that time:

11 "Positional asphyxia (restraint-related asphyxia)  
12 can occur when a subject is placed in a position which  
13 interferes with the ability to breathe. Death can occur  
14 rapidly, and it may be the case that a police officer  
15 can be found to be liable."

16 The risk factors which contribute to the condition  
17 are then listed, there are a number of bullet points  
18 listed there, the body position, which can result in  
19 partial or complete airway constriction; alcohol or drug  
20 intoxication is a major risk factor; inability to  
21 escape; the subject is prone, so on their front;  
22 obesity; age; stress; respiratory muscle fatigue  
23 relating to prior violent muscular activity, such as  
24 fighting with police officers?

25 A. Yes.

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1 Q. So these are named risk factors for positional asphyxia.  
2 As it says above this, death can occur rapidly with  
3 positional asphyxia. If we look at the right-hand  
4 column it then gives a list of signs and symptoms:  
5 "Officers should recognise the following symptoms  
6 and be prepared to administer emergency first aid:  
7 "Body position restricted to prone, face down.  
8 "Cyanosis~...  
9 "Gurgling/gasping sounds.  
10 "An active subject suddenly changes to passive or  
11 loud~...  
12 "Panic.  
13 "Verbalising that they cannot breathe.  
14 "When a subject has been involved in a physical  
15 and violent struggle, the exertion involved causes the  
16 muscles to use oxygen at an increased rate. The process  
17 can cause oxygen debt in the muscles and the  
18 physiological response to that is accelerated breathing.  
19 "When a subject is restrained, ventilation (the  
20 process of getting air into and out of the lungs) can  
21 become more difficult, due to the internal organs  
22 exerting pressure on the diaphragm. This is  
23 particularly evident when a subject is placed in the  
24 prone position or pressed against a surface.  
25 "If the subject's hands are restrained to the rear



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1 breathing ability may be restricted. This must be  
2 considered~..."

3 If we move down:

4 "The process of restraining often requires the upper  
5 body to be held down, sometimes by an officer's own  
6 bodyweight. This chain of events may trigger  
7 positional asphyxia.

8 "Officers are encouraged to remove the subject from  
9 the prone position as soon as possible following  
10 restraint. The subject can then breathe without  
11 restriction and the officer can still carry out search  
12 procedures before executing the safe get-up technique."

13 So you will see that section alone talks about  
14 various risks --

15 A. Yes.

16 Q. -- signs and symptoms to be conscious of, and the need  
17 to get the subject essentially out of the prone position  
18 as soon as possible following restraint?

19 A. Mm-hmm.

20 Q. There is no safe period of time given that you can --  
21 an officer can keep a person in the prone position for,  
22 three minutes or four minutes and it will all be safe.

23 A. Yes.

24 Q. There is an explanation that death can occur suddenly.

25 A. Mm-hmm.

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- 1 Q. And if these risk factors are there, these are  
2 significant because they could result in death.
- 3 A. Yes.
- 4 Q. So again on 6 May the PIRC have two statements taken by  
5 eyewitnesses, giving a description of the restraint.  
6 They have no justification from the police officers as  
7 to any justification for use of force.
- 8 A. Mm-hmm.
- 9 Q. PIRC are also aware that CS spray and PAVA spray have  
10 been used because items were left at the scene?
- 11 A. Yes.
- 12 Q. So at this stage there is clearly -- there has been  
13 a use of force, and there is no justification. The  
14 post mortem has been carried out on 4 May, but cause of  
15 death at that stage is unascertained.
- 16 A. Yes.
- 17 Q. And there's further tests to be carried out,  
18 toxicology --
- 19 A. I remember those, yes.
- 20 Q. -- things of that sort. We have heard evidence from  
21 Mr Little that he had spoken to the pathologist after  
22 the post mortem and what had been ruled out was  
23 blunt-force trauma to the head. But nothing else had  
24 been ruled out as a cause or contributory cause?
- 25 A. Yes.

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1 Q. Positional asphyxia had not been ruled out, mechanical  
2 asphyxia had not been ruled out, and the impact of the  
3 restraint had not been ruled out as a cause of death.

4 So I spoke to Mr McSporran about this, and the  
5 references in the statement from Ashley Wise, the baton  
6 being used to hold the man down towards his throat area,  
7 Ashley Wise saying it lasted for about five or ten --  
8 maybe ten minutes. I asked Mr McSporran about  
9 Kevin Nelson talking about five or six officers trying  
10 to restrain the man, one kneeling on the ground with the  
11 weight of his upper body using his arms to the back of  
12 male's shoulder/back or the back of his neck area, and  
13 four or five other officers laying over his body.  
14 I asked him what his views were about the investigation  
15 at that stage, where he had those two statements. This  
16 was the training that was given to officers at the time.

17 A. Yes.

18 Q. Positional asphyxia/restraint is not being ruled out as  
19 a cause of death and I asked him at what stage -- where  
20 was he with the investigation then at that point.

21 I don't know if at that stage you were aware of the  
22 evidence you had available --

23 A. No.

24 Q. -- to your investigators? But in light of what I have  
25 told you was available on 6 May from Ms Wise and

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1           Mr Nelson, against that background, can you tell me what  
2           your thoughts were about the way the investigation was  
3           going at that point?

4           Now, at this stage it is into the circumstances, it  
5           is not a (b) (i), there were no indications at the  
6           initial instruction from Crown that there had been  
7           criminal activity, but where was the investigation at  
8           that point?

9           A. Well, I wasn't in the office at that time but --

10          Q. I am asking --

11          A. -- looking at it on a theoretical basis --

12          Q. Yes, obviously I appreciate you weren't there.

13          I appreciate this was not something you were party to  
14          discussions to, but as Commissioner, and obviously  
15          having been head of CAPD, I am interested in where you  
16          think the investigation was on 6 May. Looking at it  
17          now.

18          A. In terms of the actual terms of reference provided by  
19          Crown Office, my recollection is that it was referred as  
20          a section 33A with no further specification of it being  
21          a (b) (i) or (b) (ii). So it could at any point have  
22          moved between those two. My expectation is that the  
23          investigation would continue with a view to clarifying  
24          what had happened.

25          Q. To what extent would you expect the investigation to

## Transcript of the Sheku Bayoh Inquiry

- 1           continue at that point?
- 2           A. I think there were further witnesses to be seen, but
- 3           additionally potentially advising Crown Office in
- 4           relation to the witness statements that had been
- 5           obtained.
- 6           Q. What would you be expecting your investigators to advise
- 7           Crown Office?
- 8           A. Of the content of those statements, to allow
- 9           a consideration to be made as to whether they wished it
- 10          to be refined further.
- 11          Q. When you say "refined further", what would the options
- 12          have been at that point?
- 13          A. To consider whether it continued, as I think the verbal
- 14          instruction had been, to investigate the death and -- or
- 15          alternatively to consider whether there was the
- 16          potential for that being considered as a (b) (i).
- 17          Q. So I think the understanding of the investigators was
- 18          that they were to investigate the circumstances
- 19          initially of Mr Bayoh's death?
- 20          A. Mm-hmm.
- 21          Q. But do you think on 6 May it would have been possible
- 22          for investigators to go back to the Crown and say: do
- 23          you wish to consider whether this should be a (b) (i),
- 24          an investigation into potential criminal activity?
- 25          A. I think the potential for that was open to them. Yes.

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1 Q. Thank you. We have heard they didn't do that; does that  
2 surprise you?

3 A. I think in terms of the original instruction and the  
4 terms of reference provided, because they were so broad,  
5 I don't know, but I would ... I would think that they  
6 may have felt that 33A encompassed both.

7 Q. I don't think we have heard any evidence to suggest that  
8 they thought it encompassed both. I will be corrected  
9 if I am wrong, but my understanding is the investigators  
10 thought they were doing a (b) (ii) investigation into the  
11 circumstances of the death.

12 A. Yes, well I agree. That was my understanding, they were  
13 doing an investigation into the death. But given the  
14 fact that Crown Office had left it open as a 33A, they  
15 hadn't pinned it to either a (b) (i) or a (b) (ii), so in  
16 those circumstances it was maybe felt, and I am  
17 speculating here, that the 33A was capable of  
18 encompassing both. That is perhaps a better way of  
19 putting it.

20 Q. Was it common for the Crown Office to just refer to  
21 section 33A and not pin it to (b) (i) or (b) (ii)?

22 A. No, from recollection this is the only investigation  
23 that I can recall that it has been left as wide.

24 Q. At any stage did you consider, when you became involved,  
25 going to Crown and asking for them to be specific about

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1           that position?

2           A. We had meetings with Crown Office staff on a regular  
3           basis, and the impression that I gained was that it was  
4           being -- and this may have been based on the fact that  
5           the original, the verbal instruction was into the death,  
6           that it was a death investigation, and indeed from  
7           recollection there was a further meeting in relation to  
8           some additional points that were referred to us and  
9           there was some dubiety as to whether or not they  
10          should -- on our part as to how they should be advanced,  
11          and from recollection my memory is that they were to be  
12          tied to the original instruction, which was continuing  
13          as a death investigation.

14         MS GRAHAME: I will maybe come back to that.

15                 I wonder if that would be an appropriate stage?

16         LORD BRACADALE: We will take a break for 20 minutes.

17         (11.31 am)

18                         (A short break)

19         (11.54 am)

20         LORD BRACADALE: Ms Grahame.

21         MS GRAHAME: Thank you. Just to recap very slightly, we  
22          were looking at 6 May.

23         A. Yes.

24         Q. I appreciate you weren't in the office that day. But in  
25          terms of your view as Commissioner at that time, would

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1           you have expected your investigators to go to  
2           Crown Office, advise them as to the statements of  
3           Ashley Wise and Kevin Nelson, and would you have  
4           expected them to raise the issue of maybe changing it to  
5           a (b) (i) investigation with the Crown at that time?

6           A. I think my point before we broke was, because it was  
7           a 33A and it had been left open as either a (b) (i) or  
8           (b) (ii), but on the understanding that the investigation  
9           was progressing as a death investigation, it would have  
10          been an option to go back to Crown office and make them  
11          aware of the content of those statements.

12          Q. And aware of the progress that was being made with the  
13          investigation?

14          A. Yes, and there were updates provided to Crown Office  
15          throughout this.

16          Q. So if you had been asked for your advice as Commissioner  
17          on that day, what would your advice have been for your  
18          investigators?

19          A. It probably would have been to disclose the contents of  
20          those statements to Crown Office, to allow further  
21          consideration to be given as to whether they wished to  
22          refine the terms of reference.

23          Q. If you had been head of CAPD at that time, and had  
24          received a call from PIRC, what would your position have  
25          been?



## Transcript of the Sheku Bayoh Inquiry

1       A. That is quite a difficult question to answer. I think  
2       there is potentially an indication there, from the  
3       content of those statements. However, the investigation  
4       was ongoing, I recall that the CCTV did not support the  
5       length of time, I don't think, that was referred to,  
6       so -- by Ashley Wise in relation to the restraint. It  
7       probably is a reasonable example of a distinction  
8       between an indication and reasonable cause to suspect.

9       Q. If you had been asked to express a view as head of CAPD,  
10       what would your view have been about whether it was  
11       reasonable cause to suspect or an indication?

12       A. I think I would have been inclined to the fact that it  
13       would be an indication.

14       Q. So it would have become a (b) (i) investigation rather  
15       than the (b) (ii)?

16       A. Potentially, yes.

17       Q. Can I ask about status of the officers at that time.  
18       What were your expectations of your investigators in  
19       relation to considering on 6 May the status of the  
20       officers? We have heard this can be from moving them  
21       from witness to suspect, and the test was reasonable  
22       grounds for suspecting criminal activity.

23       A. Yes.

24       Q. Would you have expected your investigators to consider  
25       the status of the officers on 6 May in light of

## Transcript of the Sheku Bayoh Inquiry

- 1 information they did have?
- 2 A. Yes, I would expect them to be considering that  
3 throughout the investigation.
- 4 Q. If you had been asked for advice about the status of the  
5 officers on 6 May, what would your views have been as  
6 Commissioner?
- 7 A. I think from the information you have given me there,  
8 there is a question in relation to which officers were  
9 performing what action. So it may not have been  
10 possible to identify who was actually undertaking the  
11 action described.
- 12 Q. Would that have made a difference?
- 13 A. I think you would need to identify who it was that you  
14 were moving to potentially a suspect category.
- 15 Q. Would you have considered the implications of concert?
- 16 A. Yes, potentially.
- 17 Q. If you had been asked to consider the issue -- officers  
18 acting in concert, tell us what your views would have  
19 been about the implications of that in regard to the  
20 question of status.
- 21 A. I think I would have -- I would have needed to see  
22 how -- or what level of engagement there had been by  
23 which officers to determine first of all if they had all  
24 been acting in concert.
- 25 Q. How would you have got that additional information?

## Transcript of the Sheku Bayoh Inquiry

- 1 A. Ideally from CCTV footage or Ashley Wise, but my  
2 recollection is that neither were particularly clear.
- 3 Q. Would you have gone back for further statements to seek  
4 that information?
- 5 A. Yes, that would have been another option. Yes.
- 6 Q. Is that something you would have expected your  
7 investigators to consider doing?
- 8 A. If there were issues that required clarification, yes.
- 9 Q. Sorry, I thought you said you would have expected to  
10 identify or be in a position to identify which officers  
11 were doing which action?
- 12 A. Yes.
- 13 Q. Was that a point that needed clarified -- sorry,  
14 am I misunderstanding?
- 15 A. In relation to individual officers and their actions, if  
16 they had all been acting together in concert, that would  
17 have been, I suppose, one way that it could have been  
18 advanced. The other would have been to look at  
19 individual actions.
- 20 Q. All right. So if the view was taken that the officers  
21 were acting in concert, would the individual actions  
22 have been less significant to a consideration of whether  
23 they should be suspects?
- 24 A. I think much would depend on what those actions were.
- 25 Q. Assuming the actions are as described by Ashley Wise and

## Transcript of the Sheku Bayoh Inquiry

1 Kevin Nelson in their statements, would they be less  
2 significant if it was -- if they were all acting in  
3 concert?

4 A. No.

5 Q. So you still would have wanted to identify the  
6 individual actions of individual officers?

7 A. I would have wanted to know who was involved, yes.

8 Q. Would you have expected your investigators to have  
9 a discussion, in the office perhaps, of the status of  
10 the officers and to note that down: different  
11 considerations, how they came to a view, not to change  
12 the status of the officers on 6 May?

13 A. That was something that could have been considered, yes.

14 Q. If that had been considered, would you expect the  
15 outcome of that discussion or consideration to have been  
16 noted down somewhere?

17 A. Yes.

18 Q. Where would that be?

19 A. In a policy log.

20 Q. We have heard about something called the management  
21 policy log. Would that be the type of document that  
22 would note down considerations such as that?

23 A. Yes, and the rationale behind it.

24 Q. We have heard that part of it is about the decision and  
25 then there is a section for giving reasons why --

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1 A. Yes, that's right.

2 Q. Is that the type of --

3 A. Yes.

4 Q. -- document? I asked Mr McSporran about these matters  
5 when he gave evidence on 16 February. He said in reply  
6 to my questions about this that:

7 "Answer: We would need to wait for the results of  
8 the final post mortem to determine whether asphyxiation  
9 was a contributory cause."

10 And that was going to come several weeks later. Do  
11 you agree that it was necessary to consider the final  
12 post mortem before any decision was taken about, for  
13 example, the status of the officers?

14 A. (Pause). I am not sure. I would need to reflect on  
15 that.

16 Q. We can come back to that.

17 A. Thank you.

18 Q. Mr McSporran, when I asked him about this, took the view  
19 that, without a confirmed cause of death, the PIRC  
20 investigation would need to continue to gather in more  
21 evidence either to support or disprove the versions  
22 given by Ashley Wise and Kevin Nelson. Do you agree  
23 with that?

24 A. I am sorry, could you repeat that?

25 Q. I spoke to Mr McSporran about this in evidence. He was

## Transcript of the Sheku Bayoh Inquiry

1           of the view, as I understand his evidence, that without  
2           a confirmed cause of death, which wasn't available on  
3           6 May, it was inconclusive at that time --

4           A. Yes.

5           Q. -- the PIRC investigation would need to continue to  
6           gather in more evidence to either support the versions  
7           of Ashley Wise and Kevin Nelson or to disprove the  
8           versions of Ashley Wise and Kevin Nelson. Do you agree  
9           with that?

10          A. I think the cause of death would be important in  
11          relation to determining what the potential crime would  
12          be, rather than proving or disproving a witness's  
13          testimony.

14          Q. Thank you. If that cause of death is significant in  
15          relation to the ultimate charge or crime that is being  
16          alleged, is it fair to say that that is not necessary to  
17          a consideration of the status of the officers; that is  
18          separate from consideration of their status?

19          A. You would require to have a suspicion of a particular  
20          crime. So the cause of death would link to that.

21          Q. Could that crime be excessive use of force by officers  
22          rather than a crime of excessive use of force which  
23          caused a death?

24          A. Oh, yes, and I think that is perhaps the distinction  
25          I was seeking to draw there, yes.

## Transcript of the Sheku Bayoh Inquiry

1 Q. So it would be possible to consider status of officers  
2 bearing in mind a crime of excessive use of force?

3 A. Mm-hmm.

4 Q. It wouldn't be necessary to prove cause of death in  
5 order to consider status?

6 A. Yes.

7 Q. Thank you. As I understand it, and from your  
8 experience, am I correct in saying that any use of force  
9 which is not justified or which is excessive --

10 A. Yes.

11 Q. -- is not a legal use of force?

12 A. Yes, that's right.

13 Q. And as such is a criminal -- potential criminal  
14 activity?

15 A. Yes.

16 Q. If I told you there was nothing in the management policy  
17 log detailing a consideration of the status of police  
18 officers, considering whether they met the threshold,  
19 that there hadn't been an approach to Crown Office at  
20 that time, would that surprise you, that none of that  
21 was done?

22 A. Yes, it would.

23 Q. Would you have concerns that it wasn't done? We are  
24 obviously talking about adequacy of the investigation  
25 here, one of the five principles.

## Transcript of the Sheku Bayoh Inquiry

1       A. I think if a policy log had been initiated and there was  
2       a significant consideration such as that, I would have  
3       expected that to be contained in the policy log.

4       Q. Thank you. There certainly was a policy log. We have  
5       gone through a number of entries in relation to that.  
6       There is nothing on 6 May in relation to this question  
7       having been considered.

8       A. Okay.

9       Q. We have heard evidence from Mr McSporran, who was the  
10      lead investigator at that time, I asked him:

11             "Question: Did you consider at that point ..."

12             Talking about 6 May:

13             "... because you had those two statements ..."

14             That's Ashley Wise Kevin Nelson:

15             "... changing the status of officers?"

16             And he said "No". I asked him if he had considered  
17             that and he said "No". He hadn't considered that. He  
18             gave evidence on Day 83 that:

19             "Answer: We did not know whether the restraint  
20             contributed to the death or otherwise."

21             He said:

22             "Two people had saw the restraint. It was obviously  
23             a restraint on the ground, there was a struggle. But as  
24             we say, we wanted to know how long did that occur, could  
25             that have contributed to the death, and that would come



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1 through pathology and other mechanisms."

2 Which wasn't available, the final post mortem, at  
3 that time. Do you agree with his emphasis on the  
4 restraint and cause of death as being significant  
5 against the background of considering status?

6 A. No, I think it sounds from what you are saying that he  
7 was solely considering a death rather than other  
8 potential options.

9 Q. Thank you. Can I move on and ask you to look at  
10 a notebook dated 14 May. So this moves on from -- we  
11 were talking about 6 May a moment to ago, we are now  
12 moving on to 14 May, just over a week later. If we look  
13 at COPFS 04609. These are handwritten notes which we  
14 understand are an extract from Lindsey Miller's  
15 notebook. You know Lindsey Miller from Crown Office?

16 A. Yes, I do.

17 Q. You will see it says:

18 "Meeting with the PIRC, 14 May 2015. LA~..."

19 Which I understand stands for Lord Advocate, who at  
20 that time I think was Frank Mullholland?

21 A. Yes.

22 Q. John Mitchell, who was your director of operations --  
23 investigations, sorry. Les Brown, who we have heard  
24 took over as head of CAPD when you left, and yourself,  
25 Kate Frame as the Commissioner. And Lindsey Miller's

## Transcript of the Sheku Bayoh Inquiry

1           initials are also there. You will see that these are  
2           handwritten notes. If we can scan through the first two  
3           pages there is initials in the left that indicate who  
4           was speaking or the point raised, and then some notes  
5           taken of the meeting on the right. Do you see that?

6           A. Yes.

7           Q. Can we look at the beginning of that section. You will  
8           see the first entry at the top of that page is against  
9           the initial LA, for Lord Advocate. Do you see that?

10          A. Yes.

11          Q. "Disgrace no statements provided. Should be suspended."

12                 That was a comment made from the Lord Advocate. Do  
13                 you remember this meeting?

14          A. I do remember the meeting, yes.

15          Q. And John Mitchell is noted as having said:

16                 "Don't disagree."

17                 Can you move down to -- you will see there is  
18                 a section with a line next to it. Just under that line  
19                 says:

20                 "JM [John Mitchell]. May need to detain and  
21                 interview under caution. This is a carbon copy of the  
22                 Duggan scenario."

23                 There is an asterisk:

24                 "But independent confirmation of his actings."

25                 Can I ask you about the comment made by

## Transcript of the Sheku Bayoh Inquiry

1           John Mitchell:  
2           "May need to detain and interview under caution."  
3           Can I ask you first of all to explain to the people  
4           listening what an interview under caution is?  
5        A. An interview under caution would take place when someone  
6           is a suspect, they are afforded their rights and advised  
7           that they don't need to say anything in response, and  
8           are provided with the opportunity to seek legal advice.  
9        Q. You've mentioned already, is that at the stage the  
10          person being interviewed is a suspect?  
11       A. Yes.  
12       Q. So they are no longer, if they ever were, a witness?  
13       A. Mm-hmm.  
14       Q. At that stage if someone is a suspect, and being  
15          interviewed under caution, there are reasonable grounds  
16          to consider they have committed a criminal offence?  
17       A. Yes, yes.  
18       Q. There is no reference there to you having commented  
19          about that or responded to that. Can you tell us what  
20          your views were at that stage when John Mitchell raised  
21          the issue with the Lord Advocate:  
22          "We may need to detain and interview under caution."  
23       A. I don't recall -- I don't recall that comment to start  
24          off with. And I am not sure where it was considered ...  
25          or what Mr Mitchell had in his mind in relation to

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1           considering the officers as suspects, I don't know if he  
2           was aware at that stage -- obviously that may have taken  
3           place, he may have had the statements shared with him  
4           the previous week. I don't know, I hadn't had that  
5           discussion with him.

6           Q. Certainly PIRC had Ashley Wise and Kevin Nelson's  
7           statements.

8           A. Yes, I appreciate that.

9           Q. And on 14 May there were no statements provided by  
10          the officers on that date.

11          A. Yes.

12          Q. So you don't know what he was meaning then, when he  
13          spoke about that?

14          A. No, I didn't know what he is basing that comment on.

15          Q. We have not heard the evidence from Mr Mitchell in  
16          relation to this passage. If part of that is based on  
17          the statements of Ashley Wise and Mr Nelson, had you  
18          considered whether there would be a need by 14 May to  
19          consider detaining officers and interviewing them under  
20          caution?

21          A. No. My recollection, I was just almost back from leave  
22          and the meeting had been arranged with the  
23          Lord Advocate, so I was literally into the meeting  
24          almost within a day or so of returning.

25          Q. Had you not been briefed prior to going for a meeting

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1           with the Lord Advocate?

2       A. I had been updated in relation to what had taken place  
3           but I don't recall any information being provided in  
4           relation to either Ashley Wise or Kevin Nelson.

5       Q. No information had been provided to you about two key  
6           eyewitnesses?

7       A. Not that I can recall, no.

8       Q. Had you been given any information about the status of  
9           officers or what PIRC were considering at the time?

10      A. I certainly wasn't aware that there was any  
11         consideration of detention at that stage.

12      Q. Perhaps you should explain detention, something that  
13         existed in 2015, compared to arrest.

14      A. Yes, that was the stage effectively before -- at the  
15         stage of detaining that is when you would move to the  
16         status of a suspect and it allowed the opportunity for  
17         the interview under caution.

18      Q. But to be detained would you have to be a suspect?

19      A. Yes.

20      Q. What briefing had you been given for this meeting with  
21         the Lord Advocate?

22      A. I can't recall at this time what briefing I had been  
23         provided with in advance of going to the meeting.  
24         I certainly was aware that the officers had still not  
25         provided any statements and my understanding is that the

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- 1 meeting had been convened to discuss those  
2 circumstances.
- 3 Q. If we move to the top of the page, I will come back to  
4 this entry if a moment, but do we see there is some  
5 initial discussion about the fact statements hadn't been  
6 provided by the officers?
- 7 A. Yes.
- 8 Q. So this is about 11 days after the death of Mr Bayoh?
- 9 A. Yes.
- 10 Q. I think we are aware that officers had decided not to  
11 give statements and to seek legal advice?
- 12 A. Yes.
- 13 Q. Had you been given a briefing about the circumstances  
14 surrounding the absence of statements?
- 15 A. Yes.
- 16 Q. It's clear there is mention there about the officers  
17 being suspended. Do you remember the discussion about  
18 suspension?
- 19 A. I don't. No, I am sorry, I don't.
- 20 Q. Do you remember the discussion about the absence of  
21 statements?
- 22 A. I do.
- 23 Q. What were the concerns of PIRC at that time about the  
24 absence of statements?
- 25 A. It was the first time that this had ever happened, and

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1 I think there was a degree of surprise about it,  
2 frustration. There had to that stage been  
3 an expectation that officers would provide statements in  
4 circumstances such as this, or initial accounts in  
5 circumstances such as this, and I think there was  
6 a balance or a consideration as to officers being  
7 afforded their -- officers being afforded their  
8 opportunity to be treated as other members of the public  
9 because I think the concerns being expressed were that  
10 they were potentially concerned of any potential around  
11 incrimination, and like anyone else both witnesses are  
12 not able to be compelled to speak, even if they are  
13 suspects, similarly they cannot be forced to provide  
14 a statement or incriminate themselves.

15 Q. We've heard evidence that PIRC were keen to know what  
16 had happened at Hayfield Road on 3 May?

17 A. Yes, that's correct.

18 Q. That there was an issue determining who had done what in  
19 terms of the individual officers?

20 A. Yes.

21 Q. And that that was a hurdle, if you like, that  
22 investigators were keen to get past?

23 A. Yes.

24 Q. Were you aware of all of that when you went to see the  
25 Lord Advocate that day?

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- 1 A. Yes.
- 2 Q. My understanding is that PIRC were quite keen to find  
3 a route through that difficulty that they were facing.
- 4 A. Yes, and my understanding is that that was really the  
5 essence of the meeting.
- 6 Q. And there was -- PIRC were thinking about different ways  
7 that they could find some sort of route through?
- 8 A. Yes.
- 9 Q. So what solutions to this problem were you thinking  
10 about when you went to this meeting with the  
11 Lord Advocate?
- 12 A. I can recall discussion around the potential for  
13 precognition on oath. There was also the discussion  
14 of -- around whether the Lord Advocate would contact the  
15 Chief Constable with a view to any assistance in  
16 securing those statements.
- 17 Q. Tell us what a precognition on oath was.
- 18 A. It's where someone can be ordered to appear in court and  
19 provide evidence under oath.
- 20 Q. What consideration did you give to using that as  
21 an option?
- 22 A. Well, the PIRC wasn't enabled to undertake that, and  
23 there was discussion around whether COPFS would be in  
24 a position to advance that.
- 25 Q. Were they?



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- 1 A. Well, they didn't do it.
- 2 Q. So was this issue discussed at this meeting with the  
3 Lord Advocate or at other meetings with Crown Office?
- 4 A. It was discussed at this meeting.
- 5 Q. What were the reasons, as far as you are aware, as to  
6 why the Crown decided not seek a precognition on oath?
- 7 A. I can't recall why they didn't do that.
- 8 Q. Was that something PIRC would have supported if the  
9 Crown had been willing to move it forward?
- 10 A. Yes.
- 11 Q. Did you consider interview under caution as a solution  
12 to finding a route through the difficulties with the  
13 absence of statements?
- 14 A. Not from the information I had, no.
- 15 Q. Did you consider discussing the information you had with  
16 the Lord Advocate to see whether the Lord Advocate took  
17 a different view about the status of the officers or  
18 whether interview under caution was a possibility?
- 19 A. There was discussion around the status of the officers,  
20 and the Lord Advocate's view that he stated quite  
21 clearly in the circumstances, that he considered them to  
22 be witnesses.
- 23 Q. So at that stage, if it was the Lord Advocate's view  
24 that they were witnesses, did PIRC not take the idea of  
25 interview under caution any further?

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1 A. I think that is right, yes.

2 Q. Was there any attempt to raise with the Lord Advocate  
3 about the information that was available from the  
4 statements with Ashley Wise and Kevin Nelson?

5 A. I don't recall any discussion about those two witnesses  
6 at this meeting.

7 Q. Was there -- you did not consider there might be merit  
8 in addressing the Lord Advocate about those two  
9 statements?

10 A. As I say, I don't think I was aware of the content of  
11 those two statements.

12 Q. You weren't aware of the content of them at that time?

13 A. At that time, no.

14 LORD BRACADALE: Can I just ask you something, Ms Frame. As  
15 a generality, setting this case to one side, in any  
16 investigation where suspicion begins to crystallise on  
17 somebody --

18 A. Yes.

19 LORD BRACADALE: -- is it the PIRC's decision to change the  
20 status or do you have to go to the Crown?

21 A. No, I ... I think that the decision is generally or has  
22 generally been made by the lead PIRC investigator.

23 LORD BRACADALE: Thank you.

24 MS GRAHAME: Thank you. Can we go back to the entry we  
25 looked at a moment ago:

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1                    "We may need to detain and interview under caution."

2                    This was a comment by Mr Mitchell. It said under  
3                    there:

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

5                    Do you remember what that part of the discussion was  
6                    about?

7                    A. I don't recall this being raised at the meeting.

8                    However, I have had discussions which would chime with  
9                    Mr Mitchell's comments about the Duggan scenario.

10                  Q. Tell us the relevance of the Duggan scenario to the  
11                  investigation into Mr Bayoh's death.

12                  A. Yes, I discussed this with the IPCC and --

13                  Q. Is that the English equivalent of your role?

14                  A. More or less, yes. And in that case the officers  
15                  refused to provide statements other than in writing,  
16                  which delayed the IPCC investigation, I was told, for  
17                  approximately a year.

18                  Q. They didn't provide statements for one year, other than  
19                  in writing?

20                  A. The delays, yes.

21                  Q. So they wouldn't give oral, verbal, statements?

22                  A. Yes, that is my understanding.

23                  Q. So in relation to the reference to "carbon copy", is  
24                  that in relation to the difficulties in relation to  
25                  statements --

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1 A. I think -- I would assume that is what he is referring  
2 to, yes.

3 Q. You don't appear to contribute to that aspect of the  
4 discussion. Was there a reason for that?

5 A. To the Duggan scenario conversation?

6 Q. To the comments made by Mr Mitchell:

7 "May need to detain and interview under caution.

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

9 A. No, I didn't contribute to that. I was aware of the  
10 background around Duggan. We had discussed that. There  
11 had been various documents circulated within the  
12 investigation team about the Duggan case, so I was  
13 familiar with it, he was familiar with it, and we were  
14 aware that the investigation team generally were  
15 familiar with those circumstances.

16 Q. Then beside the asterisk it says:

17 "But independent confirmation of his actings."

18 Do you remember that element of the discussion?

19 A. No I am sorry, I don't.

20 Q. Can we move on to the next page, page 2. If we can look  
21 at a comment attributed to Mr Mitchell. Which is  
22 further down. There we are:

23 "SPF position is that they employ Peter Watson but  
24 they disagree with legal advice; should be for each  
25 individual officer to decide."

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1           Do you remember that part of the conversation in the  
2           meeting?

3           A. No, I recall some general comments in relation to the  
4           officers being represented but I can't recall any  
5           particular detail around that.

6           Q. Then beneath that I am not entirely sure what the third  
7           word is but it says:

8                     "I am ... [something] ... this up because AA came to  
9           me and because it was discussed at Cabinet."

10           AA I understand to be a reference to Aamer Anwar?

11           A. Mm-hmm.

12           Q. Who was representing the family at this time. So it  
13           was:

14                     "... discussed at Cabinet and they are keen to avoid  
15           another Baltimore."

16           A. Mm-hmm.

17           Q. What was your understanding at that time to the  
18           reference to avoiding "another Baltimore"?

19           A. Well, I think many people at that meeting were aware of  
20           the general unrest following a death in Baltimore and  
21           civil unrest and rioting, as I recall.

22           Q. Was that in relation to the death of a black man --

23           A. I think it was.

24           Q. -- at the hands of the police?

25           A. Yes.

## Transcript of the Sheku Bayoh Inquiry

1 Q. So was everyone at the meeting on 14 May aware of  
2 the recent events in Baltimore?

3 A. I can't speak for everybody, I was aware.

4 Q. And the matter had been -- Mr Anwar had spoken to Crown  
5 and this matter had been discussed in cabinet. Were you  
6 aware of that?

7 A. No, I wasn't.

8 Q. Then we see -- three lines down from that there is  
9 a reference to LA:  
10 "(PM was far too quick)."  
11 Do you see that? Do you remember that part of the  
12 discussion at the meeting?

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

14 Q. Did you have any views at that time about the speed at  
15 which a post mortem was carried out?

16 A. I recall I was surprised. I was surprised largely  
17 because it was the holiday Monday, I was surprised that  
18 there are pathologists even available on the holiday  
19 Monday.

20 Q. Insofar as the PIRC investigation was concerned,  
21 I appreciate you weren't -- you were only at work  
22 briefly on the Monday, would you have had any concerns  
23 at that time about the post mortem being delayed  
24 slightly to accommodate the family attending for  
25 an identification of the body?

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- 1 A. I think that was something that I was flagging up to  
2 Crown Office, to allow them to consider that.
- 3 Q. This was on 14 May?
- 4 A. Sorry, no, not on the 14th. On the 4th, I think.
- 5 Q. When you spoke to Mr Green?
- 6 A. Yes.
- 7 Q. Can I -- we've heard evidence that in order to justify  
8 use of force, all officers have to justify every single  
9 use of force that they adopt during their operations,  
10 their daily work?
- 11 A. Yes.
- 12 Q. So if, for example, there are three baton strikes, they  
13 have to justify using each individual one of those three  
14 baton strikes?
- 15 A. Yes, I would agree with that.
- 16 Q. So it's not enough for officers to simply give a general  
17 justification, it has to cover all three?
- 18 A. Mm-hmm.
- 19 Q. If that justification is not given then it could be  
20 considered excessive and not legal?
- 21 A. Yes.
- 22 Q. Can I ask you some questions about when you did get the  
23 statements of the officers, which was not until 4 June.
- 24 A. Mm-hmm.
- 25 Q. So the meeting we have just been looking at was 14 May.

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1       A. Yes.

2       Q. And the statements from the officers came on 4 June,  
3       some weeks later.

4       A. Yes.

5       Q. We have heard evidence from your investigators at the  
6       time that arrangements were made and a number of them  
7       attended at the Scottish Police College and  
8       investigators interviewed them and took their  
9       statements?

10      A. Mm-hmm.

11      Q. We have heard evidence that Mr McSporran and Mr Little  
12      were effectively in a co-ordination role that day?

13      A. Okay.

14      Q. I would like to ask you to look very briefly at some  
15      statements that were obtained that day on 4 June.  
16      Again, look at a snapshot of some information that PIRC  
17      had available.

18      A. Okay.

19      Q. The first two officers on the scene in Hayfield Road on  
20      3 May. Let's look at the statement of PC Paton who gave  
21      a statement to PIRC on that date, PIRC 00262. There may  
22      be a technical glitch. I wonder if we could maybe see  
23      something else on the screen, because I will move on and  
24      come back to the statements. Here we are. Excellent.  
25      So we are looking at statement here from Alan Paton who



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1           was one of the first officers on the scene given on  
2           4 May 2015.

3           A. Yes.

4           Q. It was taken by Alex McGuire and in the presence of  
5           Ricky Casey?

6           A. Yes.

7           Q. I am interested if pages 4 and 5. And page 4 starts  
8           with the paragraph:

9                        "I think it took me ..."

10           That is the one. Can we look just under halfway  
11           down this page at the paragraph, it says:

12                        "I was straight out of the passenger side door ..."

13           There we are. You see that big paragraph in the  
14           middle of the page?

15           A. Yes.

16           Q. "I was straight out of the passenger site door of  
17           the van~..."

18                        This is the statement taken from PC Paton on 4 June.

19           A. Okay.

20           Q. "... I immediately took my CS spray out of my vest.  
21           I continued to think that he may still have been in  
22           possession of a knife, and I wasn't taking any risks."

23                        So he goes on to say:

24                        "As I have already said I was still conscious of  
25           the fact that just because I could see his palms he

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1           might still have the knife in his waistband or secreted  
2           somewhere else about his person. With my spray in my  
3           right hand and pointing in the direction of the man,  
4           I shouted loudly and very clearly 'GET DOWN ON THE  
5           GROUND'. The guy was walking towards me and completely  
6           ignored me. He kept walking towards me with his palms  
7           out and I remember thinking how crazy he looked and as  
8           if he was on a mission. I was in genuine fear for my  
9           life and at this point I pressed my red emergency button  
10          and shouted loudly and clearly 'GET DOWN ON THE FUCKIN  
11          GROUND'. My shouting and my pointing of my spray had  
12          absolutely no bearing on him and he kept walking towards  
13          me ignoring me as if he was in a one-track mind. I was  
14          terrified and thought I was going to get attacked by  
15          him.

16                 "When he was about 10 feet away from me I sprayed my  
17          CS spray toward the boy's face."

18                 And he describes the impact of that. Next page,  
19          please. There is a reference at the top of the page to  
20          Craig, this is PC Craig Walker, who was the other  
21          officer who was first on the scene with PC Paton:

22                 "... Craig had come out of the van and had come  
23          round to the front~... He would be pretty much side on  
24          with the boy on the boy's left side. Craig also had his  
25          spray out. I remember seeing it was PAVA, it had the

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1 red top on it, and Craig also discharged it towards the  
2 boy's face. Some of it hit the boy but some of it blew  
3 into my face."

4 And then the next two paragraphs down:

5 "At no point hear the boy say a single thing."

6 Do you see that? Then I'd like to move on to the  
7 statement from Craig Walker, which is PIRC 00265. I am  
8 interested in page 56 but if we look at page 1 first of  
9 all. So this is PIRC 00264, sorry. While we wait for  
10 that next statement to come up on the screen I am  
11 interested in the use of CS/PAVA.

12 A. Right.

13 Q. CS and PAVA sprays --

14 A. Okay.

15 Q. -- when the officers came out of the vehicle, in  
16 relation to the use. And you will have seen Mr Bayoh  
17 was said at that time to have his palms out. We have  
18 heard a knife wasn't visible but clearly PC Paton was of  
19 the view it could have been secreted on his body at that  
20 time.

21 A. Mm-hmm.

22 Q. So this is -- we are waiting for PIRC 00264. While we  
23 wait for that I will tell you the section I am  
24 interested in. Again, it's a statement from PC Walker.  
25 If we look at page 1 first of all it's a statement from

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1 PC Walker, 4 June 2015, taken at Scottish Police College  
2 by Keith Harrower, and a trainee investigator,  
3 Lynn Ungi.

4 If we can go on to page 5, please, if we can look at  
5 the paragraph that begins:

6 "As I was in the process of exiting the van~..."

7 Here we are:

8 "... I could hear PC Paton shout a command at  
9 him~... 'Stay where you are, don't move' or words to  
10 that effect."

11 Do you see that?

12 A. Yes.

13 Q. So he talks about PC Paton:

14 "... standing in a spray drawn position, which means  
15 spray in right hand, pulled back towards the body, his  
16 left hand fully extended in a fend off position. He was  
17 in a sort of defensive stance~... PC Paton was standing  
18 directly in his path. As I walked round I was looking  
19 over to gauge his reaction and there was no reaction at  
20 all. He just kept walking and was about six feet away  
21 from him directly in front of him. As I moved across  
22 the front of the van PC Paton took a couple of steps  
23 backwards and shouted again at him ... 'Stay where you  
24 are'. The man ... said nothing at all and kept walking  
25 and PC Paton was having to work to keep the gap. He

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1           then sprayed him with his CS spray. I could see the  
2           spray go into a large cloud in front of his face.  
3           I am not sure if any of the spray hit his face. The  
4           wind was against PC Paton and it just dispersed widely."

5           Then can we go to the bottom:

6           "As I got past the front of the van he turned  
7           towards me after I shouted at him 'Stay there' or words  
8           to that effect. He faced me and I had my PAVA spray in  
9           the drawn position I described in my right hand. I also  
10          had my left arm extended pointing at him. I think I was  
11          standing in a defensive position. I again shouted 'Drop  
12          your weapon' or something like that but there was no  
13          response from him. I still thought he had a weapon  
14          concealed on him and he wasn't giving verbal or  
15          non-verbal communication at all.

16          "I immediately discharged my PAVA spray at him.  
17          I didn't issue warning re the discharge but it would be  
18          obvious to him as I had it up in front of him in plain  
19          sight and it has a bright red lid on it."

20          So can I ask you to consider just the use of PAVA  
21          spray and CS spray by PC Paton and PC Walker when they  
22          get out of the van. Can you bear that in mind as I ask  
23          you to look at another document?

24          A. Okay.

25          Q. This is a use of force SOP, a standard operating

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1 procedure, and it is PS10933. Now this, as I understand  
2 it, is -- I am interested in section 4.6 and 4.7.

3 So this is the use of force standard operating  
4 procedure we have heard is used by Police Scotland at  
5 the time. It was in force at the time. Section 4.6 is  
6 called, "Profiled offender behaviour". I will just very  
7 quickly run through this with you. So profiled offender  
8 behaviour:

9 "... encompasses the actions and behaviour of the  
10 subject and comprise of the Warning and Danger signs  
11 they exhibit coupled with Impact Factors. Profiling  
12 a person's behaviour may assist in determining  
13 an officer's reasonable response. [It] can be  
14 subcategorised~..."

15 We have looked at this previously but I will just  
16 refresh your memory on this. There are a number of  
17 different levels of profiled offender behaviour. There  
18 are six. Level one is compliance, level two is verbal  
19 resistance and/or gestures, which includes:

20 "... shouting, swearing and verbal challenges to  
21 requests and/or instructions given. It normally  
22 includes non-verbal gestures and posturing ... and can  
23 consist of Warning and Danger signs of potential  
24 attack."

25 Level three is passive resistance, typically used by

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1           demonstrators but not exclusively. It is:

2           "... non-active conduct with no compliance to lawful  
3 instruction."

4           Level four is active resistance:

5           "... more of a physical form of resistance, in that  
6 the subject is actively doing something to prevent or  
7 obstruct an officer from carrying out their duty ...  
8 although physical by nature, falls short of an assault."

9           Level five is assaultive resistance it's:

10          "... a deliberate intention by another to cause  
11 a physical effect upon a person, either directly or by  
12 indirect means (assault by menaces)."

13          And then level six is serious/aggravated assaultive  
14 resistance, this is:

15          "The highest level of resistance encountered which  
16 generally involves the intended use of weapons as part  
17 of the attack where the perceived threat is that of  
18 serious injury or is life-threatening."

19          The statements of PC Paton and PC Walker talked  
20 about Mr Bayoh having his palms out, no weapon visible,  
21 but he was not responding to commands, he was not  
22 responding to the spray ultimately but he didn't shout,  
23 he wasn't swearing, he wasn't being aggressive towards  
24 the officers at that stage when they get out the van.

25          Can we look at levels one and two. We have heard

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1           that at that point, that moment in time, his behaviour  
2           was not compliance but could have been up to level two,  
3           verbal resistance and or gestures. Although there was  
4           no shouting, swearing or verbal challenges to requests,  
5           it could have been between one and two, his profiled  
6           offender behaviour.

7           Let's look at section 4.7, which is the reasonable  
8           officer response:

9           "By combining the elements of Profiled Offender  
10          Behaviour and Impact Factors it affords the  
11          officer/staff the ability to quickly assess the threat  
12          and to make an informed decision to adopt appropriate  
13          tactics from a range of force Options in order to deal  
14          with the situation in a controlled justifiable and  
15          accountable manner."

16          I think you agreed earlier that it is necessary for  
17          officers to show that they have precluded other options?

18          A. Yes.

19          Q. And they have used the absolute minimum force necessary?

20          A. Yes.

21          Q. I would like to look at level four, please. There are  
22          five levels of reasonable officer response in this SOP.  
23          Five is deadly or lethal force, so that is the top level  
24          that an officer can adopt. Level four is defensive  
25          tactics. These tactics are generally perceived to be



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1 strikes, whether delivered by means of empty hand  
2 techniques or baton strikes, but also include the more  
3 robust defensive handcuff techniques and the use of CS  
4 incapacitant spray.

5 So use of a spray is a level four response by  
6 an officer?

7 A. Mm-hmm.

8 Q. We've heard from PC Walker he didn't give a warning  
9 before he discharged his spray?

10 A. Yes.

11 Q. His statement does not include any reference to PC Paton  
12 giving a warning, and PC Paton's statement does not  
13 mention giving a warning to Mr Bayoh. And they have got  
14 out their vehicles with their sprays and used their  
15 sprays at a time that Mr Bayoh was palms to the front,  
16 no visible weapon, no communication. Is there  
17 an assumption that PIRC adopted that all use of force by  
18 police officers was lawful?

19 A. No.

20 Q. So it remained the case that it was for the officers to  
21 justify each use of force?

22 A. Yes.

23 Q. Did PIRC assume that in the absence of a justification,  
24 that the use of force was unlawful?

25 A. Sorry, could you repeat that?

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1 Q. If there is no justification given by an officer to PIRC  
2 as to the use of force, was there an assumption or  
3 a presumption that it was unlawful?

4 A. I don't ... I don't know if it was. I don't know how  
5 that was treated.

6 Q. Have you any idea how it was treated by your  
7 investigators?

8 A. I don't, no.

9 Q. What was your view? If the officers did not provide  
10 justification for a use of force, did you consider that  
11 to be unlawful use of force?

12 A. Yes, because it does require to be justified.

13 Q. So on the face of this description from the officers on  
14 4 June, where we have an SOP, we've heard -- tell me if  
15 you take a different view -- that the behaviour,  
16 profiled offender behaviour of Mr Bayoh initially, as  
17 the officers got out the vehicle, was one up to two and  
18 the officers have gone straight to using CS and PAVA  
19 spray, apparently without warnings. What would your  
20 view have been in relation to that use of force?

21 A. It seems to have escalated potentially beyond the  
22 behaviour that was being demonstrated.

23 Q. Do you mean excessive use of force? When you say  
24 "beyond", what do you mean?

25 A. It seems to have moved quickly to a force that does not

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1 accord with the circumstances that are being presented.

2 Q. Thank you. If officers justify some uses of force, but  
3 not others --

4 A. Yes.

5 Q. -- was that enough for PIRC?

6 A. No.

7 Q. The Chair asked you a short time ago whether it was for  
8 PIRC to assess whether each use of force had been  
9 justified or was that for the Crown. What was your  
10 answer to that? I think he was talking about would it  
11 be up to PIRC to decide ...

12 LORD BRACADALE: Just for clarification, that was in the  
13 context of changing the status from a witness to  
14 a suspect.

15 MS GRAHAME: Sorry, let me ask you something else. Let's  
16 look at paragraph 727 of your Inquiry statement. I have  
17 asked that question poorly, I am sorry. Let's look at  
18 727. I think this might make it more straightforward.  
19 So this is your Inquiry statement. It's one of  
20 the later paragraphs:

21 "I have been asked if PIRC investigations following  
22 deaths in custody would always involve an analysis of  
23 officers' actions."

24 Do you see that?

25 A. Yes.

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- 1 Q. It's also on the screen if you prefer:
- 2 "I have been asked if PIRC investigations following
- 3 deaths in custody would always involve an analysis of
- 4 officers' actions against the terms of SOPs."
- 5 A. Yes.
- 6 Q. "Usually there was a comparison between what the SOP
- 7 detailed and the actions taken. I can't remember
- 8 whether or not there was always a written analysis of
- 9 that, particularly in relation to the Use of Force SOP,
- 10 as determination of whether the actions were legal,
- 11 proportionate or necessary was a matter which
- 12 Crown Office required to determine."
- 13 A. Yes.
- 14 Q. So that was not something that PIRC had to determine or
- 15 decide upon --
- 16 A. No.
- 17 Q. -- themselves.
- 18 A. No.
- 19 Q. But in terms of your expectations of your investigators,
- 20 you would have expected there to be some sort of
- 21 comparison between what you knew of the officers'
- 22 actions and the requirements in the SOP relevant at the
- 23 time?
- 24 A. Yes, and that was regularly done.
- 25 Q. You say there you can't remember whether it was always

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1 a written analysis. Would you have expected there to be  
2 some record made of that analysis?

3 A. Yes, I think there probably should have been some  
4 comparison, and comparison that was captured to detail  
5 whether it accorded with the appropriate action.

6 Q. Would that have been good practice, to record that type  
7 of analysis if it was carried out?

8 A. Yes, it would be best practice.

9 Q. In terms of if there had been a written analysis carried  
10 out, where would that have been noted?

11 A. In the report?

12 Q. I am talking about if an officer had carried out that  
13 comparison exercise --

14 A. If an investigator had done that?

15 Q. Yes, sorry, if an investigator had done that, would you  
16 have expected that to be noted in a particular location?

17 A. Well, again, I would probably have expected that in the  
18 policy log.

19 Q. And that would have given the decision and also the  
20 reasoning behind it?

21 A. It would.

22 Q. If I was to say to you that we have looked at the policy  
23 log and no such comparison has been carried out,  
24 certainly nothing that was noted there --

25 A. Yes.

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1 Q. -- and we have not heard any evidence of that type of  
2 comparison, would that concern you?

3 A. Yes, I think it would be surprising and disappointing.

4 Q. Right. Thinking again about adequacy of the  
5 investigation, we were looking at Article 2 issues, does  
6 that cause you concern that that wasn't done?

7 A. Yes. I think it would have been best practice for that  
8 to have been recorded.

9 Q. I think you have said that, having looked at the 4.6  
10 profiled offender behaviour and the reasonable officer  
11 response, you can see --

12 A. A discrepancy, yes.

13 Q. A discrepancy. Is that something you would have  
14 expected to be done after 4 June when the officers'  
15 statements were available?

16 A. The comparison against the SOP?

17 Q. Yes.

18 A. Well, yes, that would have been appropriate to do that.

19 Q. How quickly would you have expected that sort of work to  
20 be done?

21 A. That would very much depend on what other priorities  
22 were being undertaken by the investigation team, but  
23 I would have thought that, with the detail that was  
24 provided in the statements, it would have been  
25 relatively straightforward, particularly by

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1           investigators who had a background knowledge as well of  
2           what the SOP expected.

3           Q.   What would you have considered a reasonable period for  
4           your investigators to carry out this comparative work?

5           A.   As I have said, depending on the other priorities, but  
6           I would have thought certainly within a week or two.

7           Q.   A week or two of 4 June?

8           A.   Yes.

9           Q.   Thank you.   Just to be clear, where it says in your  
10          statement, you make reference to the Use of Force SOP:

11                   "The determination of whether the actions were  
12                   legal, proportionate or necessary ..."

13                   Is that essentially a reference to whether the  
14                   actions were justified as being reasonable,  
15                   proportionate or necessary?

16          A.   Yes.

17          Q.   And that is required in order for that use of force to  
18           be legal?

19          A.   It is, yes.

20          Q.   Thank you.   I would like to move on to the final  
21           post mortem report which later became available to your  
22           investigators, and that was on 18 June.   So around  
23           two weeks after the officers' statements had been made  
24           available to you.   If we look at PIRC 01445.   If we can  
25           look at page 2.   Do you see it says:

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1 "Final report: date issued 18 June 2015."

2 A. Yes.

3 Q. It is in relation to Mr Bayoh, and if we can move down  
4 the page, please. The medical cause of death is given  
5 as:

6 "1a. Sudden death in a man intoxicated by MDMA  
7 (ecstasy) and alpha-PVP whilst being restrained."

8 A. Yes.

9 Q. The date of the autopsy is 4 May 2015 and the examining  
10 doctors were Dr Kerryanne Shearer and  
11 Dr Ralph Bouhaidar.

12 LORD BRACADALE: I think, Ms Grahame, if you are going into  
13 the post mortem report this is probably a good time to  
14 stop for lunch. We will sit again at 2 o'clock.

15 (12.58 pm)

16 (The short adjournment)

17 (2.00 pm)

18 LORD BRACADALE: Ms Grahame.

19 MS GRAHAME: Thank you very much. We had just moved on to  
20 the final post mortem report.

21 A. Yes.

22 Q. This was dated 18 June 2015. Can we have that back on  
23 the screen, please. We see the first page. So this is  
24 page 2 of the pdf. The final report, 18 June, 2015. If  
25 we move down the page do we see the medical cause of



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1 death is:

2 "1a. Sudden death in a man intoxicated by MDMA  
3 (ecstasy) and alpha-PVP, whilst being restrained."

4 The autopsy was on 4 May 2015 and the examining  
5 doctors were Dr Kerryanne Shearer and  
6 Dr Ralph Bouhaidar, they were the forensic pathologists?

7 A. Mm-hmm.

8 Q. If we can -- just before we leave that page, we heard  
9 evidence from John McSporran about the final post mortem  
10 coming in, they had been waiting for that.

11 A. Yes.

12 Q. So this was at a point where you had statements from the  
13 attending officers, they had been given on 4 June, and  
14 then on the 18th, two weeks later, the final post mortem  
15 comes in, all the investigations have been completed at  
16 that point.

17 A. Okay.

18 Q. Mr McSporran gave evidence on 16 February about this,  
19 and he said the final report was available and the cause  
20 of death was known to the investigators in relation to  
21 the final report.

22 On that date when the final post mortem came in,  
23 were you in a position to read the post mortem?

24 A. I didn't. I can't remember it being passed to me at  
25 that stage, no.

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- 1 Q. Would you have -- we have heard of the complexity and  
2 the significance of the death of Mr Bayoh?
- 3 A. Yes.
- 4 Q. We have heard a number of witnesses give evidence about  
5 the significance of this investigation to PIRC.
- 6 A. Yes.
- 7 Q. Would you have expected to have been shown that final  
8 post mortem report?
- 9 A. I was certainly briefed in relation to the comment.
- 10 Q. Who gave that you briefing?
- 11 A. I discussed it both with Mr McSporran and also  
12 Mr Mitchell, I think, at some point. I don't know if it  
13 was on this day.
- 14 Q. Would it have been -- if it wasn't on this day, would it  
15 have been shortly after it came in?
- 16 A. Yes, I would think so.
- 17 Q. Was that a discussion that took place in their building  
18 or in your office?
- 19 A. I think it was in the other building.
- 20 Q. And --
- 21 A. I don't think it was actually together, I think they  
22 were separate.
- 23 Q. You had two separate discussions with each of them?
- 24 A. Mm-hmm.
- 25 Q. Tell us when your discussion with Mr McSporran took

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1           place, do you remember?

2           A. I don't. I wouldn't be able to place it in terms of

3           time.

4           Q. Maybe it doesn't matter. Which discussion was first?

5           A. I don't know. I really don't know.

6           Q. When you say you were given a briefing, can you tell us

7           what was the briefing you were given?

8           A. Well, it was the -- what the post mortem's final cause

9           of death was given as.

10          Q. What were you told about that?

11          A. Just exactly what was on the screen, sudden death in

12          a man intoxicated with MDMA and alpha-PVP whilst being

13          restrained.

14          Q. Was there any reason you didn't read the full

15          post mortem yourself?

16          A. I did eventually, yes.

17          Q. When you say "eventually", when do you mean?

18          A. Some time within~... I don't know ... I would imagine

19          a few weeks after, within a few weeks of receiving this.

20          Q. So the briefing you received essentially relayed to you

21          the medical cause of death as we see on the screen?

22          A. Yes.

23          Q. Was there any other information given to you at that

24          time by either Mr McSporran or Mr Mitchell about the

25          report itself?

## Transcript of the Sheku Bayoh Inquiry

1       A. Yes. I was given information in relation to the  
2       injuries to the body. I was given information in  
3       relation to the results that had come back from  
4       toxicology, obviously, and at that time I think we also  
5       had the -- is it the neuropathologist's report that had  
6       been incorporated in this and there had been updates  
7       given throughout as those elements were getting pulled  
8       together.

9       Q. Thank you. Would you describe that as a sort of general  
10      overview of the post mortem findings?

11     A. Yes.

12     Q. Can we look, please, at pages -- page 16 of the pdf and  
13      page 15 of the post mortem report itself. You will see  
14      that this is headed up, "Final CNS autopsy diagnosis.  
15      Brain evolving global ischaemia", and the conclusions  
16      start here.

17                Do you see that?

18     A. Yes.

19     Q. Can we look at the next page, please. Page 16 of the  
20      report and 17 of the pdf. I am interested in the  
21      paragraph that starts:

22                "Given the circumstances provided ..."

23                Which is just below:

24                "Given the circumstances provided, toxicological  
25      findings and lack of another cause of death at

## Transcript of the Sheku Bayoh Inquiry

1 post mortem, the possibility of excited delirium  
2 syndrome has been considered in this case. It is  
3 however a psychiatric and not a pathological diagnosis  
4 and there is some debate in the forensic community with  
5 regards to its application as a cause of death."

6 A. Yes.

7 Q. What was your understanding at that time of the  
8 syndrome? Or did you have an understanding?

9 A. I didn't have an understanding, my understanding was  
10 effectively based on what was contained in the  
11 post mortem report.

12 Q. So was that something you were made aware of during the  
13 briefing?

14 A. Yes, when the report --

15 Q. When you read it. Okay, so it was when you were given  
16 the update?

17 A. When I was given the update, yes.

18 Q. So excited delirium was mentioned during the briefing?

19 A. Yes.

20 Q. Either with Mr McSporran or Mr Mitchell?

21 A. Yes.

22 Q. What awareness did you have prior to that briefing about  
23 excited delirium or its reference and significance?

24 A. Very minimal information or understanding around it.

25 Q. Were you enlightened by the briefing you received?

## Transcript of the Sheku Bayoh Inquiry

1       A. Following -- or at around the same time as the briefing  
2       there was a further meeting with Crown Office staff  
3       about it and there was a discussion in relation to how  
4       it really wasn't widely accepted.

5       Q. So did you then become clear from that discussion with  
6       Crown Office that it was viewed as a psychiatric not  
7       a pathological diagnosis?

8       A. Yes, that was clear.

9       Q. Thank you. Can we move on to page 17 of the report,  
10      which is page 18 of the pdf, the following page.

11      I would like it look at the paragraph:

12                "Taking everything into consideration, death here  
13      was sudden in nature. In summary, there was no evidence  
14      of gross or histological natural disease that would  
15      account for death. Toxicology revealed MDMA and  
16      alpha-PVP and these drugs could potentially have caused  
17      sudden death at any time due to a fatal cardiac  
18      arrhythmia. That said, it is recognised that restraint  
19      in itself can be a cause or contributing factor in some  
20      deaths and given the circumstances, in that this man was  
21      restrained at the time of his respiratory arrest and  
22      post mortem examination showed petechial haemorrhages  
23      that may represent a degree of asphyxia, it cannot be  
24      completely excluded that restraint has also had a role  
25      to play in death here."

## Transcript of the Sheku Bayoh Inquiry

1 Do you see that?

2 A. Yes.

3 Q. Then:

4 "Overall it is not possible to be sure what has been  
5 the most significant factor in death here and as such  
6 the cause of death is best regarded as being: Sudden  
7 death in a man intoxicated by MDMA (ecstasy) and  
8 alpha-PVP, whilst being restrained."

9 And there were no other significant findings and the  
10 cause of death then became, as we have said earlier:

11 "Sudden death in a man intoxicated by MDMA (ecstasy)  
12 and alpha-PVP, whilst being restrained."

13 A. Yes.

14 Q. Can I ask you about the paragraph that talks about:

15 "... restraint in itself can be a cause or  
16 contributing factor in some deaths~..."

17 At the top of the screen there:

18 "... and given the circumstances, in that this man  
19 was restrained at the time of his respiratory arrest and  
20 post mortem examination showed petechial haemorrhages  
21 that may represent a degree of asphyxia, it cannot be  
22 completely excluded that restraint has also had a role  
23 to play in death here."

24 Do you have an understanding -- I appreciate you  
25 were a lawyer for many years -- do you have

## Transcript of the Sheku Bayoh Inquiry

- 1           an understanding of the phrase when something is  
2           de minimis?
- 3       A.   Yes.
- 4       Q.   Is it your understanding that if there is a reference to  
5           something being de minimis, as lawyers would say, that  
6           it's -- something that is de minimis would be something  
7           that was trifling or insignificant?
- 8       A.   Yes.
- 9       Q.   Or a minimal matter?
- 10      A.   Yes.
- 11      Q.   And that if something is trifling or insignificant, it  
12           can be excluded as being a factor?
- 13      A.   Mm-hmm, yes.
- 14      Q.   So here in the post mortem report, when it says that  
15           restraint can be a cause or contributing factor in  
16           death, and it cannot be completely excluded that  
17           restraint has also had a role to play in death here,  
18           what was your understanding of that explanation by the  
19           pathologists in the report?
- 20      A.   Well, that it could be a factor in the death.  
21           I certainly didn't regard it as de minimis.
- 22      Q.   Thank you.  So it was your understanding of this report  
23           that restraint was not being excluded by the  
24           pathologists as de minimis or insignificant?
- 25      A.   That's right, yes.



## Transcript of the Sheku Bayoh Inquiry

1 Q. Was it your understanding that restraint was a factor  
2 which had given a material contribution to the death?

3 A. Yes.

4 Q. We've heard evidence that the cause of death was  
5 multifactorial, that was the word that was used.

6 A. Okay.

7 Q. Was that your understanding?

8 A. I wouldn't have used that word but yes, I thought there  
9 were a number of factors.

10 Q. We have seen the cause there, that ecstasy is named?

11 A. Yes.

12 Q. Alpha-PVP was named?

13 A. Yes.

14 Q. And restraint is named?

15 A. Yes.

16 Q. We've actually now heard evidence -- it's not within the  
17 body of the final report but we have heard evidence that  
18 the struggle against restraint is also a factor.

19 I don't think that is relevant for my purposes today but  
20 that is evidence that is available to the Chair. We've  
21 also heard evidence from Mr McSporran about the final  
22 post mortem report and the cause of death. He gave  
23 evidence, and I will quote from what he said on the  
24 16th:

25 "Answer: What it doesn't say is that restraint

## Transcript of the Sheku Bayoh Inquiry

1           contributed to the death. What it says is:

2           "'Sudden death in a man intoxicated by ... (ecstasy)

3           and alpha-PVP, whilst being restrained.'

4           "So it didn't say restraint contributed to the

5           death."

6           He repeated that:

7           "Final post mortem report does not say that

8           restraint contributed, it simply says he died from drug

9           intoxication whilst being restrained and it doesn't say

10          how much the restraint may or may not have contributed

11          to the death."

12          What do you make of that explanation from your lead

13          investigator?

14          A. From my reading of the report, I would suggest that

15          restraint was being viewed as contributing factor.

16          Q. So you don't agree with Mr McSporran's position?

17          A. Not that interpretation, no. And in fact we went on to

18          seek expert medical evidence to look at the restraint.

19          Q. Right. But on the face of this final post mortem

20          report --

21          A. Yes.

22          Q. -- restraint is a material contribution to death?

23          A. Yes.

24          Q. In terms of you as Commissioner and your expectation of

25          your investigators, would you have expected your

## Transcript of the Sheku Bayoh Inquiry

1           investigators to have a clear and accurate understanding  
2           of material contribution or a cause that is the sole  
3           cause or a contributory factor in cause of death?

4       A. I think they would have some understanding, perhaps not  
5           to the degree that you or a civil lawyer would  
6           understand.

7       Q. In terms of your own investigators at that time, would  
8           you have expected them to recognise the phrase "material  
9           contribution"?

10      A. I would have thought so.

11      Q. Would you have expected them to understand the concept  
12           of something that was de minimis or trivial and should  
13           be excluded?

14      A. Yes.

15      Q. Would you have expected them to understand what it meant  
16           for a factor to be a contributing cause to a death?

17      A. I would have thought that reading the report itself  
18           makes it quite clear. It says that restraint in itself  
19           can be a cause and then goes on to detail the  
20           circumstances around it.

21      Q. Again, thinking about your expectations of your  
22           investigators, if the investigators were confused about  
23           cause of death or uncertain about the meaning and how  
24           the report should be interpreted, what would you have  
25           expected them to do as a first port of call?

## Transcript of the Sheku Bayoh Inquiry

1 A. Either approach their line managers, either the head or  
2 the director, and he in turn could have been approaching  
3 me.

4 Q. So a lead investigator could have spoken to,  
5 in May 2015, either Irene Scullion or John Mitchell?

6 A. Yes.

7 Q. If they remained unclear or there were issues which  
8 neither of those senior managers could assist with,  
9 would you have been available to provide that  
10 assistance?

11 A. Yes.

12 Q. Is that something you would have been willing to help  
13 your investigators with, if that request had been made?

14 A. Well, yes.

15 Q. And you were available from 18 June?

16 A. Yes.

17 Q. Would you have expected the lead investigator or someone  
18 on his behalf to even contact one of the pathologists to  
19 discuss matters with them if confusion lingered?

20 A. If there was any requirement or he felt the need for  
21 clarification, yes.

22 Q. Is that something you would normally expect your  
23 investigators to do, or was that not that common?

24 A. I don't think it would have been common, no.

25 Q. But would there have been anything to stop the lead

## Transcript of the Sheku Bayoh Inquiry

1           investigator perhaps seeking further clarification from  
2           the pathologist, if required?

3           A. Not that I am aware of.

4           Q. So if we've heard that -- I have given you the evidence  
5           of Mr McSporran. I read that out to you. If we have  
6           heard that he didn't go back to the pathologist or  
7           didn't seek further guidance in relation to cause of  
8           death, and remained under the view that, as I say, the  
9           final post mortem didn't say that restraint contributed  
10          to the death, does that surprise you?

11          A. It surprises me in the regard that, as I say, experts  
12          were commissioned specifically to look at restraint. So  
13          I don't know how, having gone from a lack of  
14          understanding of this to then instructing or  
15          commissioning experts, we got to that position.

16          Q. So if we take Mr McSporran's evidence on the face of it,  
17          as his position, does that give you cause for concern in  
18          relation to the understanding your investigators had  
19          about material contribution and its contribution to the  
20          death?

21          A. My position is that there was a recognition of  
22          restraint. So I am surprised if there has been any  
23          misunderstanding or lack of understanding of it.

24          Q. In May 2015 were you aware that there may have been some  
25          confusion around this matter?

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1 A. No.

2 Q. Was it ever drawn to your attention that there was  
3 perhaps uncertainty or confusion about material  
4 contribution?

5 A. No.

6 Q. Had -- sorry, I interrupted.

7 A. It was regarded that the drugs, the restraint -- I think  
8 from recollection -- I haven't gone back through this --  
9 but I think the sprays were considered to not have  
10 played a part.

11 Q. That is correct.

12 A. As I recall. So the discussions that I was privy to  
13 related to cardiac problems, the drugs and the  
14 restraint.

15 Q. So, as far as you were concerned in May 2015, was there  
16 any information available to you to suggest that there  
17 had been some fundamental misunderstanding or confusion  
18 about --

19 A. No.

20 Q. -- the cause of death?

21 A. No.

22 Q. Can I ask you about a paragraph in your statement,  
23 please. 610:

24 "I remember a meeting with Crown Office staff  
25 following receipt of final post mortem report, which had

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1           been inconclusive."

2           I am interested in that word that you use there, in  
3           what way do did you view the final post mortem report as  
4           inconclusive?

5       A. I suppose a better word there would have been  
6           unascertained in relation to what had been the cause  
7           of -- the final cause of death.

8       Q. Can you explain what you would have expected from the  
9           post mortem to render the view conclusive?

10      A. No, I think that is a poor choice of word actually,  
11           inconclusive.

12      Q. We --

13      A. Because we did have the factors in the report. I don't  
14           think I had access -- well, I didn't have access to the  
15           report when I provided the statement.

16      Q. You didn't have access to the final post mortem report?

17      A. Yes.

18      Q. This is about your recollection of your view on the  
19           final report?

20      A. Yes.

21      Q. I accept you said inconclusive maybe isn't the word that  
22           you would wished to have used there but in reply to me  
23           a moment ago you said the report was "unascertained as  
24           to the final cause of death". Now that you have had  
25           an opportunity to look at the final post mortem report

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1 on the screen --

2 A. Yes.

3 Q. -- and you have seen the cause of death, do you now  
4 think that the report was -- the final cause of death  
5 was unascertained or inconclusive?

6 A. No, it wasn't unascertained. The interim report I think  
7 from recollection was unascertained.

8 Q. I think that is correct.

9 A. Yes. Okay. No, I think it was ascertained in relation  
10 to the factors that I described earlier.

11 Q. So from 18 June, when the final post mortem report came  
12 in --

13 A. Yes.

14 Q. -- that cause of death was at that point ascertained?

15 A. Yes.

16 Q. And there was a conclusion drawn by the pathologists?

17 A. Yes.

18 Q. But the interim report which had been produced at  
19 an early stage after the post mortem, that was the one  
20 that was unascertained?

21 A. Unascertained, yes.

22 Q. Thank you. I am interested about your understanding of  
23 the final post mortem report. On 30 August 2015 there  
24 was a public statement from the Commissioner, yourself,  
25 in response to a Sunday Mail story, and there is



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1 a quotation that says:

2 "The post mortem conducted in Scotland did not  
3 reveal a conclusive cause of death."

4 Then on 1 September 2015, so roughly around the same  
5 time.

6 A. Right.

7 Q. Again you are quoted as saying:

8 "Despite the fact that the post mortem conducted  
9 shortly after his death was inconclusive, I remain  
10 committed to thoroughly investigating all lines of  
11 enquiry."

12 A. Okay.

13 Q. But by August/September you had the final post mortem.

14 A. Right.

15 Q. The final -- the cause of death at that stage was  
16 ascertained in the final post mortem, as you say. Why  
17 are public statements being made by you that cause of  
18 death was -- let me just quote -- "not conclusive" and  
19 was "inconclusive"?

20 A. That is not correct, yes.

21 Q. You accept that those comments as reported are not  
22 correct?

23 A. Yes.

24 Q. Thank you. Can I ask you about some evidence that we  
25 heard from Dr Shearer and see if you agree with this, if

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1           this accords with your understanding at the time. It  
2           came from Dr Shearer's Inquiry statement, which for  
3           those behind me it was SBPI 00304 and it was paragraph  
4           126 of that Inquiry statement. We may have that  
5           available to come up on the screen. She talks about:

6                     "Pathologically~..."

7           So it's paragraph 126. Here we are.

8           Do you see not quite halfway down that paragraph she  
9           has been asked to comment on a number of other matters.  
10          She says:

11                    "Pathologically ..."

12          So that's from the perspective of her as a forensic  
13          pathologist:

14                    "... I cannot say whether the restraint used was  
15          adequate or excessive."

16          You would agree with that, presumably?

17          A. Yes.

18          Q. And equally is it -- it is not for her to say whether  
19          restraint was adequate or excessive. Would you say it  
20          was for PIRC to make an assessment of whether restraint  
21          was adequate or excessive as part of the investigation?

22          A. I think that would be a matter for Crown Office.

23          Q. That would be for Crown as well:

24                    "However, at the end of the day, he was restrained.  
25          He was in a position that would have hampered his

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1 breathing, hampered his heart, and was intoxicated with  
2 drugs. As such, there was a combination of factors that  
3 all would have interplayed with each other, and it was  
4 difficult to say what has been the more important  
5 factor. I think all of them together is important.  
6 They have all happened together and resulted in his  
7 death. It would be interesting to know what his  
8 actual ..."

9 Sorry, that was in relation to Dr Karch. But:

10 "They have happened together and resulted in his  
11 death."

12 She says all together they were important; would you  
13 agree with that?

14 A. Yes, and I think that probably reflects a number of  
15 factors that was in, if I recall, the neuropathology  
16 report too.

17 Q. So you are happy that the explanation given by  
18 Dr Shearer here is that they were all -- there were  
19 a number of factors, they were important factors, to  
20 think of them all together was important?

21 A. Yes.

22 Q. Can I ask you what your understanding of material  
23 contribution is. Do you understand there to be  
24 a distinction between material contribution and  
25 something that is significant in cause of death?

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- 1           A. Material contribution I would have thought could be  
2           a significant factor.
- 3           Q. In terms of assessing whether something is significant  
4           or a material contribution to death, is that something  
5           in terms of the PIRC investigation that you were  
6           assessing independently or would you have relied on  
7           medical evidence in relation to that?
- 8           A. Relied on the medical expert, and the experts.
- 9           Q. You talked earlier about a question being asked about  
10          possible ultimate charges. Now, you've spoken about  
11          considering status of the officers, you've spoken about  
12          cause of death. At what point did the PIRC  
13          investigation reach a stage where you then send all of  
14          that information you've ingathered, send it to  
15          Crown Office and ask them to assess matters from their  
16          perspective?
- 17          A. I think all of that information was provided in August,  
18          August 2015, so --
- 19          Q. The interim report was August 2015.
- 20          A. My recollection is all of that information was contained  
21          in that.
- 22          Q. So was it at that point that you expect the Crown to  
23          then go on and consider questions of, ultimately  
24          a matter for the Crown, whether they wish to prosecute  
25          the officers, consider them -- that would be a matter

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- 1           for Crown, not for PIRC?
- 2       A. Yes.
- 3       Q. Do you have any role as part of the PIRC investigation
- 4           to make recommendations to the Crown in relation to the
- 5           evidence that you have ingathered?
- 6       A. No, I don't think that is part of legislation.
- 7       Q. So that is left completely at the door of the Crown?
- 8       A. Yes.
- 9       Q. So the purpose of the PIRC investigation is that, to
- 10           simply gather in the evidence that is available?
- 11      A. Mm-hmm.
- 12      Q. And then hand that over to the Crown to make their
- 13           decisions?
- 14      A. Yes, ingather the evidence, as you say, and report it to
- 15           Crown Office, and they take the decision in relation to
- 16           the evidence that is presented.
- 17      Q. Thank you. In terms of charges that could be levelled
- 18           or could be considered as part of the investigation,
- 19           I have asked you questions about perhaps excessive use
- 20           of force being used, you have talked about cause of
- 21           death, I think you said to me earlier that if it was
- 22           lesser charges you wouldn't need to know the cause of
- 23           death in terms of assessing status of the officers,
- 24           possible criminal charges?
- 25      A. Well, yes, depending on what the injuries were, whether

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1           they could be tied to a crime.

2           Q.   So you would -- it would be necessary for you to look at  
3           some of the conclusions of the post mortem report but  
4           you may not necessarily require to have any views about  
5           the ultimate charges that were going to be levelled or  
6           not levelled?

7           A.   Yes.

8           Q.   That is again a matter for the Crown?

9           A.   It is.

10          Q.   So is it not for PIRC to stray into areas where the  
11          Crown may be wishing to form conclusions about whether  
12          charges should be levelled in relation to either assault  
13          or culpable homicide or possibly murder; that would be  
14          for the Crown to decide?

15          A.   On receipt of the information that was provided, yes.

16          Q.   Can I --

17          LORD BRACADALE:  I am sorry to interrupt.  When I asked you  
18          a question earlier you said that the investigator of  
19          PIRC would decide whether to treat someone as a suspect.

20          A.   Yes.

21          LORD BRACADALE:  Now, if you treat someone as a suspect,  
22          what would you say to them in terms of the basis on  
23          which you were treating them as a suspect?

24          A.   You would have to identify the crime that they were  
25          suspected of.

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1 LORD BRACADALE: So at that stage the PIRC investigator  
2 would be having in mind some offence?

3 A. Yes, but on occasions you would consider going back to  
4 the Crown if there was a particular change of direction  
5 or revelation. As we did by updating them throughout.

6 LORD BRACADALE: Thank you.

7 MS GRAHAME: Was there a stage in the investigation into the  
8 death of Mr Bayoh where PIRC investigators considered  
9 the status of the officers at the point where the  
10 investigation had reached a stage where you were nearly  
11 ready to put forward the interim report? That would be  
12 about the August.

13 A. My understanding would be that that was being considered  
14 throughout the investigation.

15 Q. As far as you are concerned, was there ever a discussion  
16 or consideration given where PIRC investigators did  
17 consider whether there were reasonable prospects of --  
18 reasonable grounds, sorry, reasonable grounds of  
19 suspecting criminality and considered treating the  
20 officers as suspects?

21 A. I can't recall a conversation that pointed towards that.

22 Q. Was there ever a consideration amongst the investigators  
23 that you are aware of which considered changing the  
24 status of officers to suspect and considered what  
25 possible criminal offences could be -- they could be

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1           questioned in relation to?

2           A. As I have said, I think it was being considered  
3           throughout, but any particular move in the direction  
4           that you have described, I don't recall that, and  
5           I would have expected that to have been raised with the  
6           management, within the investigations team.

7           Q. With the team; who do you mean when you say the team?

8           A. Well, I would have expected the senior investigator to  
9           be raising that with potentially the head and director  
10          of investigations.

11          Q. That was Mr Mitchell?

12          A. Yes.

13          Q. In relation to considering those aspects, and  
14          considering whether to change the status of the  
15          officers, perhaps considering criminal activity  
16          amounting to assault or excessive force of some  
17          description, or perhaps culpable homicide or something  
18          along those lines, in terms of your investigators, what  
19          more evidence, if any, would they have needed in terms  
20          of causation beyond the cause of the final post mortem?

21          A. I am not sure.

22          Q. When you say you are not sure, is that because you think  
23          they maybe didn't need more than they had at that stage  
24          or you are not sure what might have assisted?

25          A. I think I would need to go back to review all the



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1 evidence that was available.

2 Q. So on the basis of what I have been discussing with you  
3 today, what more evidence from a pathological point of  
4 view or from a medical point of view about cause of  
5 death would have assisted that consideration by  
6 investigators? So this is after the point at which the  
7 final post mortem is available.

8 A. Mm-hmm.

9 Q. And you have information saying that restraint played  
10 a material contribution in the cause of death. Was  
11 there any more pathological evidence you would have  
12 needed to allow a consideration to be given by PIRC  
13 investigators about the status of officers and whether  
14 any criminal element -- activity could be considered?

15 A. In relation to the criminal activity, which charges are  
16 you focusing on?

17 Q. Let's think about culpable homicide, so that would  
18 automatically include the death?

19 A. Yes.

20 Q. It would have to include the death, it wouldn't be  
21 simply an assault which wouldn't necessarily require the  
22 death. So let's think about culpable homicide. Would  
23 anything more from the pathologists have been required  
24 from the perspective of PIRC carrying out  
25 an investigation, to allow that assessment to be made?

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1 A. Possibly not.

2 Q. Is that something that you would have expected your  
3 investigators to be considering after the final  
4 post mortem was available?

5 A. Yes.

6 Q. Can I ask you to look at two paragraphs in your  
7 statement, 562 and 563. So that is 562:

8 "I have been asked why establishing a precise cause  
9 of death is necessary for officers to be detained as  
10 suspects. For someone to be considered a suspect there  
11 requires to be reasonable cause to suspect that they  
12 committed a crime. A precise cause of death would show  
13 how the person died. Without a precise cause of death,  
14 death may have been due to any number of reasons and not  
15 relate to the incident. If a precise cause of death was  
16 established which could be linked to a criminal act then  
17 grounds may have been established to provide reasonable  
18 cause to suspect that the officers had committed  
19 a crime."

20 Then 563:

21 "I have been asked if, without establishing  
22 a precise cause of death, it would have been possible  
23 for the officers to have been detained as suspects for  
24 crimes not directly linked to Mr Bayoh's death, such as  
25 assault. If there had been evidence of other crimes

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1 committed by the officers then if there was a reasonable  
2 cause to suspect that they had committed these crimes,  
3 then that may have been possible. However, there was no  
4 such evidence available. Despite the fact that there  
5 was evidence that Mr Bayoh was found to have minor  
6 blunt-force injuries, it was not possible to establish  
7 either when or how they had occurred but even if it was  
8 accepted that they had been caused in the course of the  
9 incident with the police officers, it would have been  
10 necessary to establish that the officers' actions were  
11 not reasonable, necessary or proportionate before  
12 the crime of assault could be established. There was no  
13 evidence available to show that. I think I perhaps  
14 could have made that clearer in the letter."

15 I just want to go back over those two paragraphs  
16 with you just so that I can completely understand your  
17 position there. Because it is quite complicated. So  
18 can we look at 562 first of all, please:

19 "I have been asked why establishing a precise cause  
20 of death is necessary for officers to be detained as  
21 suspects."

22 I think earlier you -- as I understood your evidence  
23 earlier you were saying that you could consider whether  
24 officers were suspects and consider whether there were  
25 reasonable grounds of suspecting criminal activity

## Transcript of the Sheku Bayoh Inquiry

1           without having a precise cause of death. Was that  
2           correct? Am I correct in that understanding?

3           A. I think what I was addressing was the death, yes.

4           Q. So this is where you are thinking if you can establish  
5           that some activity on the part of officers was part of  
6           the cause of death, this is the scenario you are talking  
7           about here?

8           A. Yes.

9           Q. So would that be the scenario where restraint by the  
10          officers was a contributory factor to the cause of  
11          death?

12          A. Yes.

13          Q. So this is about the scenario that we have here, after  
14          the final post mortem?

15          A. Mm-hmm.

16          Q. It says:

17                 "A precise cause of death would show how the person  
18                 died. Without a precise cause of death, death may have  
19                 been due to any number of reasons and not related to the  
20                 incident."

21                 That is self-explanatory:

22                 "If a precise cause of death was established which  
23                 could be linked to a criminal act then grounds may have  
24                 been established to provide reasonable cause to suspect  
25                 that the officers had committed a crime."

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- 1 A. Mm-hmm.
- 2 Q. So where the cause of death attributed restraint as  
3 a material contribution to death, and where you had  
4 evidence available both from Ashley Wise and  
5 Kevin Nelson, and you also had the opportunity to do  
6 that comparison with the officers' statements that we  
7 looked at earlier, Walker and Paton, that were given on  
8 4 June, and you can compare that with the Use of Force  
9 SOP, and you then have the final post mortem on  
10 18 June --
- 11 A. Yes.
- 12 Q. -- giving the ascertained cause of death, was that at  
13 the point at which all of that evidence was available to  
14 PIRC and it was at that point on 18 June or shortly  
15 thereafter that there could have been some consideration  
16 given by PIRC in relation to whether there was  
17 reasonable cause to suspect the officers had committed  
18 a crime or criminal activity?
- 19 A. Yes, a crime rather than a crime that resulted in the  
20 death.
- 21 Q. But if you had the final post mortem report on 18 June  
22 attributing restraint as one of the factors to the cause  
23 of death, would that, at that stage, have permitted PIRC  
24 to make some assessment, as part of your investigation?
- 25 A. It possibly could have.

## Transcript of the Sheku Bayoh Inquiry

- 1 Q. Why do you only say "possibly"; what else would have  
2 been required by PIRC?
- 3 A. Well, there are other factors involved in this.
- 4 Q. What other factors would need to be ruled out or  
5 explored further at that stage, before some sort of  
6 assessment could be done by PIRC?
- 7 A. I think that is where the medical experts come into  
8 play.
- 9 Q. But in terms of thinking of whether there is reasonable  
10 cause or reasonable grounds --
- 11 A. Yes.
- 12 Q. -- to suspect that the officers had committed a crime,  
13 so we are looking at a stage where they could be  
14 considered suspects.
- 15 A. Yes.
- 16 Q. What else was required for that assessment to be carried  
17 out by PIRC?
- 18 A. I think then you would move to whether the actions were  
19 necessary, reasonable or proportionate.
- 20 Q. And where we've looked at the statements of  
21 PC Walker and PC Paton, and I think your description was  
22 that when we compare those initial actions regarding the  
23 use of sprays with the Use of Force SOP, and the  
24 profiled offender behaviour in paragraphs 4.6 and the  
25 reasonable officer response in 4.7, you said:

## Transcript of the Sheku Bayoh Inquiry

1           "Answer: It seems to have escalated potentially  
2           beyond the behaviour that was being demonstrated and it  
3           seems to have moved quickly to a force that does not  
4           accord with the circumstances that are being presented."

5           So you have that -- you have the statements  
6           available on 4 June, I think before lunch you said  
7           within a couple of weeks that would have been  
8           a reasonable time to carry out an assessment,  
9           a comparison with the SOP, and on the 18th, which is  
10          two weeks after the statements are given, you have  
11          a cause of death showing material contribution between  
12          restraint and death. So in terms of the evidence you  
13          have available on 18 June, and an assessment by PIRC in  
14          relation to considering whether there were reasonable  
15          grounds to suspect the officers had committed a crime,  
16          what more would you have needed at that stage to carry  
17          out that assessment or analysis of whether there were  
18          reasonable grounds to suspect officers?

19          A. I think my comments related to the officers' actions in  
20          relation to spray.

21          Q. Yes.

22          A. Which is not -- or does not reflect the potential for  
23          the restraint element.

24          Q. Right. You've also said that all use of force has to be  
25          justified?

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- 1 A. Yes.
- 2 Q. And if it is not justified as reasonable, necessary and  
3 proportionate, then it is not lawful?
- 4 A. Yes.
- 5 Q. So can you explain why this would not be an appropriate  
6 time to consider an assessment of whether there is  
7 reasonable grounds to suspect officers had committed  
8 a crime? Whether it's culpable homicide or something  
9 lesser than that.
- 10 A. No, I'm afraid I can't.
- 11 Q. So would you have expected, once the final post mortem  
12 report was available, for your investigators to consider  
13 whether there were reasonable grounds to suspect in  
14 relation to --
- 15 A. That a crime had been committed?
- 16 Q. That a crime had been committed and whether the  
17 officers' status should have been changed from witness  
18 to suspect?
- 19 A. I think it could have been considered at that stage.
- 20 Q. Again, is that something you would have -- that process,  
21 that assessment would have been something you would have  
22 expected to be noted in the management policy log --
- 23 A. Yes.
- 24 Q. -- if that had been done?
- 25 A. Yes.



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1 Q. There is nothing in the log to suggest it was done. But  
2 I am asking if this is something you would have  
3 expected?

4 A. I think that would have been a significant decision that  
5 you would have expected to feature, yes.

6 Q. Again, is that something, if that assessment had been  
7 carried out at that time, that you could have assisted  
8 with if any of your investigators had asked?

9 A. I was available but similarly the director and the head  
10 of investigations would have been their first port of  
11 call.

12 Q. So only if they had gone to Ms Scullion or Mr Mitchell  
13 and not been able to resolve the issue would they have  
14 come to you?

15 A. I would have been available but I would have expected  
16 that as the natural progression within the investigation  
17 team, for that process to be followed.

18 Q. Do you think your experience as a Fiscal and as head of  
19 CAPD for many years would have assisted in that process  
20 if investigators had come to you?

21 A. Yes, but equally what we had was very experienced  
22 investigators who had participated in a number of  
23 serious -- well, murders are always serious, but  
24 a number of high profile murders.

25 Q. We've heard that Mr McSporran has told us that he was

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1           very interested in alpha-PVP, that there wasn't a lot of  
2           awareness generally in Scotland at that time about the  
3           impact of alpha-PVP, and that was something obviously  
4           that was named in the cause of death. Looking back now,  
5           do you think there was perhaps an overemphasis on  
6           investigating alpha-PVP given it was only one factor  
7           named in the cause of death?

8           A. No, and I am certainly not aware that Mr McSporran had  
9           a particular interest in that. I know that he explored  
10          it, but I don't think, as there was a complete lack of  
11          knowledge of that drug, that he should not have explored  
12          it.

13          Q. Do you consider alpha-PVP to be in any way more  
14          significant than ecstasy or restraint --

15          A. No, no.

16          Q. -- in the cause of death? Was there any concern that  
17          either of those three factors were more or less  
18          significant than the others?

19          A. Not in my view.

20          Q. We've heard from Mr McSporran that he was sent to  
21          America to investigate alpha-PVP.

22          A. No, that is not correct. He was -- as I understand it,  
23          he was on a Scottish Government project and he may very  
24          well have undertaken some research.

25          Q. So PIRC weren't funding his trip to America?



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1           recollection is -- and the process is that it was  
2           Crown's report, the report to the -- the post mortem  
3           report went into Crown Office before it came to us, and  
4           was shared with the family solicitor at that time.

5           So in respect to the question about who should be  
6           referring what to whom and who should be assessing  
7           the suspect, Crown Office had a role at the beginning on  
8           receipt of the report before it was actually even shared  
9           with us.

10          Q. Do you remember when it was shared with you? It's dated  
11          18 June.

12          A. I don't remember the precise date. I would imagine it  
13          would be within a day or two.

14          Q. Is there still an expectation on PIRC investigators at  
15          that point to take matters forward and continue with the  
16          investigation in light of the information you now had  
17          about cause of death?

18          A. Yes, the investigation was continuing but the point I am  
19          making is the post mortem report was commissioned by  
20          Crown Office, Crown Office received it before it came to  
21          PIRC.

22          Q. Did you or do you remember now if any guidance or  
23          discussion took place with Crown in light of the  
24          post mortem report?

25          A. I am not aware of any discussion that took place.

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- 1 Q. You weren't party to that --
- 2 A. No.
- 3 Q. -- if it did take place?
- 4 A. Yes, that's right.
- 5 Q. If there had -- if your lead investigator or any of the  
6 investigators wanted to have a discussion with the Crown  
7 about the post mortem, would they have done that at some  
8 point shortly after 18 June?
- 9 A. Yes.
- 10 Q. Is that the sort of thing that might have been noted in  
11 the management policy log?
- 12 A. Yes, I don't have an issue in relation to what should  
13 have been in the policy log. My point is that the  
14 report was sent to Crown Office before it even came to  
15 PIRC.
- 16 Q. Was that the normal practice?
- 17 A. Yes, these reports are commissioned by Crown Office.
- 18 Q. When post mortem reports are sent to Crown Office, is  
19 there -- when Crown then forwarded it to PIRC or at the  
20 time when Crown forwarded it to PIRC was there any  
21 additional information or commentary given by Crown? Or  
22 was it simply forwarded to PIRC for consideration by  
23 PIRC?
- 24 A. I don't know. It wasn't forwarded to me, I think  
25 Mr Mitchell perhaps may have had a role in that.

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- 1 Q. So it may be Mr Mitchell can help us with that further?
- 2 A. Possibly.
- 3 Q. Thank you. Can I move on then and ask you about another
- 4 of the five principles.
- 5 A. Yes.
- 6 Q. This one I am interested in is "reasonably prompt".
- 7 A. Yes.
- 8 Q. So matters have to be done without delay, if I can use
- 9 that expression.
- 10 A. Yes.
- 11 Q. Or without unreasonable delay. We have heard evidence
- 12 that there was a delay in investigators from PIRC
- 13 arriving at Kirkcaldy Police Office on 3 May. I don't
- 14 know if you are aware of any of the questions I have
- 15 asked about that?
- 16 A. No.
- 17 Q. We have heard that PIRC were initially instructed by the
- 18 Crown at 9.35 on 3 May?
- 19 A. Mm-hmm.
- 20 Q. And they arrived at Kirkcaldy Police Office at around
- 21 about 1.30 in the afternoon. I think you were asked
- 22 about this in your Inquiry statement?
- 23 A. I was, yes.
- 24 Q. I wonder if I can ask for your views about that period
- 25 between the initial instruction and then investigators

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- 1           actually arriving at Kirkcaldy, which was obviously  
2           between 9.35 and 13.30.
- 3       A.   Mm-hmm. My expectation would be that they would get  
4           there as quickly as possible. I think I made the point  
5           in my statement that unlike Police Scotland, who had  
6           a number of officers on duty, the PIRC investigators  
7           were at home, they were on call, they then gathered  
8           themselves at the office where they were briefed, and  
9           then moved on to Kirkcaldy to take over the  
10          investigation.
- 11       Q.   Do you have any concerns about the period between the  
12          instruction and their arrival at Kirkcaldy?
- 13       A.   Yes, as I say, I would like them to get there -- or  
14          would have liked them to have got there sooner. I do  
15          not know, I wasn't there on that day, in relation to  
16          what may or may not have prevented that happening.
- 17       Q.   Just looking in terms of timescale, does the timescale  
18          they arrived meet the expectations you had of your  
19          staff?
- 20       A.   I expected them to be there as soon as they could.  
21          I don't know how long that took or why.
- 22       Q.   Did you consider with any of your investigators why it  
23          took so long when you did come back to the office?
- 24       A.   No, I didn't explore that with them. I don't -- I don't  
25          think -- I don't know if I was actually aware of the

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- 1           time they arrived.
- 2           Q. I think in your Inquiry statement you actually comment  
3           on the first Gold Group meeting. We have heard evidence  
4           that the first Gold Group meeting took place at 11.30  
5           that morning, so around two hours after PIRC had been  
6           instructed?
- 7           A. Yes.
- 8           Q. We have also heard that no one from PIRC was present at  
9           that time.
- 10          A. Mm-hmm.
- 11          Q. Do you have any concerns about the fact that  
12          a Gold Group meeting was being held at 11.30 and no one  
13          from PIRC was present?
- 14          A. Yes, I think it would have been preferable if there had  
15          been a PIRC presence at that meeting.
- 16          Q. Would that -- how would you have resolved that issue, in  
17          terms of making sure someone from PIRC was present; if  
18          you had been fixing the meeting, when would you have had  
19          the first Gold Group meeting?
- 20          A. If I was fixing the Police Scotland Gold Group meeting?
- 21          Q. If you were fixing a Gold Group meeting, yes. If you  
22          had had an input into it or a contribution to make in  
23          terms of when it took place?
- 24          A. I think it would have been possible for a PIRC  
25          investigator to have been there at 11.30.



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- 1 Q. Are you aware of the reason why no one from PIRC was  
2 present at 11.30?
- 3 A. My understanding is that they gathered together at the  
4 office for the briefing.
- 5 Q. You say it would have been possible for someone from  
6 PIRC to be there. Would it have caused any problems, as  
7 far as you are concerned, if one of the investigators  
8 had gone Kirkcaldy for that Gold Group meeting?
- 9 A. I couldn't have seen there would have been a problem  
10 with that.
- 11 Q. We have heard that now many of these things are on Teams  
12 or online?
- 13 A. Right.
- 14 Q. At that time in 2015 was there ever a view taken about  
15 whether telephone -- they could join a meeting by  
16 telephone?
- 17 A. Yes, of course they could have joined by telephone.  
18 I don't know if they were aware of the Gold Group  
19 meeting.
- 20 Q. Can I ask you about the interim report that was  
21 ultimately sent by PIRC to the Crown. You were asked  
22 about this and I think we've heard that the interim  
23 report went on 7 August --
- 24 A. Yes.
- 25 Q. -- 2015, which was round about three months after the

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- 1 death of Mr Bayoh.
- 2 A. Mm-hmm.
- 3 Q. Can you explain to the Chair what is the purpose of  
4 an interim report from PIRC to Crown?
- 5 A. I think there was a recognition that there would be  
6 further work required in relation to medical experts,  
7 and that certainly was I suppose the direction of travel  
8 with Crown Office staff at the meetings, that further  
9 experts would require to be commissioned.
- 10 Q. What was the purpose of getting further medical experts  
11 to give reports?
- 12 A. It was a range of experts, in relation to the various  
13 factors that had been identified in the post mortem  
14 report.
- 15 Q. So it was experts regarding two factors in the  
16 post mortem report. Would that have been the MDMA?
- 17 A. It would have been -- yes, the drugs overall, but  
18 I think the more -- certainly one of the significant  
19 features was the impact on the heart and the cardiac  
20 impact. We also explored the restraint and the sprays.
- 21 Q. So you explored the drugs, that would relate to  
22 toxicology?
- 23 A. Yes.
- 24 Q. And the impact on the heart, cardiac matters, would that  
25 be of the restraint or of the drugs or both?

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1 A. Both.

2 Q. Then the restraint itself?

3 A. Yes.

4 Q. The sprays?

5 A. Yes.

6 Q. The interim report having been sent to Crown, was it at  
7 that stage that the Crown then came back and asked PIRC  
8 to investigate further with medical experts or other  
9 experts?

10 A. Yes, I think there was a discussion. It may have just  
11 been before the report went. I can't honestly remember.

12 Q. We've heard the interim report went on 7 August.

13 A. Mm-hmm.

14 Q. We've heard that the Crown sent a further letter of  
15 instruction on 2 September?

16 A. Right.

17 Q. And that evidence has been heard about that letter of  
18 2 September and how there were expanded or enlarged  
19 terms of reference.

20 A. Yes, I recall that.

21 Q. Do you remember that now?

22 A. Yes.

23 Q. I would like to ask you about -- we will come on to this  
24 in a moment but at that stage Mr McSporran gave evidence  
25 that it was expected that the Crown would come back to

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1           PIRC if they had further questions and queries?

2       A.   Yes.

3       Q.   Was that quite common practice?

4       A.   Yes.

5       Q.   For further letters of instruction to be sent to PIRC?

6       A.   Yes.

7       Q.   So interim report was around 350-odd pages long, it's

8           a substantial document.  Went to the Crown.  Was it only

9           as a result of further queries from the Crown that

10          delayed a final report being sent?  Or was there

11          anything else that PIRC were expecting to do at that

12          stage?

13       A.   I think the expectation from discussions with Crown was

14          that there would be further medical evidence sought.

15       Q.   If the terms of reference had not been expanded, was

16          that effectively going to be the end of the

17          investigation by PIRC?

18       A.   I think in terms of what had been originally directed.

19       Q.   Yes?

20       A.   Yes.

21       Q.   In terms of PIRC investigators' involvement with the

22          instruction of experts --

23       A.   Yes.

24       Q.   -- what in your awareness -- what experience did

25          investigators have for instructing expert reports?

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- 1           A. I don't think they had much experience within PIRC.
- 2           I don't know if they had had experience in any of their
- 3           former careers.
- 4           Q. Was that not something you were aware of, whether they
- 5           had experience in former careers?
- 6           A. No, I haven't.
- 7           Q. We have heard that many of them were former police
- 8           officers.
- 9           A. Yes.
- 10          Q. And we have heard that some of them came from other
- 11          fields, one worked for the Fire Service in the past, we
- 12          have heard that one of them came from the caring side of
- 13          matters, so they weren't all former police officers.
- 14          A. Yes, that's right.
- 15          Q. Did you have any awareness at all of the extent to which
- 16          your investigators had been involved in instructing
- 17          expert reports prior to the Sheku Bayoh investigation?
- 18          A. No, I didn't have a finite knowledge of that, no.
- 19          Q. When you say "finite knowledge", what do you mean by
- 20          that?
- 21          A. I was aware that they would have been involved with
- 22          experts at some point in some of the investigations.
- 23          What the level of their involvement was, I didn't know.
- 24          Q. We've heard that until a formal letter was sent on
- 25          2 September, we've heard evidence that there was no

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1 active line of investigation being pursued in relation  
2 to race in relation to the death of Mr Bayoh.

3 A. Mm-hmm.

4 Q. Was that something that you were aware of, had been  
5 briefed on or discussed?

6 A. Well, from discussion with various members I was aware  
7 that it was a matter that was being considered at the  
8 time, not actively being investigated as a separate  
9 strand, but there was consideration throughout, in  
10 particular in relation to whether there would have been  
11 any difference in the interaction of the officers with  
12 Mr Bayoh if he had been of a different ethnic origin.

13 Q. We have heard it described that PIRC investigators were  
14 to take cognisance --

15 A. Yes.

16 Q. -- of any issues of race as they emerged. We have heard  
17 evidence from one of your investigators that as far as  
18 he was concerned nothing did emerge?

19 A. Mm-hmm.

20 Q. We've heard it being described as being mindful of race,  
21 or keeping an open mind about race. Does that all  
22 accord with your understanding of where PIRC were in  
23 relation to the question of race?

24 A. Yes, as I say my understanding was that it was being  
25 considered alongside the investigation throughout.

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1 Q. When you say your understanding was it was being  
2 considered, but not an active line of investigation, can  
3 you explain what your understanding at the time was  
4 about that distinction?

5 A. Well, probably just as you said, that they would take  
6 cognisance if any evidence emerged.

7 Q. Did you consider as Commissioner that your terms of  
8 reference at that time, to investigate the circumstances  
9 of Mr Bayoh's death, would have permitted PIRC  
10 investigators to actively investigate whether race was  
11 a factor?

12 A. I would have expected a specific direction from  
13 Crown Office about that.

14 Q. In the absence of a specific direction, Crown having  
15 simply given a general direction, if I can put that way,  
16 to investigate the circumstances, did you consider that  
17 your terms of reference did not permit an active line of  
18 investigation in relation to race?

19 A. I don't think it would have prevented it.

20 Q. If it wasn't prevented, can you help us understand why  
21 there wasn't that active line of investigation pursued?

22 A. Well, I think there was the consideration that was given  
23 throughout. Without moving on to the further lines of  
24 investigation that were effectively undertaken in  
25 relation to trends within Fife Division, and exploring

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1           various matters that subsequently were brought to our  
2           attention.

3           Q.   What were your expectations then in terms of your  
4           investigators if they are not pursuing an active line of  
5           investigation but they are taking cognisance --

6           A.   Yes.

7           Q.   -- of issues to do with race, what did you expect  
8           investigators to be doing in relation to race between  
9           3 May and the beginning of September, when the terms of  
10          reference expanded into race?

11          A.   If there was evidence that in the course of the  
12          investigation of the death they uncovered, that that  
13          would then have been I would have thought probably  
14          referred to Crown Office.

15          Q.   We've heard that from 4 June statements were obtained  
16          from officers.

17          A.   Yes.

18          Q.   Did you read those statements when they were obtained?

19          A.   I read some of them in relation to the officers' active  
20          engagement with Mr Bayoh at Hayfield Road, really to  
21          identify who had taken whatever action in connection  
22          with Mr Bayoh.

23          Q.   Did you analyse those statements from that perspective?

24          A.   I didn't formally analyse them.  I suppose I compared  
25          them for my own purpose.  My recollection is that again



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1           there was some media commentary around which officers  
2           had taken part, and there was -- there was ongoing  
3           commentary as to what the potential impact of that was  
4           and whether Constable Short could have been assaulted in  
5           the way that some had described.

6           Q. Right.

7           A. So in connection with that, there was ongoing media  
8           interest in that and there seemed to be a discrepancy  
9           between both sides of that commentary in relation to  
10          what was physically possible.

11          Q. When you looked at the statements from the officers, did  
12          you consider the language that was being used by the  
13          officers?

14          A. Yes, I don't think that there was any reference to  
15          language at the Hayfield Road incident, when they were  
16          actually hands on, that I can recall.

17          Q. Do you remember reading the statements and seeing any  
18          references to the word "coloured"? Or any reference  
19          being made that linked the fact that Mr Bayoh was black  
20          with potential terrorism?

21          A. I recall -- yes, I do.

22          Q. You recall those. What steps, if any, did you take,  
23          having noticed those references in the officers'  
24          statements?

25          A. I think there was some discussion with Mr McSporran in

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1 relation to that.

2 Q. Tell us about that discussion.

3 A. Well, an identification that there had been language  
4 used like that.

5 Q. Having identified that, what actions or tasks were taken  
6 by PIRC in response to that?

7 A. I don't recall what action was taken in response to  
8 that.

9 Q. Did you consider those references to language about  
10 "coloured" or linking the fact he was black with  
11 terrorism, did you consider those as issues that were  
12 emerging which related potentially to race?

13 A. Potentially, yes. However, on raising them -- and  
14 I think that was with Mr Mitchell -- the view taken was  
15 that these were misconduct matters.

16 Q. We've heard that misconduct matters are ones for  
17 Police Scotland?

18 A. Yes.

19 Q. Is that correct?

20 A. That's right.

21 Q. We have heard that PIRC investigators were to take  
22 cognisance or be mindful of issues relating to race as  
23 they emerged?

24 A. Yes.

25 Q. If you consider that the use of that type of language

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1           was potentially the emerging of issues relating to race,  
2           was that not a point at which action should have been  
3           taken by PIRC either to seek an expansion of the terms  
4           of reference or something along those lines?

5           A. I think my awareness related to the terrorism aspect,  
6           and I can't recall whether that was referred to in  
7           a racial fashion.

8           Q. We have heard from PC Kayleigh Good who was at  
9           Hayfield Road, we have asked her about her PIRC  
10          statement which she gave on 4 June and she made  
11          reference to the use of the word "coloured" in relation  
12          to Mr Bayoh.

13          A. Right.

14          Q. Which could have potential racial connotations,  
15          implications, and that she linked the fact that Mr Bayoh  
16          was black with a potential terrorist incident at  
17          Hayfield Road. Again, something from which perhaps  
18          views could be -- inferences could be drawn in relation  
19          to race.

20          A. Mm-hmm.

21          Q. This emerged in the statements taken by PIRC on 4 June.

22          A. Right.

23          Q. I am wondering what action PIRC took in light of that,  
24          or what action now, sitting here, you think PIRC should  
25          have taken in relation to that?

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- 1 A. Yes, my expectation would have been that the  
2 investigators would have gone back to explore whether  
3 there was any racial connotation.
- 4 Q. When you say "go back", go back and explore --
- 5 A. Sorry, go back to re-interview the police witnesses, so  
6 for example Constable Good.
- 7 Q. So any references such as the use of "coloured" or links  
8 to terrorism or potential terrorism, you think that  
9 would have merited going back to the officers who had  
10 relied on that --
- 11 A. Yes.
- 12 Q. -- or mentioned that in their statement?
- 13 A. Yes, I would have expected that.
- 14 Q. You having noticed this, when you looked at the  
15 statements, did you instruct the investigators to do  
16 that?
- 17 A. I -- well, I certainly had the discussion highlighting  
18 that.
- 19 Q. And that was with Mr McSporran?
- 20 A. Yes.
- 21 Q. How long after you looked at the statements was it that  
22 you spoke to Mr McSporran about this?
- 23 A. I think very shortly --
- 24 Q. After the 4 June?
- 25 A. Well, whenever I saw the statements. I don't know if

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- 1           that was on 4 June or not.
- 2           Q. Do you have any recollection at all of how long after  
3           they had been obtained that you read them?
- 4           A. It would be after they were typed. I don't know when  
5           they were typed up.
- 6           Q. How long did statements normally take to get typed up?
- 7           A. In this case because of the volume it was delayed.
- 8           Q. By how much?
- 9           A. I can't remember.
- 10          Q. Having raised that with Mr McSporran, what was your  
11          expectation of what he would then do in relation to  
12          saying there's these references in statements,  
13          investigators may go back to clarify this?
- 14          A. I would have expected him to have directed the  
15          investigators to go back to the witnesses.
- 16          Q. Within a reasonable period, they would go back?
- 17          A. Yes.
- 18          Q. What would a reasonable period be?
- 19          A. Whenever there was an opportunity, dependent on the  
20          priorities that were being undertaken.
- 21          Q. All right. Did you instruct Mr McSporran to speak to  
22          Crown about this, having become aware of these  
23          references in the statements?
- 24          A. I don't recall doing that, no.
- 25          Q. Is that something you would have expected Mr McSporran

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- 1 to do anyway?
- 2 A. Yes, potentially. I would think he could have done  
3 that.
- 4 Q. Is that something you would have expected him to do  
5 independently --
- 6 A. To have flagged it up, yes.
- 7 Q. -- to the Crown? Did you check up that that had been  
8 carried out by Mr McSporran?
- 9 A. I followed that up with a conversation with Mr Mitchell.
- 10 Q. Tell us about that conversation.
- 11 A. Highlighting the issue or potential issue, and the  
12 discussion at that stage was that he was of the view  
13 that it was a misconduct matter.
- 14 Q. Do you remember when that discussion took place?
- 15 A. No, I couldn't tell you.
- 16 Q. I think in your Inquiry statement -- we can maybe look  
17 at it on the screen, 397:
- 18 "I have been asked if, prior to 3 May 2015, PIRC had  
19 ever considered the issue of race within  
20 an investigation. I don't remember it featuring in  
21 an investigation in the preceding months."
- 22 When you refer to preceding months, is that  
23 from August 2014 when you took up your role?
- 24 A. Yes.
- 25 Q. So you are not aware of any investigations during your

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1           time before Mr Bayoh's death --

2           A. That is right.

3           Q. -- where race had been under consideration?

4           A. Yes.

5           Q. Did you have experience at that time of an investigation

6           being carried out where race was a factor, in any of

7           your professional career?

8           A. Yes, whilst I worked with the Procurator Fiscal Service.

9           Q. Can you tell us anything about that investigation?

10          A. Yes, it related to a Chinese national who had been

11          assaulted and racial comments had been made at the time

12          of the assault.

13          Q. We've heard that that -- we've heard things like that

14          described as sort of overt racist comments being made at

15          the time. That was situation you had experience of in

16          your time as a Fiscal?

17          A. Yes.

18          Q. At 265 of your Inquiry statement, you say you expected

19          direction and guidance from the Crown, I think. 265:

20                 "I have been asked if I was content with the

21          direction, instruction and support that PIRC received

22          from [Crown Office] in relation to the investigation.

23          I think the various Terms of Reference in this

24          investigation were generally fine in relation to what

25          they expected to be investigated - apart from the one

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1           which simply copied on correspondence from a third  
2           party. PIRC would expect to receive direction and  
3           guidance from Crown Office in relation to any issues  
4           arising in the course of investigations."

5           Would that include any questions regarding race?

6           A. Yes.

7           Q. So if, as they did, issues emerged from the statements  
8           of the officers, would you have expected the Crown to be  
9           in a position to provide PIRC with further guidance  
10          regarding the issues that were arising from the  
11          statements?

12          A. Yes, I would, because those statements were supplied to  
13          Crown Office.

14          Q. When they were supplied to Crown Office, was there some  
15          sort of indication given to the Crown that further  
16          guidance was being sought from PIRC on the issue of  
17          race?

18          A. No, I am not aware of that.

19          Q. I think in 266 you are asked again you were content with  
20          the guidance provided:

21                 "Whilst some guidance was received, there were  
22                 a number of instances of guidance being sought but not  
23                 provided. For example, when PIRC sought guidance about  
24                 how to assess whether the officers' actions had been  
25                 influenced by race. At the original meeting with



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1 Crown Office staff about this, we expressed concerns  
2 about the feasibility of assessing whether race had any  
3 influence on the officers' actions in the absence of any  
4 evidence of overt actions and sought guidance. No  
5 guidance was provided and it was not until we re-raised  
6 this at a subsequent meeting, that the difficulties in  
7 making such an assessment were recognised."

8 So was that recognised by the Crown?

9 A. Yes.

10 Q. Was this at the stage that the Crown had expanded the  
11 terms of reference to include race, or was this at  
12 an earlier stage?

13 A. No, I think it was following the expanded terms of  
14 reference.

15 Q. You said:

16 "... expressed concerns about the feasibility of  
17 whether race had an influence on the officers' actions  
18 in the absence of any evidence of overt actions~..."

19 A. Yes.

20 Q. "... and sought guidance."

21 We've heard from Mr McSporran that he was also  
22 looking for any overt references to race?

23 A. Yes.

24 Q. He indicated that it was quite difficult to assess race  
25 if there was no overt comments made at the time or

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- 1           suchlike; would you agree with that?
- 2           A. I think potentially the focus was in relation to the  
3           actual interaction with Mr Bayoh and whether there were  
4           any overt comments or indications at that time.
- 5           Q. In the absence of that, obviously PIRC sought guidance?
- 6           A. Yes.
- 7           Q. Were you -- what guidance were you given by the Crown  
8           about looking for evidence about race or potential race  
9           implications where there were no overt comments made?
- 10          A. Well, as I have said here, that wasn't until it was  
11          re-raised as a difficulty that I think there was  
12          a recognition of the difficulty. So as I recall there  
13          was no specific guidance in relation to in the absence  
14          of any overt actions.
- 15          Q. Did the Crown, after it was re-raised, provide PIRC with  
16          guidance or direction about identifying evidence that  
17          might be of assistance in considering whether race was  
18          a factor?
- 19          A. I think at the original meeting there was discussion  
20          around -- well, it was the assessment of complaints,  
21          racial complaints, provided, and that was pre -- I think  
22          it was the October or November meeting.
- 23          Q. So there was some guidance provided that PIRC should  
24          look at previous complaints --
- 25          A. Yes.

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- 1 Q. -- and issues that may have been raised in the past?
- 2 A. Mm-hmm.
- 3 Q. You mentioned a moment ago statistics or assessing, was  
4 that in relation to Fife Police --
- 5 A. That is right, and contrasting any complaints of that  
6 nature against the broader Police Scotland.
- 7 Q. What guidance, if any, was given to PIRC about  
8 investigating the circumstances -- not the past, not  
9 statistics, but the actual events which took place at  
10 Hayfield Road? Was there any guidance given about  
11 evidence from which inferences could possibly be drawn?
- 12 A. I don't recall any guidance of that nature.
- 13 Q. Was there any discussion when you talked to Crown about  
14 this, about what should we as PIRC investigators look  
15 for in terms of evidence concerning race that could  
16 potentially give rise to inferences that race was  
17 a factor?
- 18 A. No, other than the trends, I don't recall any particular  
19 guidance given.
- 20 Q. Was there anyone within PIRC, in the team of PIRC, in  
21 your investigators, who had been in a position -- who  
22 had experience of investigating cases where race was  
23 a factor?
- 24 A. I understood so, yes.
- 25 Q. Who were they?

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- 1 A. I can't remember which members of staff right now.
- 2 Potentially Mr McSporran.
- 3 Q. All right.
- 4 A. But I am really hazarding a guess on that.
- 5 Q. Were you satisfied that your team of investigators had
- 6 sufficient experience to investigate whether race was
- 7 a factor in the death of Mr Bayoh?
- 8 A. A good number of them were very experienced
- 9 investigators who had previously investigated these
- 10 matters. I do recognise, however, that if there had
- 11 been available resources that would have allowed the
- 12 staff to have further training on this, that would have
- 13 been beneficial.
- 14 Q. Was that something you identified before or after the
- 15 death of Mr Bayoh?
- 16 A. Before.
- 17 Q. Had you sought additional resources for the purposes of
- 18 training your investigators in relation to race
- 19 investigations?
- 20 A. I don't think specifically in relation to race
- 21 investigations, but in relation to equality and
- 22 diversity and training generally my memory is that that
- 23 was identified as part of the bid that was put into
- 24 Scottish Government, that obviously there needed to be
- 25 further funds to allow resources. And it wasn't just

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- 1           for training, but for other abstractions such as  
2           attending court to give evidence; none of that had been  
3           recognised.
- 4       Q.   When did you make that request for further resources for  
5           training in equality and diversity?
- 6       A.   No, it wasn't specifically in relation to training in  
7           equality and diversity, it was in relation just to  
8           training generally, global training, and the advancement  
9           of professional development.
- 10      Q.   When was that request made for further resources to  
11           allow for that to be done?
- 12      A.   I can't remember which budget bid that was included in.  
13           There were a number of bids.
- 14      Q.   Was it before the death of Mr Bayoh, or after?
- 15      A.   I don't know.
- 16      Q.   Before the death of Mr Bayoh had you identified the need  
17           for additional training in relation to investigations,  
18           particularly where race may have been a factor?
- 19      A.   I hadn't specifically identified that, no.
- 20      Q.   Would that have been something within your remit, to  
21           identify gaps in training for your investigators and  
22           trying to plug those gaps?
- 23      A.   The responsibility for that lay with the director of  
24           investigations.
- 25      Q.   So that was Mr Mitchell?

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- 1 A. Yes.
- 2 Q. Did Mr Mitchell ever raise with you the fact that there  
3 may have been a need for further training for  
4 investigators in relation to investigations, and in  
5 particular investigations where race was a factor?
- 6 A. No, I don't recall that.
- 7 Q. Were you aware of any deficiencies in relation to  
8 diversity regarding the investigations team per se?
- 9 A. In relation to diversity within the investigations team,  
10 I think it was recognised that it wasn't a particularly  
11 diverse team.
- 12 Q. When you say "not particularly", what do you mean?
- 13 A. Well, the diversity extended really to a gender balance.  
14 Well, maybe not a balance, but there were a number of  
15 females. In relation to those from other black or  
16 ethnic minority groups, I don't recall other  
17 investigators being there. There were members -- well,  
18 at least one member of the review team and others that  
19 were from either a black or ethnic minority group.
- 20 Q. You think there were investigators --
- 21 A. No, not investigators, the review team and also the  
22 corporate services, there was a temporary appointment  
23 there.
- 24 Q. In terms of your investigation team --
- 25 A. No.

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1 Q. No black investigators?

2 A. No.

3 Q. Or investigators from any ethnic minority?

4 A. No.

5 Q. Did you see that as being a matter for concern?

6 A. Yes, I ... I would have liked to have a workforce that  
7 represented all groups.

8 Q. What steps did you take to encourage recruitment of  
9 those from a more diverse background?

10 A. There were some limitations around that because of the  
11 funding, and the fact that very few of the  
12 investigations team at that stage, having just recently  
13 joined the organisation, were leaving. So effectively  
14 the complement remained static for a considerable length  
15 of time until some additional resources, and we talked  
16 this morning in relation to what was made available,  
17 I think another two over and above what we had had we  
18 were capable of recruiting. I can't remember if at that  
19 time or if it was a later advancement of funds where we  
20 specifically took the steps to advertise posts in  
21 sources where we thought there would be a greater  
22 diverse range.

23 Q. You have said you eventually got resources for an  
24 additional two investigators. You mentioned that this  
25 morning.

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- 1 A. Yes.
- 2 Q. What steps did you take at that stage to encourage  
3 recruitment in areas involving a more ethnically diverse  
4 group of people?
- 5 A. We were also undertaking presentations at various  
6 educational establishments, to reach a broad populace.
- 7 Q. What were those educational establishments?
- 8 A. The colleges and schools.
- 9 Q. Did that expose PIRC and raise awareness about PIRC and  
10 its role amongst a wider group than had previously been  
11 reached?
- 12 A. Yes.
- 13 Q. Was any of that outreach work -- did it bear fruit in  
14 relation to diversity?
- 15 A. Not in relation to the two that were added to the  
16 complement, no.
- 17 Q. We heard one of the previous witnesses talk about  
18 perhaps some targeting in terms of where recruitment  
19 adverts were placed, and advertised, is that something  
20 you had had a hand in?
- 21 A. Yes, it was.
- 22 Q. Tell us about that?
- 23 A. I think there was a recognition of the lack of  
24 diversity, and I can't remember if it was -- at around  
25 what time there was a review of the organisation more



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1 broadly, and I think at that time there was  
2 an understanding that any vacancies should be advertised  
3 in such sources.

4 Q. Do you remember the locations of any of the adverts that  
5 you --

6 A. No, that was handled by the HR team.

7 Q. HR. Can I ask you about what was available to your  
8 investigators in-house at that time, in May 2015. Was  
9 there any guidance available to investigators in  
10 relation to investigations where race was a factor; were  
11 there any guidelines or information sheets or anything  
12 of that sort?

13 A. The only information guidance was contained in on-call  
14 pack that investigators had obviously when they were on  
15 call.

16 Q. Can you tell us about the on-call pack and what that  
17 contained?

18 A. It contained a variety of documents, which had been put  
19 together, I think, from the early stages of PIRC,  
20 providing guidance on a whole range of matters both in  
21 relation to the legislation, their powers, on-call  
22 numbers for others. It was quite a -- it was a file  
23 probably of this size. (Indicating).

24 Q. Are you talking about the blue folder in front of you?

25 A. Yes, the lever-arch, yes.

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- 1 Q. Was that something that contained guidance for  
2 investigators about investigations where race was  
3 a factor?
- 4 A. No, it didn't specifically contain -- as I recall, it  
5 didn't specifically contain guidance on investigations  
6 into racial matters, it contained information in  
7 relation to various faiths and different cultures.
- 8 Q. What use would that information have been to  
9 investigators investigating a death where race was  
10 a possible factor?
- 11 A. There was some information in that in relation to  
12 post mortems and the positioning of body -- of a body.
- 13 Q. In terms of post mortem information, tell us what  
14 guidance was available to investigators in that regard?  
15 We have heard that some religions have views in relation  
16 to when a -- whether a post mortem should take place,  
17 when a body should be buried or suchlike.
- 18 A. Yes.
- 19 Q. Is that the type of information that you are thinking  
20 of --
- 21 A. Yes.
- 22 Q. -- that was contained within this?
- 23 A. Yes.
- 24 Q. Can I ask was there anything available to investigators  
25 in around May 2015 which actually gave guidance about

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1 an investigation where race is a factor, looking at  
2 possible lines of investigation or possible evidence  
3 that can be sought or anything along those lines?

4 A. I am not aware of that. But that again would be held  
5 within the investigation team and I wouldn't expect to  
6 be sighted on every document that was held there.

7 Q. So were you not aware of whether or not your  
8 investigators had any guidance available in relation  
9 to --

10 A. I wasn't aware of any guidance that was available to  
11 them.

12 Q. Does it cause you concern, looking back now, as  
13 Commissioner -- so you are the Commissioner, part of  
14 your role is strategic, planning, development, and you  
15 have an investigation team carrying out what you hope to  
16 be Article 2-compliant investigations.

17 A. Mm-hmm.

18 Q. That there is -- they are dealing with the death of  
19 a black man in police custody or after contact with the  
20 police. You are not aware of any training that they  
21 have had in relation to investigations of that sort, you  
22 are not aware of any guidance that is available to them.  
23 You think perhaps Mr McSporran had experience but you  
24 are not aware of what experience they had. Looking back  
25 now, do you think that perhaps you could have done more

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1 in terms of strategy and planning to support your  
2 investigators in this investigation, to ensure that it  
3 was adequate?

4 A. Well, yes, I think all of us with the benefit of  
5 hindsight could have contributed some degree of  
6 experience and expertise to it. However, the director  
7 of investigations had responsibility in relation to  
8 ensuring the investigative response within that team.

9 Q. All right. Looking back now, obviously we have the  
10 benefit of hindsight now, so looking back now to 2015 --  
11 and the Chair will wish to think about what improvements  
12 could perhaps be made. Thinking of that now, do you  
13 have any reflections on what improvements could perhaps  
14 have been made to support your investigators?

15 A. I understand now that there has been an adaptation of an  
16 IOPC investigative document which clearly will be of  
17 benefit.

18 Q. I don't know if you have seen them. We have had -- we  
19 have heard evidence to some extent on guidelines that  
20 are now available. Can I show you those. PIRC 04724.  
21 You see these are headed up PIRC and they say:

22 "PIRC guidelines:

23 "For dealing with allegations of discrimination when  
24 undertaking Investigations and Complaint Handling  
25 Reviews."

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1 A. Yes.

2 Q. Was this something that you had a hand in preparing?

3 A. No, I didn't.

4 Q. If we can go on to the next page, please. You see the  
5 contents there, the Commissioner's foreword, and then  
6 there is comments about Professional Standards and  
7 ethics, and identification of what is discrimination.  
8 And then you will see that at section 6 it says.

9 "Conducting an investigation or a [case handling  
10 review]."

11 We are obviously interested in investigation. Can  
12 we perhaps look at the Commissioner's foreword. There  
13 is a recognition:

14 "It is crucial for public confidence in the  
15 independent investigation and review of complaints that  
16 allegations of discrimination against the police are  
17 handled properly."

18 Am I correct in saying you would agree with that?

19 A. I would.

20 Q. Yes. If we can look at section -- can we look at the  
21 bottom of that please. It's titled:

22 "Michelle Macleod, Commissioner."

23 This is after you left?

24 A. Yes.

25 Q. Can we look at section 6. Which is -- it says page 30

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1 but I think when we looked at this the last time it was  
2 actually 31 on the pdf. I may be wrong:

3 "Conducting an investigation~..."

4 Section 6 and there is a recognition:

5 "[Investigators] should have detailed understanding  
6 of equality and diversity issues and an appropriate  
7 level of knowledge, skills and experience to be able to  
8 apply these guidelines and undertake effective  
9 investigations~..."

10 There is a comment about terms of reference For  
11 an investigation into a death that:

12 "... raises issues of discrimination should  
13 explicitly refer to and address any discrimination  
14 allegations raised."

15 Is that something that would have assisted PIRC in  
16 2015, if specific terms of reference had been provided?

17 A. Yes, it would have.

18 Q. "This includes where discrimination is alleged as  
19 an aggravating factor in relation to a separate criminal  
20 or complaint allegation or where no specific allegation  
21 of discrimination has been made but it is apparent that  
22 discrimination may be a relevant consideration."

23 A. Yes.

24 Q. We can go on:

25 "Understanding the allegation of discrimination."

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1           So there is some guidance there for investigators  
2           about understanding an allegation of discrimination. Is  
3           that the type of guidance that would have been of  
4           assistance in 2015?

5           A. I think it would have been.

6           Q. Can we carry on. There is sections highlighted in  
7           purple, and then:

8           "Conducting the investigation~...

9           "The understanding acquired at the beginning of the  
10          investigation or review to consider how the alleged  
11          discrimination might present and what stereotypes or  
12          prejudicial assumptions might have informed the officer  
13          or staff member's actions should inform the key lines of  
14          enquiry.

15          "For investigations standard lines of enquiry should  
16          be followed to try and find out what happened and why."

17          And then a number of suggestions about the type of  
18          evidence that could be sought:

19          "An investigation will need to consider whether  
20          there is other evidence which supports the allegation of  
21          discrimination. This includes:

22          "Complaint history and patterns of behaviour."

23          Do you see that?

24          A. Yes.

25          Q. And if we keep going. Comparator evidence, comparing

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- 1           how the person may have been treated, compared to  
2           someone who was white, for example.
- 3       A.   And that was a consideration as part of investigation.
- 4       Q.   When you say that, is that after the terms of reference  
5           were expanded?
- 6       A.   No, right from the beginning that was discussed.
- 7       Q.   Who discussed that at the beginning?
- 8       A.   It was -- well, I certainly discussed it with a number  
9           of the investigation team.
- 10      Q.   Who was that?
- 11      A.   I discussed it with Mr McSporran, Ms Scullion,  
12           Mr Mitchell, and a variety of other investigators.
- 13      Q.   What response did you get when you raised this issue  
14           with these investigators?
- 15      A.   They were receptive to that.
- 16      Q.   When you say "receptive", what do you mean by that?
- 17      A.   Well, they indicated that if there was any evidence in  
18           the course of their investigations that emerged, I think  
19           was the phrase that you have used before, that that  
20           would be a matter that would be taken forward, whether  
21           with Crown Office or advanced as part of  
22           an investigation.
- 23      Q.   Was this viewed as a positive and active line of  
24           investigation or was it viewed in the context of taking  
25           cognisance of issues as they emerged?



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- 1           A. I think it would be more under the second, the taking  
2           cognisance of.
- 3           Q. Thank you. Can we move on with the -- going through the  
4           document, please. Then there is a mention of  
5           discriminatory language.
- 6           A. Yes.
- 7           Q. "... the investigator ... should assess the language  
8           used, including language used in any records relating to  
9           the incident in question or arising from the complaint  
10          investigation. This includes any use of obviously  
11          discriminatory language but also more subtle indicators  
12          that a person may have acted or made a decision based on  
13          prejudicial assumptions."
- 14          A. Yes.
- 15          Q. "There are terms that are commonly recognised as being  
16          offensive and officers and police staff members should  
17          be expected not to use them. However, there are other  
18          words and phrases which are inoffensive in themselves  
19          but, when heard in context, can reasonably be thought as  
20          discriminatory."
- 21                 Is that some guidance that your investigators in  
22                 2015 may have found to be of assistance?
- 23          A. Yes.
- 24          Q. Keep moving through the document, please:  
25                 "Making generalisations.

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1           "Speaking in generalisations may be an indication  
2           that a person is making judgements based on assumptions  
3           rather than individual circumstances and the evidence  
4           and intelligence available to them."

5           Was that something that was considered in 2015?

6           A. I don't recall whether it was or whether it wasn't.

7           Q. Can you remember any examples where it was considered by  
8           your investigators?

9           A. No, I can't.

10          Q. Then:

11                 "Reference to a characteristic which is irrelevant  
12                 to the policing purpose.

13                 "In some circumstances, describing a person's race,  
14                 religion, gender, age, disability ... will be relevant  
15                 to a legitimate policing purpose - ie to help identify  
16                 a suspect or victim, or to provide a service that takes  
17                 account of a person's individual needs. However,  
18                 references to clearly irrelevant details about a person  
19                 that distinguish them as 'different' may suggest  
20                 a discriminatory approach."

21          A. Mm-hmm.

22          Q. Was that something that your officers were considering  
23          in 2015?

24          A. I think ... no, I do think that they would have some  
25          awareness and recognition of that.

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1 Q. What makes you think they would have had some awareness  
2 of that in 2015?

3 A. For the simple reason that they had an awareness of  
4 diversity and equality.

5 Q. Was it your expectation that your investigators would  
6 have had awareness of diversity and equality?

7 A. Yes.

8 Q. Was that based on training you presumed they had  
9 obtained as former police officers?

10 A. No, I was aware that they had had training -- those that  
11 had been former police officers, a number of them had  
12 had diversity training, and some from other  
13 organisations. But that apart, there was training  
14 within the organisation.

15 Q. Was that available before Mr Bayoh died, or after?

16 A. I understand it was available before.

17 Q. Was it before you came into your post, or after you came  
18 into post?

19 A. I think it was after.

20 Q. As far as you recall, did all your investigators have  
21 that training in equality and diversity?

22 A. It was a mandatory course.

23 MS GRAHAME: Thank you.

24 I am conscious of the time. We are about to move on  
25 to probing the officers' accounts. Would that be

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1 an appropriate time?

2 LORD BRACADALE: We will stop there and sit at 10 o'clock

3 tomorrow morning.

4 (4.16 pm)

5 (The Inquiry adjourned until 10.00 am on Wednesday,

6 6 March 2024)

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