

## RESPONSE TO RULE 8 REQUEST – PUBLIC INQUIRY INTO THE DEATH OF SHEKU BAYOH

Fiona [REDACTED] Carnan, born [REDACTED] 1962, Procurator Fiscal's Office, Cameronian House, 3/5 Almada Street, Hamilton.

### Role and experience

1. What were your grade and position in COPFS during your involvement in the (Crown directed) PIRC investigation into the death of Sheku Bayoh ("the Investigation") and subsequent COPFS Precognition process ("the Precognition")? How long had you been in this position prior to the date you became involved? What were your duties and responsibilities in this position?

During my involvement in the investigation and precognition process I was a Senior Procurator Fiscal Depute in the Criminal Allegations Against the Police Division (CAAPD) of COPFS. I had been in the same grade and role since the end of 2012, when that specialist Division was set up in COPFS. My duties and responsibilities were to investigate reports of allegations of criminality by serving police officers and members of police staff and, where appropriate, to report to Crown Counsel to obtain instructions as to whether to prosecute or not.

2. When did you first become involved in the Investigation? What were the circumstances in which you became involved?

I first became involved in the investigation in early December 2017. I was asked by the then Head of CAAPD, Mr Brown, to become involved, specifically in relation to the instruction of an expert in police restraint and to work with my colleague, Mr Alasdair Macleod in respect of the analysis of evidence in the precognition report to Crown Counsel.

3. What do you understand to be COPFS' role in the investigation of sudden, suspicious, accidental and unexpected deaths in Scotland as of the date you became involved? What do you understand COPFS' duties and responsibilities to be in this regard?

My understanding is that the Lord Advocate has responsibility for the investigating sudden, suspicious, accidental and unexplained deaths in Scotland and that COPFS carried out this function on her behalf. Primarily the responsibility of the Crown is to investigate whether the death is due to criminality. If criminality is excluded, the Crown is responsible otherwise to establish a cause of death and consider whether the circumstances of the death meet the criteria for holding either a mandatory or discretionary FAI.

4. Prior to the date you became involved, what experience did you have in investigations of deaths in police custody, or deaths during or following police contact? Please provide details and the outcome of the cases. Was race a factor to consider in any of these cases?

Prior to the date I became involved in this matter I had no previous involvement in the investigation of deaths in police custody or deaths following police contact.

5. Prior to your involvement, what experience did you have in relation to family liaison in deaths cases? Was race a factor to consider in family liaison in any of these cases? If so, please provide examples.

I have been involved in the investigation of deaths at various times throughout my career in COPFS since I joined the Crown Office and Procurator Fiscal Service in 1986. Liaison with members of the deceased's family was part of the role of the Procurator Fiscal Depute until the creation of VIA (Victim Information and Advice) in COPFS, when some of the liaison was undertaken by members of VIA. I do not specifically recall any deaths when race was a factor, although there may well have been during my career.

### PIRC

6. What experience did you have in dealing with PIRC prior to the date you became involved?

I joined CAAPD in December 2012 and had regular dealings with many of the investigators in PIRC who reported cases to the Division.

7. What was your understanding of PIRC's role?

My understanding of the role of PIRC was that it was an independent body set up when the police forces of Scotland merged into one Police Service of Scotland. PIRC had two separate functions: one function was the review of complaints handling by Police Scotland; the other function was the investigation of the police, either on the specific instruction of the Crown or following a referral made to PIRC by Police Scotland.

8. In your understanding, was PIRC being directed to investigate Mr Bayoh's death under Section 33A(b)(i) or (ii) of the Police, Public Order and Criminal Justice (Scotland) Act 2006? What are the differences, if any, in COPFS' dealings with PIRC between investigations carried out under part (i) compared to (ii) of this section?

The initial letters of instruction by the Deputy Crown Agent and by the Head of CAAPD were issued before my involvement. These letters did not specify which subsection of section 33A of the 2006 Act applied to their instruction. I am not aware of whether that was intentional to include, by implication, both subsections. In my experience since then, if an instruction is issued by CAAPD, that is an instruction in terms of S33A(b)(i) of the Police, Public Order and Criminal Justice (Scotland) Act 2006 to investigate potential criminality by a police officer or member of staff. Instruction under section 33 A(b)(ii) of the Act would normally be issued by colleagues in the Scottish Fatalities Investigation Unit (SFIU), who would be considering whether there were grounds for holding a FAI. This could relate to the death of a member of the police force or staff, or death of a member of the public following recent police contact where that may have had a bearing on the death.

9. Were you aware if any further instruction was given to PIRC in the course of your involvement in their investigation? If so, when and why did this occur?

In the course of my involvement I instructed PIRC to provide evidence, in the form of witness statements by trainers and submission of training materials used, about the nature and content of the training delivered to the officers involved in the restraint of Mr Bayoh and their understanding of drug induced psychosis. I also instructed forensic examination of Ashley

Wyse 's mobile phone. I have no access to the file and cannot otherwise recall any other specific instructions issued by me.

10. What is your understanding of COPFS' role in relation to a PIRC investigation carried out under Section 33A(b) of the 2006 Act? For example, do PIRC have autonomy or do they require the authority of COPFS before taking certain steps? Do COPFS direct the work to be carried out by PIRC as part of their investigation? Do COPFS supervise the PIRC investigation? If not, to what extent do COPFS influence the direction of the PIRC investigation?

My understanding is that COPFS can instruct the PIRC to carry out an investigation in terms of either S33A(b)(i) or S33A(b)(ii). I understand that the PIRC has the powers of a Police Constable in Scotland. If COPFS instructs an investigation, the scope of the investigation and the matters to be addressed would be outlined in the letter or letters of instruction but operational decisions about how that investigation should be carried out would be matters for PIRC to determine and COPFS would not have any supervisory role in this regard. The extent of influence of COPFS in the direction of a PIRC investigation would be restricted to the initial instruction given and any supplementary instructions issued.

11. How are decisions and instructions communicated to PIRC? Please explain your involvement in this during the Investigation.

I would expect decisions and instructions would be communicated to PIRC in writing. If discussions were held by telephone or in person, I would expect these to be followed up in writing. I have referred (question 9) to instructions I issued in respect of specific further enquiries and these would have been communicated by email, although there may have been telephone contact about the requirements also.

12. How would you normally go about answering PIRC's questions and providing advice? What, if any, involvement did you have in assisting PIRC with their questions and providing advice? If you had no personal involvement, who did?

If PIRC had questions or sought advice directly from me, I would have responded if I was able to do so, or referred to Mr Brown as Head of Division for advice or assistance in responding to any request.

13. In your view, were PIRC's instructions sufficient for them to investigate and report on all relevant matters to COPFS? If not, what could have been done differently and why?

I am not aware of any shortcomings in the adequacy of the Crown's instruction to the PIRC.

14. Please read the email to Mr Les Brown dated 22 February 2018, your draft reply and the response from Mr Brown to Mr Taylor of PIRC on 27 February 2018. What did you understand to be the legal basis for downloading and examining data other than video clips from 3 May 2015 (in respect of which Ms Wyse had given her express consent)? Did you discuss this with Mr Brown? What was your understanding of what Mr Brown was advising PIRC?

I have read the two documents referred to (COPFS 02772 and PIRC **02587**). When I received Stuart Taylor's email, my concern was that there was information on Ashley Wyse's phone that may have been relevant to the ongoing investigation and I was surprised that this issue had not been explored until that time (2018). I referred the email to Mr Brown, given that I had not been involved in the investigation at the outset, with a

proposed draft response. This did not address the question of legal basis for downloading data for which Ms Wyse had not provided explicit permission but I was of the view that this was a matter for PIRC to address. It is very likely that I discussed the matter with Mr Brown but have no recollection of the discussion, other than that he was going to refer the matter to Crown Counsel for advice and direction. I believe the response issued by Mr Brown to Stuart Taylor reflected Crown Counsel's response. My understanding of the response was that it was an operational matter for PIRC to obtain by legal means evidence (from the mobile phone) in relation to the inquiry and to assess the evidence for relevance.

Family Liaison

15. What is your understanding of COPFS' role in liaison with the deceased's family in deaths cases? How does COPFS' role interact with the role of Police Scotland and PIRC in family liaison?

It is my understanding that initial contact with next of kin is carried out by family liaison officers (FLOs) from either Police Scotland or PIRC, or in some cases, both. In my experience working in Scottish Fatalities Investigation Unit (SFIU), normally transfer of the family liaison role from the FLO (either police or PIRC) to COPFS VIA officer occurs when the death is reported to Scottish Fatalities Investigation Unit (SFIU) of COPFS.

16. What, if any, duties or responsibilities do COPFS have to the deceased's family during the course of a PIRC investigation? What duties or responsibilities do COPFS have to the deceased's family during the Precognition process? How were these duties or responsibilities fulfilled? Was there a handover of family liaison from PIRC to COPFS? COPFS has a duty to keep the family of the deceased informed that the death of their loved one is being investigated. The extent of information sharing at the stage of a Police or PIRC investigation will necessarily be limited if potential criminality is being considered. As the PIRC reports had been submitted to COPFS prior to my involvement I was not aware of any handover from PIRC to COPFS or how these responsibilities were being fulfilled. By the time I became involved in this investigation, towards the latter end of the precognition process, I became aware that liaison with the family of Sheku Bayoh was, at the family request, via their solicitor.
17. What involvement, if any, did you have in family liaison?

[REDACTED]

I had no involvement in family liaison. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18.

[REDACTED]

19.

[REDACTED]

20. Insofar as not covered above, did you have any dealings with the Lord Advocate during the course of your involvement in the Investigation and Precognition? Did you have any involvement in meetings between the Lord Advocate and Mr Bayoh's family? If so, which meetings did you attend? Who was present? What was your recollection of these meetings? What was the outcome of these meetings and what was your understanding of what the Lord Advocate, and COPFS, had undertaken to do? I had no dealings with the Lord Advocate during the course of my involvement with the investigation and precognition. I had no involvement in meetings between the Lord Advocate and the family of Mr Bayoh.
21. In your notebook at page 37 you list a series of letters from Mr Anwar dated 27 May, 3, 17 June and 31 July 2015. These letters were sent to COPFS at an early stage in the Investigation, prior to your involvement; what was the purpose in reviewing these? To what extent did the Investigation address the issues summarised in your notebook?  
I am referred to page 37 of my notebook COPFS 05220. I have listed letters from Mr Anwar dated 27 May, 3<sup>rd</sup> June, 17 June and 31 July, all 2015. I believe I noted the dates and contents of those letter to check if the matters raised by Mr Anwar had been investigated. As far as I could tell from correspondence, Mr Brown instructed the PIRC to investigate and report on the issues raised by Mr Anwar. By the time I was involved in the investigation, PIRC had submitted their reports in respect of these matters. Any issues raised by Mr Anwar that related to potential criminality were, to the best of my knowledge, addressed in the precognition report to Crown Counsel.
22. What is your understanding of the role of COPFS' Victim Information and Advice service ("VIA") in family liaison in a death investigation? Were VIA involved in this case? Insofar as you are aware, what was the basis for VIA involvement or non-involvement with Mr Bayoh's family?  
My understanding is that VIA has a role is in relation to the provision of information to bereaved families in death investigations and there is a dedicated resource of VIA officers who work in SFIU and assist members of legal staff there in providing information to bereaved relatives. I am not aware of any VIA involvement in this case and had no role in decisions about how family liaison should be conducted in this case.

#### Ingathering of evidence and analysis

23. Prior to when you were involved in the Investigation, were you aware of Mr Bayoh's death from the media or word of mouth? If so, what was your understanding of the circumstances in which Mr Bayoh died?  
I knew very little about the circumstances of the death of Mr Bayoh from word of mouth. I was aware that our head of Division, Les Brown was leading on the investigation. He did not discuss the case with me until he asked me to become involved. I must have seen press reports at the time and at intervals following the death and understood from these reports that the family held the view that the police were responsible for the death of Mr Bayoh. I was also aware of press reports issued on behalf of the police federation countering the allegation.

24. After you first became involved in the Investigation, what description of the events leading up to and including Mr Bayoh's death was explained to you? When and how was this information provided to you? Who by?

During the meeting with Mr Brown in which he asked me to become involved in the investigation he provided a brief overview of the investigation to date (early December 2017). He advised me to read into the case by reading the PIRC reports in the first instance. I was then advised to contact Alasdair MacLeod to obtain more detailed information and from memory I received a copy of Alasdair's working narrative. Alasdair shared his current work on draft narrative of events and signposted me to the electronic folder where I started reading my way into the case, continually liaising with Alasdair as I went along to confirm my understanding of the evidence. I read the statements, precognitions and examined the productions that appeared relevant. I reviewed the CCTV, the multi media disc containing the CCTV combined with recordings of members of the public calling in, airwave messages and photographs. Among other documents I also reviewed the correspondence folders, production table, witness table and a very detailed timeline document prepared by Alasdair.

25. Over the course of your involvement in the Investigation and Precognition, in what ways, if any, did your understanding of the circumstances of Mr Bayoh's death change from the information initially provided to you?

Since I had very little information at the outset I don't think my understanding of the circumstances of the death changed. I would say that my understanding expanded as I read into the file and then continued to do so as any new information came to hand.

26. What, if any, consideration did you give to whether there were grounds for a Fatal Accident Inquiry ("FAI")? Did you consider that any FAI would have been mandatory in terms of s1(1)(a)(ii) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976? Please explain your reasoning. If you did not consider the criteria for a mandatory FAI were met, what consideration was given to a discretionary FAI in terms of s1(1)(b)? Was anything done in the Investigation to prepare for an FAI? Who took the decision not to hold a FAI?

It was not part of my remit from Mr Brown to consider whether there were grounds for an FAI. My role was restricted to an analysis of evidence in respect any potential criminality by the police. I understand that the 1976 Act was superseded by the 2012 Act. I was never asked to consider the question of whether the circumstances of Mr Bayoh's death met the criteria for a mandatory FAI but consider now that the circumstances of Mr Bayoh's death could be considered a death in custody in terms of the Act. Nor was I asked to address in the precognition report to Crown Counsel the merits of a discretionary FAI. I was not aware of any distinct preparation for a FAI during my involvement in looking at criminality, but was aware of the possibility of a FAI (or a public inquiry) following the conclusion of or decision not to take any criminal proceedings. Considerations of criminality would always come first. A decision whether to hold a FAI is a matter for Law Officers.

27. Please explain your involvement, if any, in ingathering and analysing evidence in relation to the response officers' accounts, including reference to any contradictions you identified

between the accounts and any impact on your assessment of the officers' credibility and reliability.

I was not involved in ingathering evidence of the response officers' accounts. PIRC investigators obtained their statements and the police officers were not precognosed. I carried out an analysis of the evidence, drawing from statements and precognitions of all pertinent witnesses and relevant productions. With regard to officer accounts, I assessed each officer's account (and if there were more than one statement from each officer, compared these with each other) against the other available evidence, whether that was from other police officers or from civilian witnesses, or from other sources such as CCTV, photographs or recorded airwave messages.

I am asked to comment on some materials that have been made available to me. The first is page 56 of a notebook (COPFS 05220). I have not dated the notes but they appear to relate to my initial thoughts about the evidence from two police officers about the alleged stamp on the back of PC Short when she was on the ground. I was noting the accounts given by PC Paton and PS Maxwell. PC Paton was on the scene and was the officer who activated his emergency button. I have posed the question of whether that emergency activation corresponded to the timing of the airwave message "officer down". I have then posed the question (to myself) of where PS Maxwell obtained the information that he passed on the airwaves at 07:24:26 (before end of restraint period) that PC Short has been stomped on. I noted that PS Maxwell stated that he was told by Paton (on arrival) that the deceased had "gone for NS and kicked and punched her to the ground". My notes provide that PC Paton's account refers to having passed a message over airwave re officer injured and that he seemed to be talking about PC Short but that this seemed to be after he went over to help her to her feet. I have noted "makes no sense with timings of airwaves." I know that I watched the footage on the multimedia disc repeatedly to try to make sense of the various statements and the sequence of events described by each of the witnesses. I had some doubts about the accuracy of the synchronization of video and airwave message. It appears from my notes that I was questioning in these notes the chronology given by PC Paton as to when he passed the airwave message and that the timing of the airwave message about PC Short being injured did not seem to be after PC Paton had gone to help her up. I am not sure that the issue of the apparent discrepancy in timing between PC Paton's airwave message and PC Paton going to help her up was a significant one and it was possible that his statement was not in chronological order in that respect. I am not sure that this particular timing issue was addressed in my report to Crown Counsel but the question of trying to identify the time when the stamp on PC Short occurred was addressed.

The second document I am asked to refer to is page 35 of another notebook (COPFS 05221). These notes relate to the expert medical witness, Rudy Crawford, instructed by the Crown in May or June 2019. This was during the period when the decision of Crown Counsel that there



should be no criminal proceedings was the subject of review at the request of the deceased's family. Mr Crawford was instructed by the Crown to provide opinion as to whether the injuries sustained by PC Short were consistent with the accounts given by some witnesses that Mr Bayoh stamped on her back. These notes relate to a meeting with Mr Crawford on 18<sup>th</sup> June 2019. I made a file note of this meeting (COPFS 01966) and have referred to this in my response to question 58 below.

The third document I am referred to named by me as 'Fiona Analysis' (COPFS 03674(a)). This is a 14 page typewritten note in which I have detailed the relevant parts of the statements and precognitions of witnesses who speaks to some element of the engagement by police with Mr Bayoh. It is clear to me that this is an early version of a document that was later completed by me. I completed this exercise for all of the eye witnesses and police officers in attendance and it was a helpful aid when checking and revising the narrative of events that was incorporated in the Precognition report to Crown Counsel. I highlighted in green the initial information provided to the attending officers, in yellow on the notes the actions of police officers and in blue the actions of Mr Bayoh as described by each witness. I also put in red type notes to myself about consistencies or inconsistencies of this evidence when viewed against other evidence. Albeit the note is incomplete it demonstrates my thinking and analysis at an early stage in considering my report to Crown Counsel. The footage was repeatedly examined by me, almost from second to second as I read through the statements of all the witnesses and tried to establish the extent to which the various accounts were supported by the CCTV/airwave messages or not. I am unable to provide details of all of the discrepancies I noted as I have not been provided with the Precognition report. I recall that there were some discrepancies and these are, to some extent, to be expected as each witness has a different perspective and may concentrate on their own involvement rather than on what others are doing at any given time. For example I have noted that PC Paton's account is inconsistent with PC Walker in terms of some chronology about handing PC Walker a baton, the timing of his message about Nicole Short injured. I have added my notes about what I can make out of his movements on CCTV.

One contradiction was the evidence about the stamp on PC Short since she herself did not speak to that but other officers present described seeing it. I considered all of the available evidence about the stamp on PC Short from police accounts, civilian accounts and compared them to what could be seen on CCTV at the same as audio messages were being passed by the officers over airwaves.

28. Please explain your involvement, if any, in gathering and analysing evidence in relation to Mr Kevin Nelson's account, including your understanding of his explanation that he did not see part of the engagement between Mr Bayoh. Was Mr Nelson asked to comment on the specifics of the details of the incident from the officers' statements in relation to a stamp by Mr Bayoh on PC Nicole Short?

I was not involved in the ingathering of evidence in relation to Kevin Nelson's account. I did not precognose him so cannot say what he was asked to comment on. However, I did pay very particular attention to the accounts given by this witness both in statements and precognitions because he took a sustained interest in what was going on outside his house. With reference to my notes in COPFS – 03674(a) I noted that Mr Nelson probably had the clearest view for the longest duration of any of the civilian eye witnesses and that view was only interrupted by his leaving one vantage point (his front window) and getting to the next vantage point at his front gate. I was able to identify the figure of Mr Nelson walking down the path to his gate on the CCTV footage from Gallagher's pub. It seemed from his accounts while at his front window he watched the initial engagement with the first officers on the scene (PCs Walker and Paton). He then saw Mr Bayoh lunge at and punch on the face/head the female officer (Nicole Short) and it was at this point that he left the window to go into the garden. I have noted that by the time that Mr Nelson was in his front garden Mr Bayoh was already on the ground. The timing of his move from the window to going outside appeared from all his accounts to coincide with the events described by the officers who speak to it, of the stamp on Nicole Short's back since they described it as following on immediately after striking her on the head and knocking her to the ground. I formed the view that Mr Nelson was a significant witness, an independent civilian witness whose evidence could be used to compare against that of the attending officers. I understood from his evidence that he moved from his vantage point at the window just after he saw Mr Bayoh punch PC Short.

29. Please explain your involvement, if any, in ingathering and analysing evidence in relation to the accounts of APS Scott Maxwell, PC Ashley Tomlinson and PC Craig Walker regarding the purported stamp on PC Nicole Short by Mr Bayoh, including the extent to which relevant Airwave transmissions were considered. I had no involvement in ingathering evidence from police officers. I analysed the evidence in the accounts of APS Maxwell, PC Tomlinson, and PC Walker in their statements regarding their accounts of a stamp on PC Nicole Short. PC Walker, according to my notes, spoke to one stamp on the lower back, whereas PC Tomlinson described two 'stomps' that had a great deal of force. In respect of their accounts I assessed what other witness evidence was available that could either support or refute what they said, along with the CCTV footage from the multimedia disc. I included in my analysis to Crown Counsel the reference to an airwave message "officer down", attributed to PC Paton. I had some doubt whether the timing of the airwave messages were accurately synchronised with the CCTV on the multi media disc that had been provided to me as there seemed to be some discrepancy between the timing of the message and the blurred images of an altercation. In assessing the evidence about the stamp on PC Short I also considered the extent to which civilian evidence provided support for these accounts. The accounts of the officers who were physically engaged with Mr Bayoh contained their own perceptions of what they were facing and their

justification for using the force that they did. This had to be viewed objectively, and with the assistance of the restraint expert, Martin Graves. COPFS – 03674(a) is an incomplete document and does not include reference to the evidence of APS Maxwell or to the airwave messages from him. However a full analysis was carried out. From memory, there was an issue with identifying the person who gave the radio message 'officer down'. I think it was initially wrongly attributed by PIRC in their report, to another officer (possibly PC Smith) who had not reached the scene by that time. As far as I recall, APS Maxwell sent an airwave message to the Control room about PC Short being 'stomped' on, but he did not witness this. His evidence was hearsay but given that his message was sent soon after he arrived on the scene, was useful in terms of limited opportunity for potential collusion between officers involved at that time in the restraint of Mr Bayoh.

30. Please explain your involvement, if any, in ingathering and analysing evidence in relation to Ms Wyse's account and related information, including her mobile telephone data and in particular her text messages.

I was not involved in ingathering evidence from Ms Wyse. I did not precognose her. I instructed PIRC to analyse her mobile phone to try to obtain a definitive timing of the snapchat photographs taken (see my response to question 53). Ashley Wyse gave a series of statements and was precognosed on two occasions by my colleagues before my involvement and I made notes of my assessment of her evidence in COPFS – 03674(a). I recall that the forensic report about Ashley Wyse's mobile phone was received quite late in the process but, from memory, there was nothing of significance in that report that altered my analysis of her evidence. Her accounts (in her statements and precognitions) were at odds with the CCTV footage with regards the number of officers who were involved in bringing Mr Bayoh to the ground. Her account of Mr Bayoh lying on his back on the ground was at odds with other accounts of his position during the period of restraint. The timing of the first snapchat photograph was assessed to have been take one minute into the period of the police restraint and was a very useful image of that moment in time. This image is inconsistent with an account given in one statement of six officers all lying on top of him. Ms Wyse saw leg restraints being used and to officers checking for breathing which accorded with the officer accounts and CCTV. She also referred to one officer using a baton to hold Mr Bayoh down, which provided some support to the account of PC Paton, who had described using his baton to pin down one of Mr Bayoh's arms in the struggle. My impression of the witness from her various accounts was that she was doing her best but in some respects was not a reliable witness. Unlike her [REDACTED] neighbour, she did not remain watching events for a sustained period. She could not recall the order in which events happened and her account was contradicted in some respects with what could be seen on the CCTV footage. Overall, the witness seemed to conflate what occurred at the start of the police engagement with what she later saw and videoed or photographed. I noted that she could not possibly have seen 6 police officers round Mr Bayoh before he was taken to the ground

as there were only 4 on the scene at the time and one (PC Short) had been assaulted and took no part in bringing Mr Bayoh down.

31. Please explain your involvement, if any, in ingathering and analysing evidence in relation to PC Short's vest, including the instruction of forensic examination of the dark marks on it (both in terms of the shape of the mark and the composition; and a comparison with Mr Bayoh's boots).

I was not involved in instructing the forensic analysis of PC Short's vest. I understand that the analysis was inconclusive so far as comparison with Mr Bayoh's boot and I would have made reference to this in the report to Crown Counsel.

32. Please explain your involvement, if any, in ingathering and analysing evidence in relation to biological samples taken from Mr Bayoh's body, including toxicologist expert opinion.

I was not involved in ingathering evidence regarding biological samples taken from the deceased or in relation to expert toxicology. The opinion of Professor Michael Eddleston, an expert in toxicology, was referred to and considered in our report to Crown Counsel. It was Professor Eddleston who stated in his report (para 23, COPFS 00038) "at the point physical restraint was started, his prognosis was poor". I am unable to comment further without access to the precognition report.

33. Please explain your involvement, if any, in ingathering and analysing evidence in relation to any belongings seized from Ms Collette Bell, Mr Zahid Saeed, Mr Martyn Dick and Ms Kirsty MacLeod, including the legal basis for their retention. I do not recall any analysis of evidence relating to items seized from Colette Bell, Zahid Saeed, Martyn Dick, Kirsty Macleod, other than reference to the fact that the knife found at the locus was, according to forensic examination, of same design as that found in the home shared by the deceased and Colette Bell. Retention of items seized as productions from witnesses was not addressed by me during my involvement in the case.

34. Please explain your involvement, if any, in considering if any of the actions of police officers and civilian staff relating to searches of Mr Bayoh and Mr Aamer Anwar in police databases. What was your understanding of any benefit to the police investigation and legality of carrying out a police database search in respect of a legal representative of a deceased person's family and, separately, the justification in recording intelligence relating to Mr Anwar under a counterterrorism category. How did COPFS take these matters forward, if at all?

I am asked to refer to pages 4-5 of COPFS 05221; page 2 of COPFS 05222 and email and attachments to Minute to the Lord Advocate - COPFS 06068. I was asked by Mr Brown to consider the evidence that PIRC had provided in relation to the allegation of potential criminality by Mr Anwar that officers of Police Scotland may have accessed police systems in breach of the Data Protection Act. [REDACTED]

[REDACTED] - [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

I am asked what COPFS did about this information. I am provided with earlier correspondence on the matter, namely: a copy of a letter (COPFS 02563 [REDACTED]) from the PF Major Crime and Fatalities to the PIRC asking PIRC to seek assurance from Police Scotland that they had the authority to hold the material and that there had been no contravention of legal privilege. I am also provided with a copy of a letter (COPFS 00582(f)) sent by the then Crown Agent to the Information Commissioner on 6<sup>th</sup> January 2017, expressing concerns about the gathering and retention of intelligence in relation to solicitors in order to allow the ICO to consider whether there was a breach of data protection principles or any offence committed by Police Scotland. I am referred also to an email trail (COPFS- 00583(j) [REDACTED]) in which ICO responded to communication from the Deputy Crown Agent, advising that the information provided did not demonstrate that a criminal offence had been committed; further that the information about the recording the reason for access and collection and storage of personal data of a solicitor 'did not appear to meet the bar for formal enforcement action' and that Police Scotland was engaging with their Assurance Team. If any further action was taken by COPFS it would be taken by those in more senior positions.

- 35. Please explain your involvement, if any, in preparing and commissioning the multimedia presentation. I was not involved in preparing or commissioning the multimedia presentation.
- 36. Please explain your involvement, if any, in ingathering and analysing statistical data relevant to the issues in the Investigation and Precognition. My work did not involve ingathering or analysis of statistics.

37. Please explain your involvement, if any, in ingathering and analysing evidence in relation to training of the officers, including the relevance of this information to investigating any potential offences by Police Scotland.

I recall instructing PIRC to obtain much more detailed information from Police Scotland about the Standard operating procedures and documents showing the content of training of police officers. I was seeking to understand the nature of the officer safety training delivered to the officers, regarding their use of force and regarding identification of drug induced psychosis, otherwise known as acute behavioural disturbance. I wanted this information to share with Mr Martin Graves who was an expert in restraint techniques. He had experience in restraint techniques and the training of police officers in these techniques in England and Wales. It was important to know what training the Scottish officers had been given on how to restrain an individual, the extent of the force they were permitted to use and the knowledge that they would have about recognising the signs of someone suffering from drug induced psychosis or acute behavioural disturbance. The information about the training would assist in assessing whether any of the officers had the necessary *mens rea* for any criminal offence. Mr Graves was asked also to comment on the adequacy of the training materials with a view to assessing whether Police Scotland had breached health and safety legislation. The letters to Mr Graves set out what was provided to him.

38. Please explain your involvement, if any, in ingathering and analysing evidence in relation to the extent to which race was a factor in the actions of the police officers engaging Mr Bayoh, including your comment on the relevancy of this issue to the Investigation and Precognition. Was race considered in relation to any offences to investigate? Was race considered as an aggravating factor in the offence? I was not involved in ingathering evidence about race. If my analysis of evidence had established that there was sufficient evidence to support criminal charges against any of the officers, the question of any racial motivation or intention would have been addressed at that stage. Since the analysis of evidence did not identify criminality by any officer, the question of racial aggravation did not arise since no offence had been identified.

39. Did you convey the analysis of all these areas to Crown Counsel? What was the response? Did you receive any advice or guidance from Crown Counsel and take further action accordingly?

My recollection is that Crown Counsel was pleased with the quality of the precognition report submitted and subsequently issued an instruction for no criminal proceedings which was, I understand, approved by Law Officers. I did not receive any advice or guidance from Crown Counsel following the submission of the precognition report.

40. In your notebook at page 14 a narrative is written with the heading "Ashley" at the top of the page. Does this note relate to a meeting with Ms Ashley Edwards QC? If not, what is the note relating to? Is this a note of what someone said to you or a briefing you were providing? At the bottom of the page the following note is written: "Reflective strip - @ kidney level waistband." Is this a reference to PC Short's vest? What was discussed? I am asked about a note on page 14 of a notebook, COPFS 05220. I believe the note was made in a meeting at PIRC's office where Les Brown,

Alasdair MacLeod, Ashley Edwards QC and I were in attendance. I believe this meeting was in December 2017 as I recall it was very soon after I became involved in the investigation. This seems to be a note about the position of Mr Bayoh when he was being restrained on the ground. We viewed footage of the snapchat still image taken from Ashely Wyse's mobile phone and there was some discussion about how one of the officers seen in the footage in a position over Mr Bayoh could be identified. The reference to 'Ashley' could be relating to a discussion with Ashley Edwards QC, or in relation to Ashley Wyse and the snapchat photograph. I do not think this was a reference to PC Short's vest. I recall the discussion with PIRC investigators about the snapchat photograph in which a reflective or white strip on the back of one of the officers could just be seen at waistband level. From memory there was some follow up with PIRC to ascertain if any officer had worn any white or light coloured garment under their police uniform, but this proved negative in terms of what was seized.

41. In your notebook at page 6 are entries under a heading "Correspondence Folders Review", at page 8 are entries under a heading "Review of Witness Table 17/7/18" and at page 9 are entries under a heading "Review of Prod Table 18/7/18". Can you recall if the correspondence folder review was carried out around the same time as the others? What was the purpose of these reviews?

I am asked about notes I made in a notebook reference COPFS 05221 about my review of correspondence folders, table of witnesses and production table. I cannot recall when the correspondence review was carried out. I have no recollection now if the review of the correspondence folder was for something specific or simply for the purpose of self briefing of what had taken place before I became involved. The witness and production tables had been commenced by Alasdair Macleod. Again, due to the passage of time I cannot recall why I was carrying out a review, whether looking for some particular or simply general self briefing. I may have been assisting Alasdair in updating the tables with the information required so that the witnesses and productions were fully cross referenced.

42. In the review of productions in your notebook the following entry is written relating to a task to contact PIRC regarding the completing of use of CS forms:  
Pro 316 – Community Impact & Reassurance Group Tasking Spreadsheet – Task 24 – re Supt Edmonston contacting Supt Gibson in Training – to get his staff to contact PIRC, discuss circs, NEGATE the need for local completion Qu – Why is this action on this spreadsheet? Why was this done? Protect officers / reputation of force?  
What is the relevancy of the completion of use of CS forms to the Investigation and Precognition? Were your questions ever addressed and the issue resolved? What difference, if any, would it have made to the Investigation and Precognition for the use of CS forms to have been completed?

I am asked about notes on page 9 of a notebook COPFS 05221. These relate to production 316 seized by PIRC – Community Impact & Reassurance Group Tasking Spreadsheet – task 24. I am provided with PIRC 01127 and referred to page 5 where the task is described as "Information to be sought in regards to the requirement for Use of Force

forms to be submitted by the officers involved. The task was marked complete – an update that Supt Gibson, Training contacted and asked for staff to contact PIRC, discuss the circumstances and negate the need for local completion of the use of CS forms given the full circumstances...” I took a note of this as I was surprised to see that the police at a senior level appeared to be in discussion with PIRC about the completion of CS forms and Use of Force forms. I understood that CS forms as a matter of routine ought to be completed by officers who deployed CS spray. This note indicated that none were completed. My note reflected my own thoughts about the motive behind this action – that those at senior level in the police were involved and that this may be to protect the officers and the reputation of the police force. I understood that the questions on the CS form would ask the officer to explain/justify the drawing of or deployment of the spray. Use of Force forms would normally be completed by officers using equipment such as handcuffs, leg restraints and batons and questions on the form would ask the officer to provide an explanation/justification for their use. No such forms were completed by any of the officers involved with Mr Bayoh. As such, a source of evidence that might have provided the PIRC and COPFS with information about what the officers were considering when using force and deploying their equipment was denied to the investigation. Such evidence would have been helpful when analysing the evidence about *mens rea*. The questions about why this task was on the spreadsheet were not addressed in the course of my involvement, when addressing evidence of criminality, but could have been matters for a subsequent inquiry into the death such as is now taking place.

43. In the review of productions in your notebook the following entry is written:  
 Pro 455 – Notes – handwritten – by Keith Harrower on 4/6/15 – taking stat from Craig Walker – although some same/similar to typewritten version this is by no means a full record of the interview. Notable gaps – no mention of hearing on radio re male hitting cars / under influence; stamping on N/S; hearing rib break...!!  
 What was notable about the gaps between the handwritten notes and the typed copy of the statement? What significance, if any, did you consider this to have? What actions did you take in order to address any concerns you may have had in relation to the “notable gaps”?  
 Was this raised with Crown Counsel and what was discussed?  
 I am asked about notes I took on review of the production table and of production 455, handwritten notes by Keith Harrower on 4/6/15 taking statement from Craig Walker. I was not sure of the significance of the production. We would not normally be provided with hand written notes of interviewers of witnesses. I noted that other handwritten notes provided were not complete either (for example Maurice Rhodes (pro 461) was in bullet point form. I considered that the notes made by Mr Harrower were 4 pages long and referred to an interview that lasted from 11:55 am until 21:10 with four short breaks. The typewritten notes were 14 pages long and contained considerably more detail in all respects and it was therefore highly unlikely that these notes were used as a verbatim record of what was said at the interview. I recall speaking to Alasdair MacLeod and Les Brown about this. I was made aware that before I had become involved in



the investigation there had been an issue about accuracy of typed statements provided by PIRC. After this was resolved I understood that PIRC had provided an assurance that the typewritten statements that were then provided had been checked and were accurate. I recall Mr Brown advising that given such an assurance had been provided by PIRC about the accuracy of the typewritten statements we could be satisfied with them. I do not recall raising this with Crown Counsel as I believed it had been resolved.

44. At page 34 of your notebook you have written: "Lindsey Miller noted – so perhaps she has transcript? "Sheku took drugs, everyone knew that"." What is this regarding? Please explain this point further.

I am asked about a note made on page 34 of my notebook COPFS 05222. Due to the passage of time, I have no recollection of the circumstances in which this note was made. It clearly relates to someone discussing information about the deceased taking drugs. I do not know what the transcript would relate to.

45. To what extent was race a factor in your analysis of the actions of the police officers? In your view, was this sufficient to inform Crown Counsel of the impact, if any, that Mr Bayoh's race had on the actions of the police officers who engaged him?

I was concerned with considering whether the actions of any of the officers either individually or collectively amounted to criminality. My focus was on the actions of the officers during the period of their engagement with the deceased and the evidence of how they conducted themselves thereafter. I did not identify criminality on the part of any of the officers involved. Had I identified criminality it would then have been part of my analysis in respect of criminality to consider whether the conduct was racially aggravated under section 50A(1)(b) of the Criminal Law Consolidation (Scotland) Act 1995 or whether race was a motivating factor that would amount to an aggravation of the conduct of the accused officer(s) in terms of section 96(2) of that Act.

46. Do you recall instances when the family and their legal representatives had proposed or suggested lines of enquiry or potential witnesses? Do you recall those being taken forward? I did not have any direct dealings with the family or their legal representative and I asked to be provided with copies of correspondence from Mr Anwar to assist me in answering this question. It is evident from what has been provided to me that most of the proposed or suggested lines of enquiry or potential witnesses were made in the period before I was involved in the investigation. However, I do recall that during the VRR process I was made aware of a request for more information about the positions of CCTV cameras at Kirkcaldy police station as referenced in a letter of 8<sup>th</sup> February 2019 to the Lord Advocate - COPFS-02112 (b) and this line of inquiry was followed up with PIRC and the information provided to Mr Anwar. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### Learning from other investigations

47. Prior to and during your involvement in the Investigation and Precognition, what awareness did you have of investigations by the police and/or the CPS into race in England and Wales? What learning did you derive from these investigations? Did anything you learned from these investigations result in any change in approach to your involvement in this case compared with your involvement in prior investigations?

Prior to my involvement in this case I had no awareness of investigations by police and /or CPS into race in England and Wales, other than what was reported in the press at the time or what I had read in relation to reports of English cases.

48. Insofar as not covered above, during your involvement in the Investigation and Precognition, to what extent did you consider the investigation into the death of Mr Sean Rigg in assessing the actions of the police officers? Prior to submission of the Precognition in May 2018, had you read the report of the Independent Review of the IPCC investigation into the death of Mr Rigg?<sup>19</sup> If so, at the time you read it, what did you understand to be the issues and learning for the IPCC and CPS resulting from this Review? What did you understand to be the importance of race in issues raised? How did you apply any of these considerations and learning to your involvement in the Investigation and Precognition?

I had read the report of the IPCC investigation into Sean Rigg's death before submitting the precognition report in May 2018.

I understood that IPCC had issues and learning in respect of the following: that they should take control of the interview process with police officers; that investigations of deaths in custody involving restraint the precise justification for restraint, its nature and duration are robustly addressed including dynamically assessing the initial and continuing need for restraint, looking particularly at the duration of time of restraint and then the moment when control is gained by officers and the opportunity to assess for signs of potential medical issues; that it was important to understand what was known at the time – not what was later known following investigation; the need for independent experts including restraint experts; the need for information embedded in a mobile phone about when photographic evidence was taken; the need for a robust and objective analysis of the evidence, testing the police accounts against other known facts or facts from independent sources. I took into account the learning from this review in the way I drafted the instruction letter to the restraint expert, Mr Graves, my analysis of the actions of the officers, considering at each step of their engagement with Mr Bayoh what was known to them and what should have been obvious to them in light of their training; reviewing their accounts against other known facts and accounts, particularly accounts of civilian witnesses and with reference to CCTV and airwave messages. The review also highlighted the need to have Ashley Wyse's mobile phone examined in relation to embedded information about when the photograph was taken that showed the ongoing restraint. I understood that the review concluded that IPCC interviews ought to have explored the question of race. With regard to this issue, the statements of the witnesses had been taken and

precognition carried out in respect of civilian witnesses by the time I became involved.

49. Insofar as not covered above, to what extent did you consider the approach of the CPS in cases of deaths in custody or during or following contact with the police in which restraint was used? What were you interested in understanding or learning from the approach of CPS? I am aware that Mr Brown and Ms Edwards QC consulted with the CPS about their approach to deaths in custody. I was not involved in this exercise.

50. [REDACTED]

Forensic examination

51. What is your understanding of the role of COPFS in relation to SPA Forensics' involvement in the Investigation and Precognition? What is normal practice in involving PIRC in the instruction and findings of SPA Forensics?

Forensic examination would normally be instructed by COPFS following a first appearance in court of an accused. There is a protocol with the Police ( and other investigating agencies) that any forensic analysis to be carried out before a person is brought before court is normally instructed by the investigating agency, whether police or PIRC, although there may be some discussion with COPFS about the forensic strategy in certain cases. CAAPD is a pre-court unit in which investigation and precognition is carried out into allegations of criminality of serving police officers before reporting to Crown Counsel to obtain instructions for court proceedings. It is therefore unusual for CAAPD to instruct PIRC in relation to forensic examination, as CAAPD does not process cases in which proceedings have been commenced and to that extent there is little precedent on which to base 'normal practice'.

52. Did you provide any instructions to SPA Forensics in relation to the incident in which Mr Bayoh died? Please provide full details and the rationale for these instructions. Did you seek any input from PIRC for these instructions? Did you notify PIRC of the terms of these instructions? Did you share SPA Forensics' findings with PIRC? Please confirm the basis for any departures from normal practice.

To my recollection I provided instructions to SPA forensics in relation to the incident in which Mr Bayoh died in relation to two separate matters. The first related to the embedded timing of the video/photographs taken by Ashley Wyse on her mobile phone. The rationale for instructing this work was to secure the most accurate evidence of the timing of this footage which captured some images of the restraint of Mr Bayoh. PIRC ought to have instructed SPA without recourse to COPFS in line with the protocol but it is my recollection that PIRC were advised by SPA that they could prioritise the work if they received a Standard Forensic Instruction (SFI) from COPFS. I therefore created the form and sent it to PIRC. The

process would then involve PIRC in turn providing more detailed instruction to SPA along with the device that was to be examined. I believe that the report of the examination of the device was provided by SPA to PIRC, who in turn provided it to COPFS. The basis for departure from the normal practice (in which PIRC would instruct SPA without recourse to COPFS for a SFI) was at the suggestion of PIRC in order to have SPA prioritise the work.

The second matter was on the instruction of Ashley Edwards QC, Alasdair MacLeod approached SPA to find out if it was possible for them to reconstruct on a body mapping programme the various positions of Mr Bayoh during the restraint period as described by the various eye witnesses. I understood that this was simply to obtain for Crown Counsel a visual aid in understanding their descriptions of position and movement of the deceased. In this connection I attended SPA at [REDACTED] with Alasdair Macleod and on a later date with Ashley Edwards QC where the descriptions of the witnesses were provided to the forensic technician who created a series of images based on those descriptions. I am not aware of any 'normal practice' in relation to this type of SPA instruction.

53. Please read the email chain involving you and Mr Stuart Taylor of PIRC on 13 February 2018 and attached Standard Forensic Instructions both dated 13 February 2018.<sup>21</sup> On page 1 under "Accused/Deceased Name" the form first lists "Nicole Short". You then change this to "Deceased – Sheku Bayoh" following a request by PIRC's Mr Taylor and explained it was auto-populated by your system. Please confirm further details of how it was auto-populated by your system and, if known, why your system initially listed Nicole Short as the accused/deceased. What was your understanding of why Mr Taylor was concerned about the families' legal representatives and why did you make the change requested? Why did you forward this email chain to your colleagues at the end of the day? To what extent was circulating an email chain with PIRC normal practice for when you completed a task? In connection with the instruction to SPA to obtain accurate evidence of timing of video/photographic evidence I am asked to review the following documents: COPFS- 04332, COPFS-04332(a); PIRC – 01964(a). The SFI form created by me is created in an IT programme called SOSR in which certain information is drawn from another associated IT programme (PROMIS). The case reference – [REDACTED] is the link between the two systems. Under this reference number, certain information is stored about the names of the persons to whom the case relates. In this case, the first system (PROMIS) lists the names of the officers who are the subject of a report from PIRC and are considered potential 'subject officers'. The officers were not 'accused' because there were no criminal proceedings against them. However, for the purpose of the SFI form, it would appear that the name of the first potential subject officer, in this case, Nicole Short, has been drawn into and auto-populated the SFI form as an accused person. I assume that this is because the form is designed for instruction of forensic examination following initial appearance in court when there is a known named accused. The form is not designed for the situation here where there was no accused as the matter remained under investigation. It is likely that I did not notice this when completing the remaining information about the nature of the instruction required on the

form. When Stuart Taylor of PIRC highlighted this to me, I understood that he was concerned that the document might be misleading in suggesting that Nicole Short was at that time an 'accused person' when she was not. In the circumstances I had no difficulty with his suggestion that the heading be changed to 'death of Sheku Bayoh' and duly amended the form accordingly. I do not know why I circulated the email chain to colleagues, other than perhaps to confirm to colleagues that the task of instructing SPA in this matter had been completed by me.

54. Were you involved in the direction of SPA Forensics relating to the forensic examination of PC Short's vest? Did you instruct fingerprint examination of the vest? If not, were you aware that the vest was to be examined for fingerprints? If so, what did you understand to be the reason for the fingerprint testing being carried out?

I had no involvement in the instruction of SPA relating to forensic examination of Nicole Short's police vest.

55. The Inquiry instructed a tread mark expert, Mr Paul Ryder. Mr Ryder in his report relating to the vest of PC Short explained: 28. ... There was black staining to the plastic-coated aspects of the reflective strips and to the police badge on the rear of the vest. I understand that this staining was a result of treating these parts of the vest with a black powder suspension with a view to developing any fingerprints that might be present. As a consequence of this treatment being applied as a liquid and then having to be removed by a washing process, parts of the yellow fluorescent fabric adjacent to the treated areas have been stained black. This includes the part of the vest on which the dark deposits had been observed. 29. From reference to the production PIRC-01176 provided to me it was observed that this staining from the fingerprint treatment had obscured parts of the dark staining that had originally been present on this vest. Were you aware that the fingerprint testing by SPA Forensics may hinder further forensic analysis being carried out on the vest? Was this a concern for you or, as far as you were aware, any of your colleagues?

Since I was not involved in the investigation at the time of examination of PC Short's police vest, I am unable to comment.

### Expert Witnesses

56. What involvement, if any, did you have in the instruction of expert witnesses? Please include your involvement in the instruction of experts by both PIRC and COPFS separately. Please include your involvement in the following aspects of the instruction: (i) the identification and choice of experts (including consideration of their qualifications, expertise and independence), and ensuring they had no conflict; (ii) preparation of the letters of instruction, and (iii) the information and documentation provided to experts to assist in framing their opinion.

I was not involved in any way in the instruction by PIRC of expert witnesses. I was involved in the instruction of the expert witness, Mr Martin Graves. Although copied into emails by colleagues trying to identify an expert in police restraint, I was not personally involved in finding or selecting him.

I was involved in drafting the letter of instruction to Mr Graves and I believe this was revised firstly by colleagues and ultimately by Crown Counsel. I am referred to COPFS -00008 - Final letter to Martin Graves and also to COPFS - 00008 dated 24<sup>th</sup> January 2018. This sets out the

facts as I understood them at the time, the extent to which I was aware of discrepancies, such as the potential for the airwave message recordings to be slightly out of time with the video footage on the composite (multi media) disc following my review of the evidence, lists the materials being sent to Mr Graves ( under separate cover) for him to consider before coming to a view and asks a series of questions about the different stages of police engagement with Mr Bayoh. At each juncture I sought opinion from the expert, taking into account the information known to them at the time, about the profile of Mr Bayoh, their risk assessment, their use of force. I asked at each stage what if anything the officers could have done differently. I also asked the expert to consider at each stage whether the officers should have been alert to the possibility that Mr Bayoh was suffering from drug induced psychosis and if so, what, if anything they could or should have done differently in light of that, in accordance with their training. In relation to the period of restraint on the ground I asked the expert to provide opinion on the methods of restraint used bearing in mind the training on positional asphyxia, on PC Paton's use of his baton, and about whether the officers could or should have moved Mr Bayoh to another position and at what stage. I also asked the expert to comment on the way Mr Bayoh's condition was monitored until CPR commenced. I recall sending a follow up letter or email to Mr Graves when additional training materials had been ingathered by PIRC. I am provided with COPFS – 00008 [REDACTED] which was drafted by me but sent to him by my colleague, Alasdair MacLeod.

57. In your letter of instruction to Mr Martin Graves on page 6 you write: "Given the information available to those first two police officers, please provide your comment on the profile of the now deceased..." What is meant by the "profile" of the now deceased? How was this relevant to the reasonableness of the officers' actions?

I asked Mr Graves to comment on the 'profile' of Mr Bayoh at different stages in the engagement. I was referring to 'profiled offender behaviour' described in police Officer Safety Training that takes account of actions and behaviour of the subject together with any impact factors present. The profiled behaviour is relevant to the perception of the officers and the reasonableness, proportionality, lawfulness and justification of their actions in response. I was seeking Mr Graves' objective assessment of how Mr Bayoh presented to the officers.

58. What involvement did you have, if any, in consulting with expert witnesses? What was the purpose and outcome of each of these consultations?

I am asked about my involvement in consulting with expert witnesses. The first consultation was a precognition with Martin Graves in May 2018 at [REDACTED] office. Alasdair Macleod and I precognosed him about his report. COPFS 00041 is our combined note of the precognition, which we completed on the day. The purpose was to gain a more in-depth understanding from him of his conclusions and clarify some of the comments made in his report.

I am referred to and asked to comment on COPFS – 01966. This is a file note of 18<sup>th</sup> June 2019. I met Mr Rudy Crawford, expert witness referred to in response to question 27 above. This was at a time when the decision

of COPFS that there should be no criminal proceedings was under review by another senior Advocate Depute under COPFS Victim Right to Review (VRR) procedure. I would not describe this as a consultation as such. It was a meeting at Hamilton at his request where he could view a police vest similar to that worn by Nicole Short and where he took the opportunity to view the multi media file containing CCTV, 999 calls, airwaves recordings. He had not yet produced his report at that stage. The purpose of the meeting was to facilitate access to him of evidence that he considered might be useful in the preparation of his report. I did not consult with him after he provided a report.

COPFS-01968 is a file note about a subsequent meeting at PIRC's offices on 3<sup>rd</sup> July 2019. This was following the meeting on 18<sup>th</sup> June 2019 and it was at the behest of Mr Crawford so that he could view the CCTV footage (Gallagher's pub) on PIRC's larger screen. The notes are self explanatory. The purpose was to facilitate the viewing by Mr Crawford of video footage on a larger screen. I would not describe this as a consultation since Mr Crawford had not produced his report by this time.

COPFS-02332 is a note of a consultation at Crown office on 28<sup>th</sup> June 2019 with Martin Graves. Again, this was during the period of (VRR) review of the decision that there should be no criminal proceedings against any officer. The senior Advocate Depute (AD) who was carrying out the review asked me and Alasdair MacLeod to attend the consultation with Mr Graves. I took these notes during the consultation. The purpose, as I understood it, was for the Advocate Depute to assess the expert evidence provided by Mr Graves and was carried out in the course of the review into the decision that had been made that there should be no criminal proceedings.

59. What, if any, analysis did you conduct in respect of the expert witness evidence? What was the outcome of this analysis? Was anything done in light of your analysis?

The report by Martin Graves and subsequent precognition thereon was considered and referred to in the analysis of evidence contained in the report to Crown Counsel. The reports of all of the medical and experts in other related fields who provided reports on their particular specialism, were considered and referred to in the precognition report to Crown Counsel. As I have not been provided with a copy of the precognition report to Crown Counsel I am unable to provide further detail.

60. At the point the case was reported to Crown Counsel, were you satisfied with the quality and extent of the expert evidence available? Did you have concerns regarding any of the expert evidence? Did you make Crown Counsel aware of your views?

At the point when the case was reported to Crown Counsel I was satisfied with the quality of Mr Graves evidence. It is my practice to record any comment I have in relation to a witness I have precognosed that might assist the person leading a witness in court. I believe I made a note about Mr Graves being quite talkative and tending, on occasion, to offer more in his response than simply answering the questions. That note at the end of the precognition note has been redacted from the copy provided to me. This was not a concern about the quality of his expertise. I did not have

any concerns about the quality and extent of the other expert evidence in the case and would have raised concerns with Crown Counsel if I had.

61. In your notebook at page 2 you wrote: "Neighbours tried to talk him down – people who knew him – he did not respond – could not". What are the circumstances of you making this note, for example is this information being told to you by someone or is this a note you are making by way of analysis of the evidence? Do you understand this to be an accurate reflection of the information available to you, including with reference to the terms of the statement of Mr Neil Morgan<sup>26</sup> at page 2 and the PIRC Report<sup>27</sup> summary of the neighbours' evidence at page 28?

I am referred to a note in COPFS 05221. I do not now recall the circumstances in which this note was written but from the way it is written it appears to be a note of a discussion in relation to evidence that may or may not be relevant to charges under the Corporate Manslaughter and Corporate Homicide Act 2007 as I see my note refers to section 5(2) sections a – c. The note also refers to the Health and Safety at Work Act 1974 as I see the abbreviation 'HSWA'. I cannot recall more given the passage of time. If the note relates to a conversation or discussion, it is possible that these are not my own words or assessment of the evidence. I am asked if this note (about the neighbours) is an accurate reflection of the information available to me with reference to the statement of Neil Morgan (PIRC 00073) and PIRC summary of neighbour's evidence (PIRC 00002). This does not appear to be accurate given that Neil Morgan refers (page 2 of his statement) to a refusal to come back to Morgan's house rather than not responding. The summary of evidence at page 28 also refers to the response given by Mr Bayoh to Neil Morgan – "no, no, I'm cool".

62. Please read your email to your colleagues in COPFS dated 29 May 2018 relating to Dr William Lawler's attached letter. You write: "This seems to answer concerns about the trace of pulse noted by the paramedics." Please explain these concerns further and how Dr Lawler's letter addressed them. Did your colleagues agree with you that the concerns were addressed?

I am afraid that due to the passage of time I have no recollection of what the concerns were about the trace of pulse noted by the paramedics and now have no access to the file to review the statements of those witnesses. However, referring to the letter of 21<sup>st</sup> May 2018 addressed to Alasdair MacLeod, (COPFS -00083 ) Dr Lawler concluded with the comment that there was nothing in the statements that caused him to revise or in any way alter his previously stated opinions. I therefore take it from that sentence that the comments of paramedics in their statements about a trace of a pulse in the ambulance were referred to Dr Lawler in case they changed his view on the matters on which he had provided comment.

### The Health and Safety (HSE Executive)

63. Prior to your involvement in the Investigation and Precognition, what experience did you have in investigations involving HSE?



I had some experience of deaths investigations involving HSE and these were all in a period when I had last investigated deaths (late 1990s - 2002) prior to this matter. One related to a tyre fitting business. Another related to a death due to drowning in a care home.

64. In what circumstances would COPFS normally invite the involvement of HSE or engage with HSE?

In the latter case (death due to drowning, about 2000) I recall that I invited HSE to become involved and they did. Since then, I have had no experience of cases in which COPFS invited the involvement of HSE and I do not have recent experience of the circumstances in which COPFS would invite HSE to become involved.

65. What involvement, if any, did you have in liaison with HSE? Why did COPFS request their involvement? What benefit would HSE have provided? Was consideration given to involving HSE? Was consideration given to any disparity in resources between HSE and PIRC insofar as it may impact on the investigation into the death of Mr Bayoh?

I had no involvement in liaison with HSE in relation to this investigation and given my limited experience in this field, do not feel I am the best person to comment on these matters.

66. What was the outcome of COPFS' liaison with HSE? How did this impact the Investigation and Precognition?

I believe that there were moves at a more senior level to invite HSE to become involved and that HSE had declined. I am unable to speculate on the impact that had on the investigation and precognition.

#### European Convention on Human Rights (ECHR)

67. During the Investigation and Precognition, were you involved in discussions in any form relating to COPFS' obligations under Articles 2 and 14 of the ECHR in respect of Mr Bayoh and his family? If so, what was your understanding of these obligations and how, if at all, did this affect your approach to your work?

I am asked about any involvement in discussions about COPFS obligations under articles 2 and 14 of ECHR re Mr Bayoh and his family. I believe the note in my notebook COPFS 05220 at page 41 refers to a discussion in which Les Brown stressed the importance following the principles of Article 2 of ECHR and referred to correspondence from Mr Anwar in 2017 in relation to that article. My understanding is that Article 2 provides for the right to life and the right not to be deprived of life. By dint of Article 2 COPFS had an obligation to carry out an effective investigation into the death of Mr Bayoh since his death was in the course of restraint at the hands of agents of the state, namely the police. Such an investigation should be independent, effective and include a thorough, impartial analysis of all relevant evidence, be expeditious and open to public scrutiny. Although the views of the family of the deceased should be taken into account the investigation should not be restricted to their concerns and there should be consideration of all relevant lines of enquiry. It affected the approach to my work in that it underpinned everything I did. Much of the investigation had taken place before my involvement but to the extent that further investigation was required, this was instructed promptly, ensuring that all relevant lines of enquiry were followed. For my

part I was concerned to obtain the necessary evidence of training materials and submit these along with the relevant statements and productions in an instruction to an expert in restraint who was independent of Police Scotland. Thereafter I conducted a thorough analysis of the evidence about potential criminality, addressing potential individual and corporate criminality as expeditiously as possible. I had no direct dealings with the family but was aware, through the correspondence from Mr Anwar, of their concerns and did my best to address those in my report to Crown Counsel where they related to potential criminality. I understood that there had been some disclosure of evidence to Mr Anwar from a relatively early stage in the investigation in order that expert opinion could be instructed on behalf of the family and referred to this in a Minute to PCC of 5 June 2020 (COPFS-00574a). I am also aware that the solicitor for the family was invited to have input into the identification of expert witnesses instructed by the Crown. Article 14 provides that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground including race and colour. I was aware of this right as it underpins the impartial approach to my work and is a standard that is expected of everyone in COPFS.

68. To what extent was Article 2 of the ECHR considered in respect of the duties of Police Scotland and PIRC?

Articles 2 and 14 applied to both Police Scotland and to PIRC. In the course of the investigation the question of whether the use of force by the police officers who engaged with him had caused the death of Mr Bayoh was explored in great depth and the report to Crown Counsel fully addressed the available evidence on this. COPFS instructed the PIRC to carry out the initial investigation into the death of Mr Bayoh in line with the requirement for an independent investigation. The same requirements of Article 2 and 14 as described in point 67 above applied to PIRC's investigation. PIRC was also instructed to investigate issues of race and whether there was any evidence of racial motivation on the part of police officers. There were obvious concerns about the failure to obtain initial accounts from the officers involved and the absence of completed standard forms relating to CS and PAVA spray and use of force was considered and addressed in the precognition report to Crown Counsel.

### Media Engagement

69. Were you following the media reporting of the matter? To what extent, if any, was your involvement in the Investigation and Precognition influenced by what was reported in the media? Were you aware if any of your colleagues were influenced by what was reported in the media?

After I became involved in the investigation, I naturally took an interest in any media reporting that I became aware of. I do not think my work in the investigation and report to Crown Counsel was in any way influenced by media reporting, it was based on the evidence. I cannot say if my colleagues were influenced by what was reported in the media.

70. What involvement did you have, if any, in COPFS' media engagement? This may include discussing media lines with colleagues, liaison with the COPFS media department, direct contact with the media or providing information to colleagues dealing with the media. In my role in COPFS I do not recall discussing media lines with our media relations department. That would have been Mr Brown's role. I may have provided information to colleagues dealing with the media but given the passage of time since then I have no recollection of this and would have to be referred to emails in this connection.
71. To what extent, if any, did you rely upon Dr Karch's opinion in order to form conclusions of Mr Bayoh's cause of death? Please read the comments attributed to Dr Karch reported in the Sun newspaper on 1 November 2015. Were you aware of these comments during the course of your involvement in the Investigation? How were they brought to your attention? What impact did these comments have on your assessment of Dr Karch's status as an independent expert witness? Were Crown Counsel made aware of these comments and any concerns you or your colleagues may have had?
- The opinion of Dr Karch was at odds with other experts. His report was one of the many medical expert reports considered during the course of the investigation. The publication of the article in the Sun newspaper had occurred in November 2015 and I was involved from December 2017 onwards. I cannot now recall if the newspaper article was drawn to my attention. I may have read about it in self-briefing from reading the correspondence file as the matter was raised by Mr Anwar at the time of publication. I believe the comments were brought to the attention of Law Officers at the time.
72. Were you aware of the Mail on Sunday newspaper article reporting the decision of COPFS not to prosecute any of the officers, prior to Mr Bayoh's family being informed? Were you aware of, and/or did you have any involvement in, any internal investigation within COPFS into the source of the information in the Mail on Sunday's article?
- I was made aware of the Mail on Sunday newspaper article by Mr Brown the day following publication and was told that there was to be an internal investigation into the source of this article. I was aware that there was to be an internal investigation but not involved in the conduct of the investigation.
73. On page 2 of a Minute to Principal Crown Counsel dated 5 June 2020 you state: "10. What is of concern is that these inaccurate comments may influence the recollections of those witnesses who are not connected to the deceased but who witnessed the restraint by the police." Which inaccurate comments were you referring to? Please explain the issue further. Was this an issue in media reporting over the course of the Investigation and Precognition? What was done to address this issue?
- The comments I was referring to were the reported comments made by Mr Anwar, Ms Colette Bell and Ms Kadi Johnson to members of the press that Mr Bayoh had said the words "I can't breathe". This was around the time when there was press reporting of the death of George Floyd in the US. I was not aware of any evidence that had been obtained in the course of the investigation that suggested that the deceased had said these words. Such words would have had significance in the context of evidence about the police restraint. I was concerned that no one had come forward with such evidence. I would have expected that if the family of the

deceased had been provided with information that Mr Bayoh had said such words that this would have been made known to the Crown. I was concerned that such reports could have an influence on or could have tainted the recollection of witnesses who may be called to this Inquiry. I was aware that throughout the course of this investigation there were press reports emanating from sources for the Police Federation and from the family of the deceased providing conflicting accounts about the circumstances of the death of Mr Bayoh. I believe that following my Minute to PCC on this matter, the issue was brought to the attention of the Chair of this Inquiry.

Parallel Investigation

74. Were you aware of an investigation into Mr Bayoh’s death being carried out on behalf of the SPF by Mr John Sallens? Did you have any concerns about this? If so, what decisions and actions did you take to resolve the issue?

I was made aware, when I became involved in the investigation, that there had been some investigation of the circumstances of Mr Bayoh’s death by Mr John Sallens, on behalf of the Police Federation. Since this investigation took place long before my involvement, I did not take any action or make any decisions about it.

75. Were you aware of witness accounts that investigators provided them with information from other sources and made them feel uncomfortable? If so, was anything done to address this?

I was not aware of information being provided to witnesses by SPF investigators.

76. Were you aware of a report of findings of the SPF’s investigation being sent to PIRC? To what extent, if any, did this report affect the approach of COPFS in the Investigation?

I was not aware of a report of findings of the SPF’s investigation being sent to PIRC. The PIRC reports (PIRC 00002, 00003, 00004) have been provided to me to check and there is no reference to any such investigation in these reports. I did learn, through a review of the correspondence folder that a letter dated 3 September 2015 had been sent by PBW Solicitors (presumably to COPFS), representing the Police Federation in which there is reference to a summary of their investigation.

[REDACTED] - [REDACTED]  
[REDACTED]  
[REDACTED] - [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

Race

77. Do you have any experience of racism being a factor to investigate in an investigation relating to: (i) a death in custody or death during or following police contact; (ii) the actions of on-duty police officers. If so, please provide details of the year(s) you were involved, how race was a factor, how you investigated the race aspect and the outcome.

I have had no previous experience of investigating a death in custody or death following police contact. I cannot recall dealing with any allegations against on duty police officers in which racism was a factor, although it is entirely possible given the length of time I have worked in this department. My role in CAAPD was to assess potential criminality and to that extent the race element of the investigation would be an assessment of the evidence to determine if there was evidence from which an inference could be drawn of racial harassment or racial prejudice.

78. Insofar as not already covered, to what extent, if any, was Mr Bayoh's race a factor in any of your decisions and actions?

Mr Bayoh's race was not a factor in any of my decisions or actions.

79. Prior to your involvement in the Investigation, in your experience, did COPFS routinely consider the role of race when dealing with a death in custody or death during or following police contact of a person who was not white? Has that position changed between the time you were involved in the Investigation and now?

Prior to my involvement in this investigation I had no experience of investigation a death in custody or a death following police contact and am therefore unable to comment on what, if anything, may have changed.

80. At the time of your involvement in the Investigation, what training had you completed that was relevant for your role in the Investigation and Precognition? Please provide details of the type of training and explain what you can recall from the session.

I received in-office training early in my career for the report of investigation and precognition. At the time of my involvement in this matter I had over 30 years' experience as a Procurator Fiscal Depute and Senior Depute in which I learned by doing rather than in a formal course setting.

81. Insofar as not already covered, what training had you completed at the time of your involvement in the Investigation in relation to the below areas? Please provide details of the type of training and explain what you can recall.

(i) liaison and instruction of SPA Forensics;

I recall a training event many years ago in which there was input from a senior colleague about the (then) new Standard Instruction Form, the protocol and the considerations and process involved. Over the years I have liaised with forensic scientists in relation to cases that I was involved with. I am aware of guidance available on our Knowledge Bank about Forensic evidence.

(ii) instruction of and consulting with expert witnesses

To my recollection I have had no formal training but have had experience over many years of instructing and precognosing expert witnesses.

(iii) taking precognitions of witnesses;

I learned how to precognose a witness by experience and practice, taking into consideration what I learned as a practitioner in court, understanding the need to ask questions to clarify evidence or cross reference with other evidence. I attended a course in 2012 about obtaining evidence (including precognition) from children.

- (iv) reporting the case to Crown Counsel, including liaison with Crown Counsel and drafting the Crown Precognition;

I have not attended any formal training courses on reporting to Crown Counsel but have learned how to do this over my career in COPFS.

- (v) family liaison

My training record indicates that I attended a course on deaths in 2000. This may well have had some input at that time in relation to liaison with families. In more recent times the role of liaison has, in the main, been assumed by VIA.

82. Insofar as not already covered, what training had you completed by or during the time you were involved in the Investigation in relation to equality and diversity issues? Which aspects of this training, if any, were applicable to your role?

I have attended presentations on diversity and equality and completed regular mandatory online training in relation to equality and diversity, recognising unconscious bias, dementia awareness and other protected characteristics.

83. What guidance or reference materials in relation to race were you aware of being available to you in the time you were involved in the Investigation and Precognition? Over the course of your involvement, did you make use of any of these materials?

COPFS knowledge bank is valuable resource for guidance and reference materials. Given the passage of time since I was involved in this investigation I have no recollection of accessing particular materials.

84. What, if any, training do you consider would have assisted you in your involvement in the Investigation and Precognition? This may be training you have carried out since, training you are aware of but have not completed or training that is not, as far as you're aware, provided by COPFS

I cannot think of anything in particular that would have assisted in this investigation.

### Records

85. Is there a requirement for you to take contemporaneous notes or any other record of your involvement in an investigation? Is there a requirement to retain them? Are there any forms that you must complete in the course of the Investigation for internal record-keeping?

There is no requirement that I am aware of to make contemporaneous notes of my involvement in an investigation although it would be good practice to make notes of significant events or discussions either by file note or in follow up email correspondence and I did this. I am now aware (since my involvement in this investigation) that my colleagues in SFIU use a Minute sheet to record decisions taken or note important conversations about an ongoing death investigation. Such a form was not used in CAAPD, since the unit was set up for the investigation of criminality of police officers and not in relation to deaths investigations. I am not sure what, if any, difference it would have made in this case. The file contained the correspondence to date and the reports, statements and productions. I was in fairly constant contact with my colleagues Alasdair

MacLeod and Les Brown throughout my involvement and copied in to emails relevant to my involvement.

86. What records did you keep in relation to the Investigation? Were these retained and archived? To what extent was your record-keeping consistent with normal practice? Please confirm the basis for any departures from normal practice.

I kept some (paper) notebooks that I used for making my own notes about the evidence that I was reviewing, to note details of discussions or tasks assigned to me or any other relevant matter. Any correspondence, whether by email or letter was also saved in a folder for this investigation. I created documents for my own use in which I made notes of the evidence and used these notes to formulate my analysis of evidence, which was a constantly evolving document until the final version which formed part of the Precognition report to Crown Counsel. I no longer have access to the folder but I understand that it remains as it was at the conclusion of the investigation and should contain these documents and any correspondence that I created.

I am aware that an electronic folder was created on what was known as the 'P' drive on our system for the restricted use of those involved in the investigation. At some point prior to my involvement the file of documents that had been started in our SOSr system had been copied from there to the electronic folder. I believe the reason for this was due to the large volume of materials involved in this case, to enable ease of access and navigation. To that extent this was a departure from normal practice that I had been used to, but I believe was normal practice in other units which deal with cases where there is a large volume of materials.

#### Miscellaneous

87. In your experience, was this investigation lengthy? Was it unduly lengthy? What is the reason for the length of time required for the case to be reported to Crown Counsel? Could anything have been done differently to reduce the length of time from Mr Bayoh's death to reporting to Crown Counsel?

This was a lengthy investigation but I do not believe it was unduly lengthy given the extent and nature of the investigation. I can only account for the length of time taken during my involvement in the investigation. I worked on this investigation solidly from the period in early December 2017 when first approached to become involved until the Precognition report was submitted to Crown Counsel. Mr Graves opinion was received slightly later than initially anticipated but as soon as this was available it was considered and arrangements made to precognose him without further delay. Given my relatively limited involvement in the later stages of the investigation I do not feel able to comment about what might have been done differently at an earlier stage to reduce the time involved.

88. When did you become aware of the possibility that a public inquiry would be commissioned to examine Sheku Bayoh's death and the Investigation? Was anything done or not done in light of this? Was this a factor in relation to the issue of whether a FAI should take place? I cannot remember when, but I did at some stage become aware of the possibility that the Lord Advocate would either ask Ministers to hold a

public inquiry or that he would instruct a FAI. I was aware that no decision would be made until consideration of any potential criminality was resolved. I am not aware of when the decision was made by the Lord Advocate in favour of a public inquiry. I am not aware of anything done or not done in light of the decision that a public inquiry be commissioned.

89. Insofar as not already covered, to what extent was your involvement, decisions and actions in the Investigation and Precognition consistent with normal practice? If there were any deviations from normal practice, please explain your reasoning. In your view was race a factor in any departures from normal practice you have identified?

I am not aware of any deviation from normal practice. Race was not a factor in any of my actions.

90. Insofar as not already covered, what significant difficulties or challenges did you encounter during your involvement in the Investigation? Would any changes to practice or procedure would have assisted you in overcoming these difficulties or challenges? To what extent were these difficulties or challenges normal or expected in your role? To what extent was race a factor in these difficulties or challenges?

The challenges for me in this investigation related to the assessment of a large volume of materials and analysis of evidence, some of which was difficult to make out or was contradictory. I am not sure that any change to practice or process would have made any difference, and these are challenges that might be expected in the role.

91. In what circumstances, if any, would COPFS share the findings of (i) a PIRC investigation and (ii) the Crown Precognition with Police Scotland? Do you consider any of your findings in the course of the Investigation, or the findings of PIRC, would be of assistance to Police Scotland if they were shared? Did you or, insofar as you're aware, any colleague share these findings with Police Scotland? Did anyone from Police Scotland or SPA request your findings for the purposes of considering disciplinary action?

In my experience, findings of a PIRC investigation have, on occasion, been shared with Police Scotland in some deaths cases where there is no consideration of criminality. I am not aware of any situation in which the Crown precognition would be shared with the police as this is a confidential report to Crown Counsel. I did not and I am not aware of any colleague sharing our findings with Police Scotland.

[Redacted]

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

Date ..... October 11, 2023 | 9:46 AM BST

Signature of witness ..... [Redacted]