

From: Stephen McGowan
Procurator Fiscal, High Court

29 August 2016

**LORD ADVOCATE
SOLICITOR GENERAL**

Copy to: Assistant Principal Crown Counsel
PS/Crown Agent
Deputy Crown Agent, Serious Casework
PF, Specialist Casework
Head of Criminal Allegations against the Police Division

DEATH OF SHEKU BAYOH

Purpose

1. To update the Law Officers in relation to progress in this case and to propose a timescale for further work.

Background

2. On 3 May 2015 Sheku Bayoh died at the Victoria Hospital, Kirkcaldy, following an incident in which he had been arrested by officers of Police Scotland. Following Sheku Bayoh's death an investigation has been undertaken by the Police Investigations and Review Commissioner on behalf of the Procurator Fiscal.

3. The final report by PIRC was submitted to the Procurator Fiscal on 10 August 2016. Since then officials have been considering the report and considering what further work is required by the Procurator Fiscal before Crown Counsel can make a decision in relation to criminal proceedings against any individual.

Work Required

4. This is a factually and legally complex case in relation to the cause of Sheku Bayoh's death and whether any force used by police officers in arresting the deceased was justified.

5. The main areas which require consideration are:

- What happened at the locus in Kirkcaldy and;
- What expert evidence can assist us with the case.

6. We estimate that we require to see in the order of 12-15 witnesses of fact speaking to the prelude to the incident in which the police came into contact with Sheku Bayoh, the initial contact, and Sheku Bayoh's restraint at the scene and whilst being transported to the hospital. Thereafter we assess that we require to consult with 9 experts. We propose to consult the experts (in which

their answers are reduced to writing and the expert is offered the opportunity to comment upon what we have noted) rather than by precognition. That ensures that there can be no misunderstanding as to the expert evidence.

7. We considered whether we could rely on the statements taken by PIRC but do not consider it appropriate to do so given the nature of the decision that Crown Counsel will be asked to make.

8. We have also considered whether or not we could precognosce witnesses of fact and experts concurrently but have taken the view that it is essential to have the precise factual background through precognition before consulting with experts.

Resources

9. Two Senior Procurator Fiscal Deputes with experience of large and complex cases have been allocated to work on the case under the supervision of the Head of the Criminal Allegations Against the Police Division. Assistant Principal Crown Counsel has been nominated as the allocated Advocate Depute in the case and we propose that we will keep her up to date at all stages with the ongoing work.

Timescale

10. In light of the foregoing work that is required we would anticipate being in a position to make a decision on criminal proceedings against any individual by the end of the calendar year.

Health and Safety Charges

11. In addition to charges in relation to individuals we consider there are matters in relation to the training given to police constables in dealing with use of force which are worthy of consideration in terms of the Health and Safety at Work Act. In particular the training afforded to constables appears to be focussed on how they would deal with a situation when they are confronted by a violent individual. There is little guidance to constables as to how they should conduct themselves in a situation where multiple officers (in this case 9) have to confront an individual. As Law Officers will be aware the Health and Safety Executive have displayed a reluctance to become involved in this case. We intend to approach the new Head of Operations at the Health & Safety Executive in Scotland on completion, on the basis that the fresh information contained in this report to see what the Health & Safety Executive's position will be. As the Law Officers will recollect, we are unable to direct HSE to become involved and we have no control over the timescale within which they would carry out a report.

Data Protection

12. During the course of their investigation PIRC have discovered that Police Scotland had gathered and processed intelligence on the solicitor for Sheku Bayoh's family. This intelligence which relates to the solicitor's legal practice

and in particular to representation of clients and in relation to human rights campaigns. Such material is badged as counter terrorism material. Following their investigation PIRC have expressed a wider consideration in relation to the way in which information on legal representatives is held by Police Scotland. Police Scotland have advised PIRC that they would advise affected persons that their information had been held on record. They have yet to do so.

13. PIRC have concluded that there may be widespread non-compliance by Police Scotland and its staff in respect of the requirements to log the reasons for undertaking checks of systems and adding intelligence to systems in potential contravention of the Data Protection Act 1998.

14. The PIRC investigation has left us concerned that Police Scotland are collecting intelligence on solicitors who are lawfully conducting their business on behalf of clients. Whilst the statutory regime allows material to be held by the police if certain safeguards are met, the PIRC report leaves a concern that the handling of this information may not be appropriate. This is a matter which requires to be raised with Police Scotland.

15. In light of the fact that would require to satisfy ourselves that evidence used to bring proceedings was lawfully obtained, and that there was no material held by the police that ought to be revealed to the Crown for disclosure purposes, it is considered that it is appropriate to draw these issues to the attention of Police Scotland. However, this requires to be considered carefully. Further discussion of the matter is required.

Conclusion

16. The Lord Advocate is asked to:
- Indicate that he is content with the extent of work and timescales indicated at paragraph 9 above.
 - The Lord Advocate is asked to indicate that he is content for their to be further discussion in relation to how the Data Protection issues raised by PIRC are addressed.

Stephen McGowan
Procurator Fiscal, High Court

Copy List	For Action/Response	For Comments	For Information
Assistant Principal Crown Counsel PS/Crown Agent Deputy Crown Agent, Serious Casework PF, Specialist Casework Head of Criminal Allegations Against the Police Division			

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