

Statement of Leslie [REDACTED] Brown, date of birth [REDACTED] 1963, Crown Office, 25 Chamber Street, Edinburgh EH1 1LA

Role and Experience

1

I have been employed by COPFS since 1985, joining as a trainee solicitor. In November 2014 I was appointed to lead the Criminal Allegations Against the Police Unit (CAAPD). I was appointed in the Grade of Band G although the post had been previously graded at the higher grade of Senior Civil Servant. My predecessor was Kate Frame who left to take up appointment as Police Investigations and Review Commissioner. CAAPD was a national unit set up to oversee the investigation of criminal allegations made against on duty police officers in Scotland and to report cases to Crown Counsel and the Law Officers for consideration of prosecution. The unit was created to assist the Lord Advocate in discharging his constitutional responsibility to investigate allegations of criminality against serving officers.

The unit was unique within the structure of COPFS as it was the only unit that received and considered reports that did not disclose a sufficiency of evidence. This reflected the significant responsibility placed on the Crown in relation to cases of this type and involved the unit in analysing all of the available evidence in all cases and instructing further inquiries where appropriate. In all cases where proceedings were recommended a full precognition, namely a collection of case materials including witness statements, including

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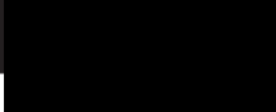
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detailed analysis of available evidence, would be prepared under my supervision and submitted to Crown Office for consideration of Law Officers. The policy of the Crown was that criminal proceedings of any description, including summary proceedings, against an on-duty officer would only be instituted on the express instructions of a Law Officer.

As Head of CAAPD at the time of the death of Mr Bayoh I worked with a team of two part time principal deutes, and two part time deutes as well as two non-legally qualified case preparers. Throughout the period of the investigation, I continued to have overall responsibility for all issues relating to the efficient performance and management of the unit. As well as a regular monthly caseload of around 50 cases dealt with by the unit, which included cases of varying sensitivity and complexity submitted during the course of the investigation I had responsibility for overseeing the investigation and preparation of the case relating to the tragic deaths of two people who died in July 2015 after the vehicle they had been travelling in came off the M9 road and a report to the police was not responded to.

2

I first became involved in the death of Mr Bayoh in the week commencing 5 May 2015. I had no professional involvement in the case prior to that date and as I recollect, I was asked to go through to Crown Office on either 5 or 6 May to meet with Stephen McGowan when the decision was made that the investigation should be

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overseen by CAAPD. The Scottish Fatalities Investigation Unit (SFIU) and Mr David Green, Head of SFIU, remained engaged for a period in relation to their familiarity with the existing structure and processes for receipt of reports relating to a sudden death and associated administrative tasks.

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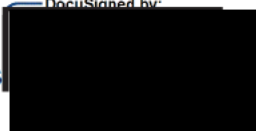
I consider that the role of the COPFS in relation to the investigation of sudden, suspicious and unexplained deaths is to enable the Lord Advocate to discharge their responsibility to carry out a thorough independent investigation into such deaths, to permit Crown Counsel to make a properly informed decision as to whether criminal proceedings should be taken, and to consider whether further investigations should be instructed and to present relevant evidence to any judicial inquiry in order to secure public confidence. COPFS should engage in an empathetic and compassionate way with relatives and next of kin that respects their needs and wishes.

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Prior to becoming involved in this case I had no experience of investigating deaths following police contact or in police custody, nor any cases where race was a factor.

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At various stages in my career I have had to engage with bereaved families and next of kin to inform them of the outcome of investigations and to address any concerns they have. I do not recollect any cases where race was a factor.

PIRC

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Prior to this case I had limited interaction with PIRC in relation to investigations and had not to my recollection ever issued an instruction to PIRC in terms of s33A of the 2012 Act.

7

I consider that the role of the PIRC is to independently investigate the circumstances of deaths in custody or following contact with the police and that it has a degree of organisational independence in carrying out this functions and will be expected to use the investigative skills and experience that it possesses in a similar way to the Police, and in Crown directed investigations, to report to the Crown.

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8

I consider that there is an expectation that COPFS will provide advice and assistance to PIRC where this is sought but I am aware of instances where the PIRC has sought independent legal advice and opinion from solicitors or counsel at their own instigation. It is of course the case that the Commissioner was a qualified solicitor. My experience is that the police will often seek legal advice from their own solicitors.

9

The instruction of PIRC in relation to the death of Mr Bayoh was undertaken by two senior colleagues over the course of the weekend. In relation to the terms of the instruction it made reference generally to s33A of the Police and Fire Reform Scotland Act 2012. s33A(b) (i) relates specifically to a Crown instruction where there is an indication that a person serving with the police may have committed an offence. A general instruction issued by my colleague was consistent with the view that there was no reasonable inference of criminality at the early stages of this investigation and that officers being investigated were not suspects. The approach recognised that it was important not to place any limitation or restriction on the scope of the investigation at an early stage in the process. The crucial fact was that this was a Crown directed investigation to distinguish it from other PIRC investigations including requests by SPA or Chief Constable to investigate serious incidents or where the Commissioner considers it to be in the public interest.

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The formal instructions to PIRC in terms of s33A of the 2012 Act were set out in a series of letters of instruction from COPFS that are set out in the PIRC reports. PIRC were also directed to areas of investigation that had been highlighted by Aamer Anwar and the Bayoh family that they wished to be investigated or addressed. The approach of the Crown was to highlight these to the PIRC where it was considered these were relevant to the investigation of Mr Bayoh's death. A good example of this approach is the correspondence with PIRC in June 2015 that highlighted three significant areas of concern that the family had namely –


Allegations by the family that they were provided with misleading and erroneous information concerning the death of Mr Bayoh to family members and a concern as to why they were provided with that information;

Concerns that the initial police investigations and attempts to secure evidence were not thorough meaning that crucial evidence was lost to the inquiry;

There was inappropriate conferring between police officers

As I recollect PIRC had concerns about their authority to investigate these areas and the letter sent to them was intended to provide reassurance that the Crown were satisfied that such investigations were relevant and appropriate.

I would say that the approach of the Crown was to ensure so far as possible that the investigation by PIRC reflected and addressed the

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concerns of the Bayoh family and this informed subsequent direction to the PIRC to investigate other areas of concern that included investigation into whether there was inappropriate accessing of police intelligence systems, to investigate the sending of racist texts and the source of an alleged terrorist threat.

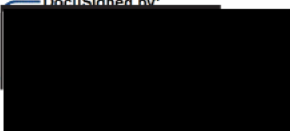
In general, the approach was to direct PIRC to areas that should be investigated and explored but allowing them a degree of operational independence as to how this should be achieved.

A more directive approach was adopted on receipt of the first report from PIRC that was reviewed by COPFS and the Lord Advocate. A series of detailed further instructions were sent to the PIRC setting out further work that required to be undertaken.

11

I am asked about an email from Stephen McGowan dated 12 May 2015 COPFS-03635 and concerns he expressed in relation PIRC requesting statements from officers involved in the incident through Police Scotland. My recollection is that I shared Mr McGowan's concerns but have no recollection as to whether the matter was raised with PIRC although at this time the focus was on securing provision of statements in relation to the incident itself and the Lord Advocate was in correspondence with the Chief Constable in relation to this. If this remains the practice, my concern would be that it gives the impression that PIRC require permission to obtain a statement

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from Police Scotland and that they have some measure of control over the process.

12

I am asked about an instruction letter to PIRC dated 24 August 2015
COPFS-02768(a) I was satisfied that these matters raised on behalf of the Bayoh family were relevant and required investigation. My recollection is that I wanted to provide reassurance that PIRC had been instructed to pursue investigations and I considered that the terms of the letter from Mr Anwar provided useful context to the matters raised.

13

It was my view that at an early stage of such investigation it was crucial to recognise the investigative independence of the PIRC team and the Commissioner and that the organisation had a number of highly skilled senior investigators who were experienced in carrying out complex and sensitive investigations. The Lord Advocate had acknowledged the importance of allowing the PIRC investigation to follow the evidence as it was obtained and that the essence of an independent investigation was to allow it to consider any aspect and to explore various hypothesis and that deciding hypothesis in advance was dangerous. Both myself and others in COPFS were in a position to lend assistance and advice to PIRC where required or requested but care had to be taken at an early stage in the

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investigation not to risk usurping the role of the Commissioner as independent investigator who will be reporting to the Crown.

I consider that the relationship with the PIRC is similar to that with Police Scotland where a high degree of operational independence exists commensurate with the investigative skills set that a modern police force possesses.

14

I do not consider that the 2012 Act envisages that COPFS are responsible for the supervision of PIRC in relation to their day-to-day investigations as this would call into question the role and operational independence of the Commissioner. The fundamental relationship between COPFS and PIRC is set out in s41 A of the 2012 Act and provides that the Commissioner must comply with a lawful instruction issued by the appropriate prosecutor under s 33A(b) but I do not consider that this provision envisages supervision of PIRC in relation to the discharge of their function and responsibilities. Essentially my view is that COPFS can direct the PIRC to investigate in a similar way that it does with the police but does not seek to prescribe how to achieve this, nor does it micromanage investigations.

The normal procedure for the police and PIRC is for them to investigate and submit a report. It is in my view difficult to issue precise and detailed instructions to a reporting agency before a

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report is submitted to COPFS and that process was followed in this case with detailed instructions being communicated to PIRC in relation to further investigations and as I recollect the Lord Advocate was content with that approach.

15

I am asked about page 4 of a notebook and entries made COPFS-05213. The transcript is substantially accurate although in the last paragraph it should read

If flawed investigation then will lead to observation....

These appear to be notes made by me incorporating observations on the contents of the first PIRC report and correspondence from Aamer Anwar including that of 31 July 2015. My notes informed and were reflected in a briefing minute prepared and submitted to the Lord Advocate in August 2015 that summarised the concerns in relation to the investigation and made recommendations on further work that should be carried out by PIRC. The concerns related to investigative flaws in the immediate aftermath of the incident and failure to separate officers and whether investigative techniques reflected best practice. Ultimately the Lord Advocate approved the further approach to PIRC to inform preparation of a second report to COPFS. The reference to Colin Marr relates to a sensitive death case where Mr Anwar believed the quality of the investigation carried out in relation to potential homicide was not explored at a Fatal Accident Inquiry.

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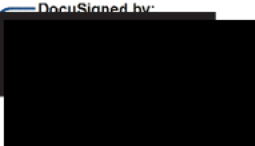
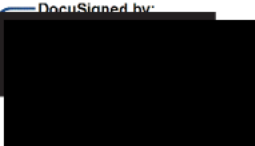
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16-17

Important communications with PIRC including instructions were sent by letter or email during the course of the investigation. I would comment that a collaborative approach was taken to such communications with senior colleagues within COPFS and draft communications were regularly shared for comment. I was content to provide PIRC with advice and assistance as required although it was not expected that I would provide this in isolation and could draw on the input and experience of senior colleagues.

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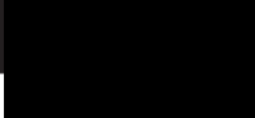
While I consider that I and other senior members of COPFS were available to provide advice to PIRC there was a degree of operational independence adopted by PIRC who were as I recollect content to design their investigative strategy. As stated above my recollection is that the Lord Advocate was content to allow PIRC to utilise their investigative skills, experience and expertise during the early stages of their investigation and in order to build the confidence of the Lord Advocate in their capacity to carry out significant and complex investigations. My recollection is that at this time the Commissioner was looking to expand the range of cases that would be automatically referred to the PIRC by COPFS for investigation, particularly allegations of sexual crimes and off duty offences and there was a degree of sensitivity in relation to this proposal.

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In retrospect, and in the light of input made by me to Dame Angiolini in relation to her review of police complaint procedures, I consider that the relationship between PIRC and COPFS in May 2015 was relatively undeveloped and that there was scope to have a more definitive structure to obtain COPFS input into development of early investigative strategy. However I considered that the directions to PIRC in relation to areas of concern to the Bayoh family together with the detailed instructions following submission of the first report were sufficient to permit the investigation to progress.

19

The instruction to PIRC was to investigate the circumstances surrounding the death of Mr Bayoh and this permitted PIRC to explore all relevant evidence surrounding the restraint techniques used by police during the incident and how these interacted with Mr Bayoh's death, whether there was evidence of inappropriate conferring, whether there was evidence of unlawful accessing of police systems and whether the training and guidance provided to police gave rise to any liability on the part of Police Scotland. It was intended that PIRC's investigation and report would enable Crown Counsel to consider whether there was evidence of a crime but it would also to enable consideration to be given to an inquiry phase in the event that criminal proceedings were not taken and so their investigation had more than one purpose in my view. As I recollect the Lord Advocate was content that the general instruction

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permitted PIRC to 'follow the evidence' and avoid being unduly prescriptive in their approach.

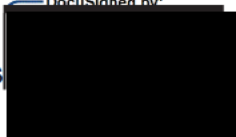
I do not recollect a discussion with PIRC around 3 July 2015 but PIRC were aware that the purpose of investigating inappropriate conferring and provision of false information, particularly concerning alleged use of a knife, had the potential to constitute a crime, likely to be attempt to pervert the course of justice. In relation to s22 of the 2012 Act I cannot recall any specific consideration although the failure of officers to record use of equipment and use of force following their return to the police station was considered by the investigative team.

20-21

I am asked about consideration of investigating potential offences in relation to drugs consumed by Mr Bayoh. Proactive inquiries were not pursued in relation to these matters at the initial stages of the investigation and the significance that drugs had had on the cause of death was the subject of considerable enquiry at this stage. I do not consider that PIRC would have any jurisdiction to investigate such a matter and that it would be for Police Scotland to carry this out. If clear evidence of supply of controlled drugs had been found during the course of the investigation then this could be passed to Police Scotland. However, in this case careful consideration would require to be given to how such an investigation should interact with the PIRC investigation into the death of Mr Bayoh and how the integrity of this could be preserved. In cases where the PIRC are not involved

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and where there is a clear link between the drugs and cause of death SFIU may ask the police to carry out enquiries to see if the source of the drugs can be identified.

I do not recollect considering this statement at PIRC-00055 and the matter was not raised with PIRC or Police Scotland to my knowledge.

22

I am asked to look at an email to me dated 22 February 2018 COPFS-02772 and the response from me to Mr Taylor of PIRC on 27 February 2018 COPFS-04726(a). My suggested reply to PIRC was intended to highlight the requirement to obtain relevant evidence that would not be the subject of challenge and I wanted PIRC to consider this matter. Whilst this matter might be regarded as an operational matter for PIRC I was anxious to have the examination proceed expeditiously and did not consider it would be helpful to refuse to engage.

I considered that the powers of the PIRC in a Crown directed investigation would have been authority for PIRC to download and examine all footage that was relevant to the investigation.

23

I am asked about an email chain between myself and Ashley Edwards dated 30 January to 6 February 2017 COPFS-03834. This email was

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expressing reservations by Ms Edwards about PIRC approaching officers themselves for further statements regarding an outstanding query regarding the alleged briefing on attacks on a female officer having regard to the fact that a decision on potential criminal proceedings had still to be taken. The expectation was that information of this nature should be obtained from other sources. I regarded this as an operational matter for PIRC.

24

I consider that PIRC acknowledged throughout their investigation that race was a central to the investigation. They provided assurance prior to submission of their first report to COPFS that if racial motivation was identified in the course of the investigation that this would immediately be referred to the Lord Advocate. After submission of their first report COPFS requested and were given assurance by PIRC that race was central to their investigation. Further guidance was provided to PIRC in meetings and in writing about the importance of race to the incident on 3 May 2015 and the distinction between overt racism and implicit bias and the significance of the latter.

The challenge for any investigative organisation is to contextualise behaviours, analyse the evidence available and come to a reasoned conclusion themselves as to whether race was a factor in the absence of overt evidence of racism.

I consider that the direction to PIRC to investigate whether there was a link to the sending of racist texts and the way this line of inquiry was discovered was important and demonstrated the value of engaging with the Bayoh family and responding to information and

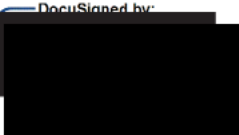
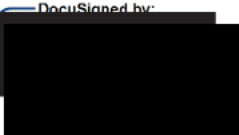
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background that they had. I was aware at a very early stage in the inquiry that the Bayoh family, and in particular Ade Johnston, indicated that he was aware that there had been some form of disciplinary action taken in relation to racist behaviour involving police in Fife and that Mr Johnston had provided some input into this matter. The information was communicated to PIRC who indicated that they had been unable to find evidence of such a matter. During October 2015 I was dealing with an inquiry from a colleague in relation to an unrelated matter in relation to a High Court case and it became apparent that the inquiry related to the sending of racist texts. I made enquiry as to where the officer had been serving at the time and discovered that it was Fife. That link had in effect been discovered by me by chance and the information was given to the Commissioner and John Mitchell as I recollect at a meeting at Crown Office to enable them to progress a focused inquiry in relation to this important matter.

Please also see my answer to question 102

25

I am asked about IPCC guidelines for handling allegations of discrimination published in September 2015 and amended in 2020 SBPI-00386x. I was unaware of these guidelines during the investigation and note that they indicate that an important consideration is whether a person has been treated differently to others who do not possess a particular characteristic and this seems to relate to notions of implicit bias. I consider that the guidelines

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would have been an operational matter for PIRC in relation to their overall investigative strategy and approach to interviewing officers.

26

I am asked about entries at page 2 of a notebook COPFS-05213. These appear to be a summary of points raised by the Lord Advocate at a meeting with him as I recollect him referring to instruction of the best experts. However, I am confident that they relate to a time later than May 2015 as they include reference to disclosing redacted statements and there appears to be a reference to disclosure of the PIRC report. The list was intended to set out immediate tasks and I have no recollection if race was specifically mentioned at this time.

27

I am asked about a file note of 1 October 2015 in relation to a meeting with PIRC COPFS-04627(a). I considered that this had been an important conversation that involved the Commissioner that had provided an opportunity to highlight and explain what our expectations were in relation to investigation and consideration by PIRC of race and racial matters as they related to Mr Bayoh. As I recollect PIRC had been describing the analysis of complaints in the former Fife Constabulary and I wanted to impress the importance of investigation and consideration of whether the approach of police to the incident on 3 May 2015 had been influenced in any way by race, and in particular whether they had made a connection to a terrorist incident or threat without a proper basis and because of Mr Bayoh's

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race. I wanted to highlight that absence of overt racism was not the end of considerations of race in relation to the incident as a whole.

Later I decided to record the discussion in a file note so that it could be recorded and retained in the electronic case file. The file note was shared with Stephen McGowan.

28

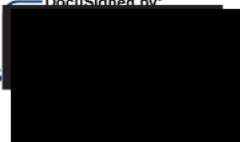
In respect of the letter from PIRC to me dated 30 October 2015 PIRC-02088(a), the update provided by them in this letter was interim and it was expected that the issue of race would be covered in the final report by PIRC. The letter provided confirmation that race and racial motivation as it affected the police approach was under active investigation. I do not recollect the Lord Advocate having any concerns with the terms of the update.

29

In relation to further correspondence with PIRC COPFS-02782, COPFS-02562, PIRC-02091 my correspondence was intended to reinforce the earlier dialogue with the Commissioner and the importance of considering issues of implicit bias. I was highlighting my view that the analysis of statistical material relating to complaints was of limited value in assessing other aspects of the interaction of officers with Mr Bayoh on 3 May. I wanted to focus on the perceptions of officers regarding the incident and the motivations of the officers themselves. My reference to the alleged terrorist threat

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was intended to link this issue to the question of whether this influenced the approach individually or collectively.

The reply provided reassurance that enquiries were ongoing including inquiries in relation to the sending of racist text messages by other officers and whether there was a link to the police who engaged Mr Bayoh but it also recognised the distinction between the analysis of complaints and the consideration as to whether race influenced the approach of officers.

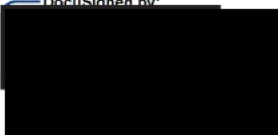
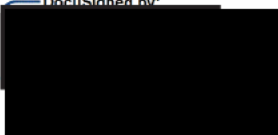
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In relation to an entry in a notebook at page 8 COPFS-05205, I agree that the note must relate to a meeting on 22 February 2016 and the note is accurate. It appears that a number of issues and outstanding enquiries were discussed together with the anticipated report date. I regret that I have no detailed recollection of the discussions.

31

At page 14 of a notebook, COPFS-05205 this entry relates to discussions around continued enquiry by PIRC into whether police systems had been improperly accessed and efforts to ascertain if there was a lawful purpose for such access. It appears that one option discussed was to interview officers as to their purpose under caution.

Accordingly the reference to interview under caution related to an associated enquiry namely potential breach of Data Protection

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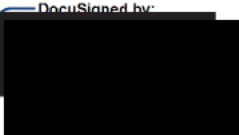
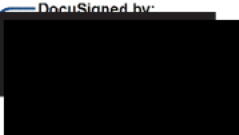
legislation and not directly to the events of 3 May 2015 involving Mr Bayoh.

32

In relation to my minute to Law Officers dated 21 November 2017 COPFS-02214 (a) this reflected my sense of frustration at that point in time that PIRC enquiries with Police Scotland and requests for documentation in relation to training and Standard Operating Procedures were being referred for approval to senior officers. I do not consider that such approval is required or necessary where PIRC are proceeding in a Crown directed inquiry. In relation to this particular matter my recollection is that it progressed without further delay, and I do not recollect PIRC seeking advice but I considered that Law Officers should be aware of the position.

33

The passage at page 7 of the summary COPFS-02126 (a) referred to the fact that police officers had made reference to being aware that they believed Mr Bayoh had sustained a rib fracture during resuscitation attempts by them but had not made mention of this in an earlier statement made before the fracture had been discovered by pathologists. This discrepancy merited further inquiry in relation to whether there was any evidence that suggested that an officer had become aware by improper provision of information of the existence of the fracture and had added information to their statement as a consequence of this. The matter was factored into the Crown investigation, including obtaining expert evidence in relation to the cause and mechanism of the fracture and whether it


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was consistent with resuscitation efforts. The results of these investigations were fully considered by Crown Counsel and there was no basis to take the matter further.

34

I saw my role as providing PIRC with advice and assistance where required or requested and to keep senior colleagues and the Lord Advocate sighted on significant developments in the case until the PIRC submitted their report. I did not carry out this role in isolation and it was expected that I would draw on the skills and experience of senior colleagues and indeed the Lord Advocate took a close personal interest in the case and wished to be kept informed of developments and provide advice and instruction in order to preserve his constitutional position as head of the independent prosecution service.

It was my view that at an early stage of such investigation it was crucial to recognise the investigative independence of the PIRC team and the Commissioner and that the organisation had a number of highly skilled senior investigators who were experienced in carrying out complex and sensitive investigations. The Lord Advocate had acknowledged the importance of allowing the PIRC investigation to follow the evidence as it was obtained and that the essence of an independent investigation was to allow it to consider any aspect and to explore various hypothesis and that deciding hypothesis in advance was dangerous. Both myself and others in COPFS were in a position to lend assistance and advice to PIRC where required or requested but care had to be taken at an early stage in the

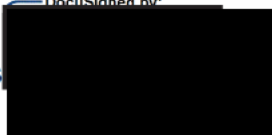
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investigation not to risk usurping the role of the Commissioner as independent investigator who will be reporting to the Crown.

I consider that the Crown can direct the PIRC to carry out additional work and to highlight areas that require further investigation and analysis in order to permit the Lord Advocate and Crown Counsel to make a properly informed decision on how to proceed. I consider that PIRC has a wide degree of operational independence and discretion as to how such further inquiries are carried out. Having regard to this, in this case, I sought to provide such direction by reviewing and analysing the report by PIRC to the Crown of August 2015 and submitting a full briefing minute to the Lord Advocate and to Stephen McGowan, Lindsay Miller and John Logue. The purpose of this minute was to permit the Lord Advocate to assess the outcome of the PIRC investigation and seek his approval and that of senior colleagues on the extent and focus of further work that was required and to instruct PIRC to carry this forward. My minute sought to reflect concerns expressed by Aamer Anwar and the Bayoh family in relation to the PIRC investigation that had apparently led to a fundamental lack of confidence in the agency. I provided comment on those concerns and recommended that the family of Sheku Bayoh were entitled to have the results of the PIRC investigation disclosed to them in due course but only after Crown Counsel had made a properly informed decision as to whether criminality could be excluded. My recollection is that the Lord Advocate agreed that the investigation to date did not enable a properly informed decision in respect of this to be taken and that the areas of further work set out by me should be undertaken by PIRC.

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The instructions were set out in the letter of 2 September 2015 to the Commissioner, and I consider that these reflected the approach of the Lord Advocate following consideration of my minute. That letter provided PIRC with detailed instruction on the focus of the work that required to be carried out and included in a subsequent report.

This approach was in my view consistent with normal practice although it was the first time to my knowledge that extensive further inquiry had been requested from the PIRC. It is the case that it is not unusual for the Crown to request that further work be carried out by a reporting agency before making a decision but the extent and detail of the further inquiry reflected the commitment that the Crown and Law Officers had to ensuring that all of the relevant areas were fully explored and analysed, that the concerns of the Bayoh family were addressed so far as possible in the investigation and to seeking confirmation that consideration of race would be a critical element.

35-36

In relation to the Memorandum of Understanding (MOU) between COPFS and PIRC PIRC-04453, I was aware of the MOU and consider that it deals in the main with the mechanisms of how the Crown may issue initial instructions to PIRC, including in relation to a death following direct or indirect contact with the police and the interaction between Complaints Handling Reviews and criminal allegations. I am not aware of any further duties that apply in the light of the MOU. In relation to this investigation the expectation was

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that PIRC would submit a full report following their investigation and that they anticipated that their report would be submitted in August 2015 and the Lord Advocate was content with that.

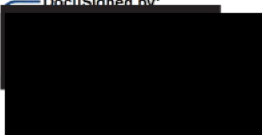
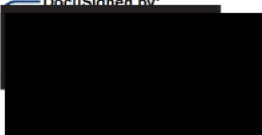
In relation to review of the MOU, I recollect that PIRC were content to wait until the Bayoh investigation was complete and it is the case that the framework for relations between PIRC and COPFS was the subject of a review by Dame Angiolini KC.

Family Liaison

37-38

I consider that COPFS have a duty to engage with families and next of kin in relation to deaths cases in order to keep them advised as to progress in investigations being carried out. Where the death is being investigated by Police or PIRC there will in my experience be dedicated family liaison officers and when the investigation is passed to COPFS, we assume responsibility for this normally through COPFS Victim Information and Advice Units (VIA) who are attached to SFIU.

In the present case it was apparent at an early stage that the family of Sheku Bayoh had instructed Mr Anwar to represent them and their interests. In the light of the keen personal interest that the Lord Advocate took to the investigation, and while the investigation was with PIRC, a bespoke approach was taken to engagement with Mr Anwar and the Bayoh family that involved personal meetings with Crown Office Officials and Law Officers.

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In order to ensure that this arrangement continued to meet the needs and requirements of the family Lindsey Miller and I discussed family liaison arrangements with Mr Anwar at his office and referred to the COPFS policy whereby the Bayoh family could receive regular routine updates from our VIA Unit if they wished. Mr Anwar indicated that it was the preference of the family for all communications with the Crown regarding progress to go through him and his office and that the existing bespoke approach should continue and accordingly engagement and updates were provided in this way.

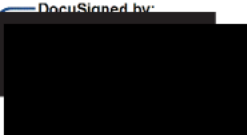
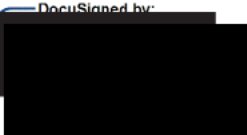
39-40

My recollection is that PIRC would be advised of meetings between the Crown and the Bayoh family and would invariably be invited to submit a progress report in advance to inform discussions.

I regret that I do not recall specific discussions with PIRC on this topic although I would have been anxious to reassure them that relevant updates and information of this nature would be shared and am aware that following meetings with the Lord Advocate in May and August 2015 that PIRC were updated by letter.

41

To the best of my recollection I attended all meetings with Mr Anwar and the family that were held with the Lord Advocate and Crown Counsel. I also facilitated and attended the showing of footage of the incident at the family's request.

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42

In relation to the letter to Mr Farrell dated 28 February 2020 COPFS-02126 (a) I take no issue with the terms of the summary. The approach taken to disclosure of the material was approved by the Lord Advocate and was undertaken in consideration of art 2 ECHR and of facilitating involvement of the family of the Mr Bayoh in the investigation and of securing their confidence in the independence of the investigative process. I consider that the provision of material in this investigation reflected the particular circumstance of the incident and in particular that Mr Bayoh had died after an incident involving the police.

43-44

In relation to notes recorded at page 28 of a notebook COPFS-05205, to the best of my recollection these notes recorded criticisms by Mr Anwar of the approach taken by PIRC to the investigation and the way that they had dealt with further enquiries. The reference to a complaint related to how such a complaint could be pursued about the Commissioner and the investigation. The reference to superhuman strength appears to be a reference to a comment made by JMcS who is likely to be John McSporrان in relation to the effects of Alpha PVP. Accordingly I am confident that it is a quote of what someone else said rather than a direct comment by anyone at the meeting.

I am very aware that a reference to superhuman strength can be a common and offensive racist stereotype.

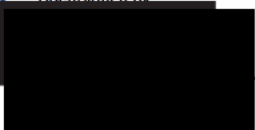
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The reference to Karen Swan is I believe another quote from Mr Anwar as to how PIRC approached the investigation into PC Paton and I believe my use of an exclamation mark was to reflect his surprise and disbelief at the inappropriateness of the comment and how it impacted on the approach by PIRC investigators to the allegations.

The criticism of PIRC approach to interviews influenced the decision by COPFS investigators to separately and personally prognose eye witnesses to the incident to ensure that witnesses expressed themselves in their own words, that no relevant information had been missed and that a neutral and independent approach was taken to obtaining this evidence.

45

In relation to page 32 of a notebook COPFS-05205 to the best of my recollection this refers to a meeting with Mr Anwar at his office that I attended with Lindsey Miller to provide him with an update on the investigation following submission of the second PIRC report in August 2016. No family members were present but towards the end of the note there is an indication that a meeting could be arranged for early the following year. The reference to three stage process was as I recollect an outline of the steps that the Crown were taking that would have included precognition of eye witnesses and obtaining expert evidence. The reference to a team and a QC is referring to the

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creation of a COPFS team headed by a dedicated Advocate Depute to progress the investigation.

46-48

In respect of the Bayoh Family letter of 10 September 2018 [REDACTED] [REDACTED] as I recollect Crown Counsel were involved in the drafting of the terms of the letter and a draft was circulated to me and others including the Lord Advocate. The letter was drafted to reflect the main conclusions that Crown Counsel drew from all of the evidence and to set out the factors and reasoning for their decision. The letter was sent in addition to a planned meeting with Mr Anwar and the Bayoh family where further explanation of the reasoning for the decision could be explored. I considered that the letter as a whole together with input to the discussions permitted Crown Counsel to explain the reasons for the decision taken to the family and what events and opinions had informed this.

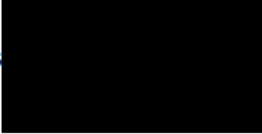
[REDACTED]

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COPFS Victim Information and Advice service (VIA) normally take the lead in relation to liaison with next of kin in a deaths investigation case once COPFS have assumed responsibility. In relation to the Bayoh family and having regard to the terms of my note at page 32 of a notebook COPFS-05205 as stated above at question 36 it was apparent at an early stage that the family of Sheku Bayoh had instructed Mr Anwar to represent them and their interests. In the light of the keen personal interest that the Lord Advocate took in the investigation, and while the investigation was with PIRC, a bespoke approach was taken to engagement with Mr Anwar and the Bayoh family that involved personal meetings with Crown Office Officials and Law Officers.

In order to ensure that this arrangement continued to meet the needs and requirements of the family Lindsay Miller and I discussed family liaison arrangements with Mr Anwar at his office and referred to the COPFS policy whereby the Bayoh family could receive regular updates from our VIA Unit if they wished and the note refers to this. Mr Anwar indicated that it was the preference of the family for all communications with the Crown regarding progress to go through him and his office and that the existing bespoke approach should continue and accordingly engagement and updates were provided in this way.

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Lord Advocate

50

The Lord Advocate has ultimate responsibility for decisions made in respect criminal proceedings that are instituted and for decisions taken in relation to investigations into sudden, suspicious and unexplained deaths. The Lord Advocate may take a personal interest in particular cases and require briefing on cases of particular sensitivity or complexity. It is the case that Frank Mulholland as Lord Advocate took a very close personal interest in the death of Mr Bayoh from a very early stage and expected to be advised of issues as they arose and would issue comment or instruction directly. For example I recollect that he required updates on the arrangements for release of the body of Mr Bayoh to the family and was clear in his expectation that this should be expedited. Obviously the Lord Advocate cannot be personally involved in every case, but I would say that this case stands out in my experience as one where successive Lord Advocates wanted to keep a close personal eye on actions taken. I, and other senior colleagues provided the Lord Advocate with regular briefings on the progress of the investigation and would seek approval of the investigative strategy that was being followed.

51

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The Lord Advocate (Mulholland) met with the Bayoh family on a number of occasions and I attended each of the meetings with other senior Crown Office colleagues. Mr Anwar was in attendance at these meetings and my recollection is that the Lord Advocate regarded these as essentially private meetings and no minutes were taken to my knowledge. I would say that the Lord Advocate saw these meetings as an opportunity to update the family on progress and timescales, and to assure the family that ultimately it would be him that would make a decision on what further proceedings would be taken and that he continued to keep a close personal interest in the case and its progress. I recollect the Lord Advocate being advised by Mr Anwar that the family had lost trust in the PIRC at an early stage. While the Lord Advocate indicated that the Crown were ultimately responsible for the investigation my recollection is that he did not want the Crown to take over the investigation at an early stage and that he was content to approve the investigative strategy communicated to PIRC in September 2015.

52

The meetings also provided the opportunity for the Bayoh family and Mr Anwar to request access to information for the purposes of instructing their own experts. My recollection is that Frank Mulholland was very receptive to these requests and agreed to facilitate this. In particular my recollection is that at a meeting with the Lord Advocate (Mulholland) Mr Anwar requested that he be provided with redacted witness statements relating to the restraint of Mr Bayoh that the Lord Advocate agreed to. This undertaking was communicated to PIRC who facilitated their provision. Following each meeting my recollection is that letters were exchanged with Mr

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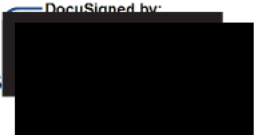
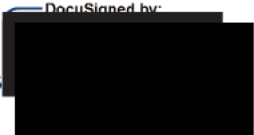
Anwar summarising the discussions and confirming what action had been taken.

53

My recollection is that the Lord Advocate (Mulholland) was advised that the family of Mr Bayoh were upset at the contents of certain comments on behalf of the SPF and that he was keen to prevent any further unhelpful media comment while the investigation was ongoing. The Lord Advocate as I recollect approved and decided the wording of the statement to the media of 22 October 2015 COPFS-00975.

54

In relation to my minute to the Lord Advocate (Wolffe) of 13 October 2017 COPFS-03325(a) at the time of this minute he had made it clear that he considered that a more restrictive approach should be made to disclosure of evidential material. I was satisfied that Frank Mulholland had indicated to Mr Anwar that expert reports instructed during the PIRC investigation would be made available to him for the purpose of instructing his own experts. As I recollect it was the Lord Advocate's and Lindsey Miller's view that he could not be bound by the approach taken by his predecessor and his approach to disclosure was informed by the stage that the investigation had reached following receipt of the second PIRC report where the focus and direction of the investigation had somewhat changed and which


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involved an imminent decision on criminal proceedings. The Lord Advocate was aware that in the event of criminal proceedings being instituted there was a possibility of family members being witnesses. The prior disclosure had been made in the context of an earlier stage in the investigation and for the purpose of instructing experts. A balance required to be struck between further disclosure of sensitive investigative material that had been obtained to assist the Crown in making a decision on criminal proceedings and potential risk to the integrity of those proceedings and the loss of control by the Crown in relation to sensitive and confidential investigative material while there were no live criminal proceedings. I still regard the matter as being for the consideration of the Lord Advocate personally and that decisions on disclosure are ones for him in the light of all of the circumstances that exist at the time.

As I recollect the Lord Advocate (Wolffe) accepted that disclosure of all reports obtained during the PIRC investigation, including that of Prof Crane, should be disclosed to Mr Anwar. The Lord Advocate was satisfied that disclosure of more recent reports instructed by COPFS at that stage was inappropriate but subsequent disclosure at a later stage was open to the Crown and that article 2 rights and obligations had to be balanced against article 6 rights to a fair trial.

55

The Lord Advocate took a close interest in the instruction of expert witnesses. I recollect the Lord Advocate indicating at an early stage that he wanted to obtain expert opinion evidence from international experts. It is my recollection that PIRC identified Dr Karch as a potential expert witness and that his CV was forwarded to the Crown and the Lord Advocate in August 2015 for consideration. An opinion

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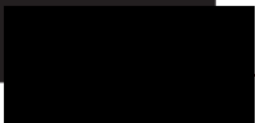
was instructed by PIRC in consultation with the Crown. Stephen McGowan and I were satisfied that obtaining a report from Dr Karch was likely to assist the investigation at that time and my recollection is that the Lord Advocate was content with this approach. No-one to my knowledge at had concerns about instructing Dr Karch at the time he was instructed.

56

The CVs of all the expert witnesses forwarded by PIRC, including that of Prof Pounder, were considered by the Lord Advocate and he selected those from whom an opinion would be sought. My recollection is that the Lord Advocate did not proceed to instruct him as he had indicated to PIRC that clinical forensic medicine was not his primary area of expertise and in the light of the fact that other expert opinion had been sought. In conveying the decision and rationale for the Lord Advocates decisions on which experts should be instructed I recollect that Mr Anwar was asked for any comment on the course of action taken by the Lord Advocate.

57

In relation to my notebook referring to Meeting LA at page 6 COPFS-05205 the entry contains reference to issuing an update to Mr Anwar on progress of the investigation and suggesting a meeting to review progress

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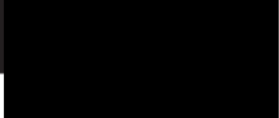
The remainder of that page headed Malcolm Graham relates to an unconnected investigation. It is reasonable to assume the meeting was on 11 February 2016.

58

I am sure that I would have attended the meeting with the Bayoh family and the Lord Advocate (Frank Mulholland) in November or December 2015 and in relation to the areas highlighted my recollection is as follows. Where I have no recollection I do not dispute that something of that nature was said.

I recollect that the Lord Advocate was very displeased to hear about certain comments that Dr Karch was alleged to have made and that were reported in a newspaper. My best recollection is that the Lord Advocate expressed views that Dr Karch had compromised his duties as an expert and that as a result the opinion of Dr Karch would not be relied upon by the Crown. I have no recollection of mention of Prof Watson. In relation to sitting down with the Bayoh family and taking them through the evidence I cannot confirm that I recollect those precise words being used although I would say that it is the type of expression that Frank Mulholland would use.

I have no current recollection of discussions regarding harassment of the black community in Kirkcaldy nor Prof Peter Watson and have no knowledge of whether contact was made by either Stephen McGowan or the Lord Advocate.

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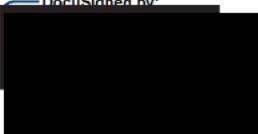
In relation to instruction of an expert in behavioural science my recollection is that this was raised by Mr Anwar and led to the instruction of Dr Maurice Lipsedge whom the Lord Advocate had previously declined to instruct and he was asked to provide opinion on group behaviour of the officers during the arrest and restraint of Mr Bayoh. In the event Dr Lipsedge declined to provide an opinion on this matter and Mr Anwar was advised of this and asked to consider how best to proceed.

59

In respect of pages 3-5 of a notebook COPFS-05211, these notes appear to relate to the review on restraint conducted by Dame Elish Angiolini KC and how these might relate to Scotland and the case of Mr Bayoh and the notes are likely to have related to my minute to Law Officers of 6 November 2017.

60 and 61

There is nothing unusual in my experience in the Lord Advocate meeting with the family of a deceased person. It will be a decision for Law Officers as to whether such a meeting is likely to assist a bereaved family in understanding the process to be followed, to allow them to ask questions and to provide reassurance that Law Officers are engaged in the process. In relation to the change in Lord Advocate both were committed to meeting with the family and keeping them updated on developments. It is that case however that

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the appointment of James Wolffe KC coincided with the submission of the second report by PIRC and the strategy approved by him that focused on making an early decision on criminal proceedings before further procedure had as a consequence a more limited approach by him to sharing investigative information.

In relation to my email of 1 March 2018 COPFS-04538 I understand that it is normal practice for a dedicated Advocate Depute to meet the next of kin. I assume that Ms Edwards the dedicated Advocate Depute wanted to make clear that such engagement was consistent with the approach of Crown Counsel to families in such circumstances.

62

In relation to my minute to Law Officers of 22 August 2018 [REDACTED]

[REDACTED]

Police Officers Status

Signature of Witness [REDACTED] DocuSigned by: [REDACTED]

63


The decision on whether a person is a witness or a suspect is normally an operational decision for the Police or PIRC where they are the investigating authority. The significance of status is that a suspect should not be compelled to incriminate themselves in relation to a crime for which they are under substantial suspicion. This relates to the principle that evidence should be obtained fairly and where a statement has been obtained unfairly it may be considered inadmissible in any subsequent proceedings.

64

I was aware that a decision to treat officers involved in the incident on 3 May 2015 as witnesses had been made in the immediate aftermath and prior to me becoming involved in the case. However I agreed with that assessment and saw no reason to interfere with it, nor did senior colleagues, as the investigation remained at an early stage and there was no substantial suspicion attaching to any officer at that point. I was aware that notwithstanding this approach that officers were declining to provide statements to PIRC. My approach was consistent with normal practice and race was not a factor in my approach to this issue.

65

I consider that the COPFS could have a role in obtaining accounts from officers directly involved in a death in custody case by way of

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precognition of the officers but only where the possibility of criminal proceedings had been excluded following investigation.

66

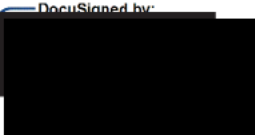
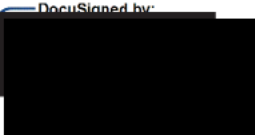
I had no direct involvement in obtaining accounts from the officers in relation to the death of Mr Bayoh

67

Hypothetically I consider that it is open to the Crown to indicate that officers will not be prosecuted or that the evidence will not be used in any proceedings in order to try to obtain their accounts. This would be a highly unusual course of action and was not to my knowledge considered in this case.

68

I have no clear recollection of the call with Mr John Mitchell of PIRC on 2 June 2015. However the status of a police officer who has had involvement in a death in custody or following police contact is not fixed and can change depending on the evidential position at any point in an investigation. I consider that this is particularly applicable to cases involving police officers where intent behind actions is of particular importance in assessing criminality. The advice referred to by Mr Mitchell would be consistent with this position and would

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remind investigators to be alert to any evidence that suggested improper and potentially criminal motive for actions.

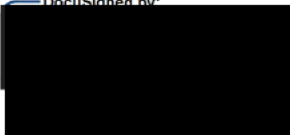
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In relation to the letter from Ms Kate Frame dated 22 March 2018, PIRC-02465(a) I do not take issue with the reference to the discussion involving the Lord Advocate in relation to the status of officers and consider that this position is consistent with the terms of my call with Mr Mitchell as the status of an officer and indeed any potential witness can change according to the evidence.

70

I consider that a person becomes a suspect where there is evidence that points to them having committed a criminal offence. If a person is treated as a suspect then certain legal rights become applicable including the right against self-incrimination. If a person is a witness such rights do not apply. The approach to the officers was not influenced by reporting, or potential reporting, in the media. There is no distinction in the approach taken by me, and so far as I am aware by any of my colleagues in the way police officers are dealt with compared to civilians.

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In relation to the letters from the Commissioner, Ms Frame, to Mr Anwar of 10 September and 9 October 2015 PIRC-01835(a) and PIRC-01849 having considered the relevant passages I do not take issue with the analysis of section 14 of the 1995 Act. I do not consider that the cause of death is determinative of whether a person should be a suspect or a witness in respect of potential criminality although it is a relevant factor. There are in my view a variety of scenarios that would indicate potential criminality that would not be dependent on a cause of death, depending on the evidence that was available.

72

The cause of death in the case of Mr Bayoh did not provide clear evidence of criminality and further expert opinion was sought in relation to this. If evidence from any source had been discovered during the investigation that suggested commission of a crime then consideration would have been given to changing the status of the officer or officers concerned.

73

The question of reasonable suspicion and whether a person falls to be treated as a suspect would ultimately be a matter for a court to determine if a statement that had been provided by a witness was found to have been unfairly obtained. The approach adopted in this case was considered and approved by the Lord Advocate (Mulholland and Wolffe). It was considered appropriate for a full investigation to be carried out by the Crown and PIRC in order to permit Crown Counsel to take a properly informed decision as to

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whether criminality of any description could be established. The focus of the precognition in this case was primarily upon whether the commission of a crime could be established and in my experience there is nothing exceptional in seeking Crown Counsel's instructions in relation to this.

74

I have considered the terms of the letters between the Lord Advocate and the Chief Constable dated 15 and 22 May 2015 and my PS08484 and COPFS-02855. The issue raised by the Chief Constable in relation to issuing some form of statement was a matter for the Lord Advocate although I am supportive of the position adopted by the Lord Advocate in this regard.

In relation to the paragraph relating to impact on the statutory duties of a constable I consider that there is a requirement on officers to provide statements unless this would impact on their right against self-incrimination. In my experience officers provide statements to prosecutors where they are witnesses to a crime where force has been used without requiring immunity from prosecution.

I have had sight of my associated letter to DCC Richardson of 22 May 2015 (COPFS-02851) and consider that this is consistent with the terms of the letter sent by the Lord Advocate. As the status of the officers involved in the incident of 3 May 2015 had been confirmed

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as that of witness I did not consider that there was interference with the right against self-incrimination.

Ingathering of Evidence and Analysis

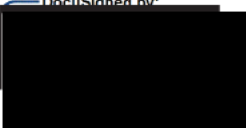
75

COPFS has responsibility for ensuring that the circumstances of a death in custody or a death following contact with the police are investigated and for reporting the circumstances to Crown Counsel and Law Officers. Crown Counsel and Law Officers may instruct further enquiries before making a decision on further proceedings. COPFS may carry out inquiries by way precognition of relevant and important witnesses or it may instruct Police Scotland or the PIRC to carry out investigations on its behalf. COPFS may instruct what further investigation is required but will rely on the investigative skills and experience of both Police Scotland and PIRC to achieve this.

76

Prior to being involved in the investigation my recollection is learning over the holiday weekend that a man had died in Kirkcaldy following involvement with the police. I cannot recall the detail of any reports.

77

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Stephen McGowan provided me with information when I attended Crown Office probably on Tuesday 5 May 2015. I do not recall in detail the information that was conveyed to me.

78


I consider that as the investigation progressed more detailed information became available in relation to the initial interactions between police and Mr Bayoh and in particular the actions of the police in relation to timing and deployment of sprays, the nature and extent of the restraint process and confirmation that Mr Bayoh was not in possession of a knife on arrival of police.

79-80

I am confident that COPFS-05204 is not my notebook and have advised the Assistant Solicitor to the Inquiry of that fact. I have also indicated to him that it may be the case that the entry at question 79 relates to another notebook and if it is the case I will be happy to assist the Inquiry in relation to this.

81

I have read the entry in my notebook COPFS-05205. This note has heading Carol Auld. She was an officer at Police Scotland Professional

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Standards and this note appears to relate to a catch up meeting I had with her. The noted reference to [REDACTED] must have referred to [REDACTED] who was a senior officer within Police Scotland and the entry appears to relate to another inquiry. My reading of the entry in relation to Sheku Bayoh indicates that it relates to the length of time that the investigation was taking and 1500 probably relates to the number of days since the incident which would suggest it was made in 2019. The reference to a form of words was I think a request to consider providing Carol Auld with a timescale on when the investigation might conclude that could be shared with officers. I do not recollect the action taken although I am confident that any update would be brief and would indicate that the investigation was ongoing and would be concluded as quickly as possible.

82

In relation to the COPFS investigative team, the approach to the case in general and the direction and management of the ongoing investigation it is the case that the dedicated Advocate Depute was embedded in and was an essential part of the investigative team from receipt of the second PIRC report and was fully engaged in the ongoing process, design of the investigative strategy and review of evidence gathered along with everyone else in the team. She ensured from an early stage of her involvement that she had read the very significant volume of material that had been produced by the autumn of 2016 and she was accordingly able to instigate and direct enquiries in relation to what she considered may assist her in the decision-making process. In addition the team were joined by two highly experienced senior deposes who brought considerable investigative skills to the process. In particular Mr

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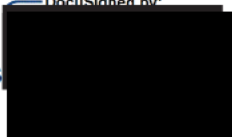
MacLeod had experience of preparing complex and demanding cases over extensive periods of time and had been involved in a previous investigation that involved police officers. All of this enabled a collaborative rather than directive approach to be taken to the investigation into all aspects of Mr Bayoh's case, with those of the team involved on a day-to-day basis inevitably building up a significant amount of detailed information and knowledge over time that they could bring to the ongoing process. The collaborative approach, the wide experience in the team and the commitment of the dedicated Advocate Depute meant that the investigative strategy, progress and identification of further work required could be agreed by the team as a whole.

In relation to my email to Stephen McGowan of 24 August 2015 COPFS-02035 my recollection is that this email was drawing attention to the accounts provided by officers involved in the restraint of Mr Bayoh in relation to placing him in the recovery position and the impact that the continued application of handcuffs would have on him. To the best of my recollection my concern was the extent to which Mr Bayoh could have been in the full recovery position in the light of the fact that his hands were handcuffed to the front. That was a particular aspect of the restraint and resuscitation attempts that concerned me and it became a specific focus of the approach to instruction of experts and the questions that they were asked.

PIRC were asked to further explore these matters following consideration of their first report by the Lord Advocate.

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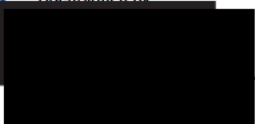
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The approach to credibility and reliability of officers was a critical consideration throughout the investigation and that the accounts provided by officers required to be tested against other evidence that was available, particularly the evidence of civilian witnesses, the expert evidence in relation to the cause of death, the analysis of airwaves transmissions both prior to the arrival of officers and during the incident itself.

These considerations informed the direction provided to PIRC following receipt of their first report and the initial strategy of COPFS staff following receipt of the second report by PIRC.

On receipt of the second PIRC report the dedicated team at COPFS agreed an investigative strategy to facilitate the decision-making process in relation to potential criminality.

The investigative strategy approved by the Lord Advocate instructed that all eye witnesses to the restraint process should be prognosed by the investigative team. It was agreed that all witnesses should be jointly preconosed by two investigators to safeguard against any

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criticism of the precognition technique following criticism by the family of the deceased of the approach taken by PIRC investigators.

The team analysed the contents of the precognitions of the various eye witnesses and compared these in detail with the accounts given by the police officers involved and more particularly with the enhanced composite footage of the incident that was prepared on Crown instruction by the SPA. Although PIRC obtained enhanced footage, the results were relatively limited and consisted of copying and zooming in to sections of footage where the overall quality of the image was indistinct and blurred.

This was an intensive and time-consuming exercise but it produced the most comprehensive account of the incident to date and the creation of a detailed time line that cross referenced and incorporated evidence from all of the relevant sources and provided a sound framework to analyse the accounts provided by police officers who were involved in the incident.

83

In relation to e mail correspondence with Sgt [REDACTED] COPFS-02888, in relation to the approach of the Crown to disclosing the cause of death I consider the proactive disclosure of the cause of death to a third party during an ongoing criminal investigation would be unusual and depending on timing might have the potential to

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affect the ongoing investigation. I was unaware that information relating to the cause of death not resulting from blunt force trauma had been shared with response officers on 4 May 2015 before statements had been provided and am of the view that such sharing could have affected the investigation and the subsequent provision of statements.

84

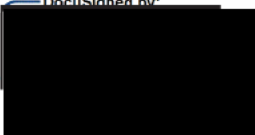
COPFS role in obtaining statements from officers will depend on the status of the investigation. The accounts of officers will be provided in statements submitted to COPFS by Police Scotland or PIRC and COPFS may decide to precognosce officers in preparing the report for Crown Counsel where criminality has been excluded.

85

I had no direct involvement in obtaining the accounts of officers in this case and this was in my view consistent with normal practice. With hindsight I consider that there was an opportunity for the Crown to have had input into the investigative strategy for the interview of officers and for there to have been similar input from a person who had experience of deaths in custody with a racial element.

86


Please see my answer to question 67.

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87-88

The evidence of Mr Nelson and the potential discrepancy between his evidence and that of police relating to a stamp was recognised as a consideration during the investigation by COPFS. During the precognition of eye witnesses investigators were directed to focus on the incident involving PC Short and the circumstances of the incident and discrepancies from various witnesses were addressed in the precognition. As I recollect COPFS investigators were able to identify a figure that appeared to be Mr Nelson emerging from his house during the incident and they were able to incorporate this into the timeline of the incident and compare this with the footage, the account of the officers and the account of what Mr Nelson saw from inside and outside his house. The potential for Mr Nelson's account to contradict the account provided by officers was considered by COPFS staff and contemporaneous transmissions were factored into this analysis as were accounts of other civilian witnesses. As I recollect I was in agreement that a rigorous comparison be undertaken with all evidential sources, including the time taken for Mr Nelson to travel from his window to his front door, the timings of broadcasts and the accounts given by civilian witnesses.

I have considered the notes on page 38 of my notebook COPFS-05205 that I have been directed to. The note 'Drugs-is behaviour consistent with ingestion of drugs' appears to relate to comments probably made by Mr Anwar for the investigation to consider this

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issue in relation to Mr Bayoh. The reference to Orchard is to my recollection a reference to the investigation into the death of Thomas Orchard who died in England in police custody following restraint by police and against a background of mental illness. My recollection is that it was Mr Anwar who raised this and its relevance to the case of Mr Bayoh.

89

My recollection is that COPFS had limited involvement in the ingathering and retention of property seized by police or PIRC from civilians. I had no involvement to my recollection in the return of property.

90

I was aware of significant concerns in relation to evidence obtained by PIRC in relation to apparent collection and retention of intelligence in relation to Mr Anwar. The Lord Advocate (Mulholland) was sighted on these developments and PIRC was instructed to make enquiries into the basis for obtaining and storing this material. Following consideration of this an instruction to PIRC was issued under s 33A of the 2012 Act by Stephen McGowan in October 2016 to investigate potential criminality in relation to this. I understand



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that a decision was thereafter made that the matter should instead be progressed through the Information Commissioner's Office (ICO) to investigate whether there had been a breach of Data Protection principles or criminality and understand the Crown Agent wrote to the ICO. Although I have no recollection of having seen this draft warrant (PIRC-04535) I suspect that it was prepared in connection with these matters.

91

My recollection is that I had involvement in discovering that a passage from the statement of Ms Wyse had been omitted from material that was disclosed to experts and ensuring that this was rectified.

I was aware that COPFS colleagues had analysed the footage obtained from the phone of Ms Wyse and considered that by identifying the arrival of vehicles that they had been able to identify a time frame within which it had been shot. I have no specific recollection of providing direction in relation to text messages. The account provided by Ms Wyse and in particular her account of the use of a police baton and how many officers were involved in the restraint of Mr Bayoh were matters that were explored during COPFS precognition of her and other eye witnesses. Guidance was given that there should be exploration of the evidence from Ms Wyse that a baton was used across the chest of Mr Bayoh near to the throat and whether there was any support for this from other witnesses. Ms Wyse had also indicated that the deceased was struggling and shouting for officers to get off him and the investigative team were asked to fully explore this with her and other relevant eye witnesses.

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92


I have no specific recollection of the terms of the call with Irene Scullion on 6 May 2015 concerning return of mobile phones PIRC-03702. However, I do not take any issue with the terms of the note although I am unclear about the context of the entry relating to 'might be viewed in a certain way.' I consider that it is likely that my approach would have been informed by avoidance of any risk that the premature return at a very early stage in an investigation of items that may contain material of significant evidential value such as downloads may have should criminal proceedings be taken at a later stage. I considered that PIRC were essentially seeking reassurance from COPFS on what would normally be an operational matter.

93

Forensic examination of the vest of PC Short and comparison with the boots of Mr Bayoh was agreed at a forensic strategy meeting on 12 May 2015 which I attended.

I am confident COPFS-05204 is not my notebook and the entry on p48 was not made by me.

94

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To the best of my recollection the ingathering and analysing evidence in relation to biological samples from Mr Bayoh's body had been dealt with prior to my involvement.

95

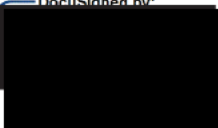
In relation to the email from Mr Stephen McGowan of 20 July 2016 PIRC-01988 I am of the opinion that the full effects of the drug Alpha PVP on a person who had ingested it would require to be considered. The impact of the drugs detected in Mr Bayoh's system was a significant element in the enquiries conducted by COPFS following submission of the second report by PIRC in August 2016. Expert opinion was sought from Prof. Michael Eddleston who was asked to consider the impact of Alpha PVP in isolation and in combination with other drugs on Mr Bayoh's behaviour and also his cognitive ability with particular reference to his interaction with police officers on 3 May 2015.

96

I do not recollect having any involvement in relation to the belongings taken from civilian witnesses.

97

PIRC were instructed by COPFS to carry out an investigation to see whether there was evidence that any police officers had unlawfully

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accessed data held on police systems following the death of Mr Bayoh in relation to a number of individuals including members of Mr Bayoh's family and Mr Anwar. This instruction was in response to concerns expressed by Mr Anwar that such unauthorised access may have occurred. I cannot see any benefit of any search in relation to a legal representative or a deceased's family nor recording information as intelligence and unless a legitimate policing purpose existed for such access a contravention of Data Protection legislation may have been committed. PIRC were instructed to investigate and report to COPFS as to whether evidence existed to establish such a crime. Separately as I indicated in my answer to question 90 the investigations by PIRC discovered intelligence material held by Police Scotland in relation to Mr Anwar and was ultimately referred to ICO for consideration and investigation by them. Both these matters were treated as serious and significant by the Crown.

98

I have read the notes contained at page 5 [redacted] [redacted]
[redacted]
[redacted]
[redacted]
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[redacted]
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[redacted]
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[REDACTED]

I have considered my minutes to Law Officers of 22 August 2018 and 25 September 2018 COPFS-04029 (e) and COPFS-00532 [REDACTED] and note that they relate to a separate Data Protection issue.

99

To the best of my recollection PIRC had made attempts to enhance the footage of the incident involving Mr Bayoh with limited success. The COPFS approach was to engage with the media technical team to

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explore what could be done with all of the media available to create a product that pulled all of them together in real time so that each could be viewed and listened to in real time as the incident developed. The actual technical creation of the disc was mainly undertaken by the investigative team at COPFS although I was aware of and was supportive of the approach and intention, and had the opportunity to view early results, as did the Lord Advocate (Wolffe)

100

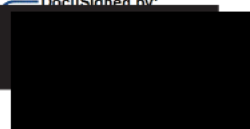
I do not recollect being involved in the gathering and analysis of statistical data.

101

Throughout the investigation I considered that it was critical to obtain clarity on the precise actions of the officers involved, the duration of the restraint, what information they had been provided with prior to their arrival and that once all relevant information was available an assessment of compliance with training and guidance including assessment of risk should be carried out. In respect of Police Scotland COPFS investigators carried out an assessment of the adequacy of the training and guidance provided and whether it reflected best practice with a particular focus on whether these were sufficient in relation to recognising and responding appropriately to persons who were intoxicated or undergoing a mental health crisis

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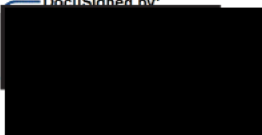
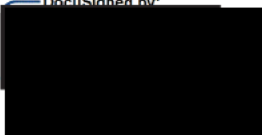
that affected their behaviour. The preparation and analysis of evidence in relation to this part of the case was carried out in consultation with COPFS Health and Safety prosecution specialists.

102

The issue of race was central to the ongoing investigation. We had a black man who died after being restrained by police, an immediate instruction to PIRC to investigate, involvement and interactions with senior Crown Office officials and the Lord Advocate taking a personal and close interest in the case, all against a background of the officers involved refusing or declining to provide statements on their actions. There had been meetings with family and their solicitor. There was a clear understanding that race had to be a focus of the inquiry and whether it had influenced the approach of police to whole circumstances.

PIRC provided assurance prior to submission of first report that if racial motivation was identified in the course of the investigation this would immediately be referred to the Lord Advocate and race was clearly within the scope of their considerations during the first part of their investigations.

Following my meeting with Inquest, and the interaction with the family following submission of the first PIRC report I submitted a full analysis in a briefing to the Lord Advocate and referred to the Sean Rigg investigation. It also identified areas of further inquiry that

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required to be undertaken by PIRC before a decision could be taken on whether there was evidence of criminality.

The issue of race was specifically highlighted in my letter of further instruction to PIRC asking for confirmation that race and whether there was evidence of racial motivation was a primary focus of their investigation.

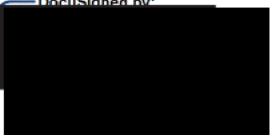
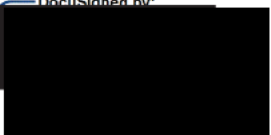
My recollection is that at the meeting attended by Stephen McGowan and myself at PIRC in October 2015 that is referred to in the file note COPFS-04627(a) there was discussion regarding the approach to racial matters. My intention was to make clear that whilst evidence of overt racial motivation was to be investigated, that there required to be consideration by PIRC of implicit bias in the sense of whether the approach of officers was in any way, including in an unconscious way, influenced by race.

That clarification was also provided in my letter of 13 January 2016 to John Mitchell that referred to earlier discussions and sought to draw the same distinction between overt racism and the overall approach to the incident including whether they considered that the incident was potentially terror related. I was reassured by the reply from PIRC that stated for the avoidance of doubt that their report would where possible address the issue of whether there is an indication that race influenced the approach taken by officers either individually or collectively in the response to the incident.

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My advice was given against a background where it was accepted that at all times race and racial motivation required to be considered as a continuous process as the inquiry progressed and that an absence of overt racial motivation should not be regarded as determinative. Consideration of implicit bias and assumptions based on race in the overall approach required to be assessed as the investigation developed and the evidence was gathered.

The team at COPFS would have been aware that PIRC had been specifically directed to investigate allegations of past racist behaviour by officers. These investigations were instructed to provide potential context and background to the behaviour of officers during the incident and were not confined to whether a separate crime could be proved. The team were also aware that Ade Johnston had raised the issue of an investigation into alleged racist behaviour by Fife officers but PIRC had been unable to identify the incident until I became aware that Fife officers had sent racist texts when another separate and unconnected case was brought to my attention that referred to such events. This resulted in an instruction to PIRC to investigate whether there was a link to any officers involved in the incident on 3 May 2015 and the COPFS team were sighted on this and analysed the results in the precognition. These are examples of how race was a key element but was


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contextualised to permit a clear focus upon practical implications.

My approach to the COPFS investigation was to focus on issues relating to race as they applied to the particular circumstances of the case. Put simply the mere fact that there was no evidence of overt racism during the incident was in no way conclusive that there was nothing to see or consider in relation to race.


The acknowledgement of potential unconscious or implicit bias reflected the concerns expressed by the family of Mr Bayoh in meetings and correspondence with us, and in the wider media. A focus on their real concerns provided a meaningful and practical context for this approach and mitigated the risk that the focus on race was superficial and could be easily dismissed.

Specifically, the approach acknowledged the concerns expressed by the family that the perception and approach by the police to the incident as a whole had been affected by bias and that they would have approached the incident differently but for considerations of his race. More particularly it was suggested that the officers' approach had been influenced by an apparent terrorism threat and warning, that this had affected their initial actions and interaction with Mr Bayoh, that they had failed to recognise signs of a medical or mental emergency, that handcuffs continued to be applied after Mr Bayoh became unresponsive and that they had used unnecessary and disproportionate force towards him, contrary to their training and the Standard Operating Procedures.

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The approach adopted was intended to ensure that accounts provided to PIRC were not accepted at face value but were tested and compared with other evidence in the case and that the actions of the police during the incident were the subject of independent expert opinion according to the state of knowledge that officers had in real time. That was a crucial element in the Crown approach as it was critical to separate out what the officers knew on their arrival as compared with what other witnesses had seen, particularly in relation to the alleged use of a knife.

Part of this approach involved detailed precognition of all key eye witnesses in order to ensure that all relevant evidence was available to Crown Counsel both in relation to what they saw and what they heard. This acknowledged observations and criticisms made by Mr Anwar in relation to the approach to this evidence by PIRC and the alleged use of value laden language. The approach also recognised the particular challenges that investigation of crime alleged against the police presents, particularly where physical force has been used. As compared with offences of this type that do not involve the police, my experience is that there requires to be more detailed consideration of what the state of mind and intention of the officers was in order to assess whether a crime has been committed. This means that any evidence, for instance by way of comment by an officer during or after the incident that indicates improper motivation on the part of an officer, or loss of temper or control, or a desire to punish can provide evidence of criminal intent. Such inquiries were very much part of the investigative strategy, and included the precognition of eye witnesses, analysis of broadcasts and review of many hours

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of footage recorded after the incident at Kirkcaldy police station.

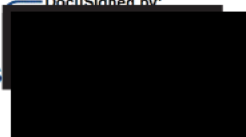
I would say that the approach of COPFS and Crown Counsel to the investigation incorporated three broad principles that recognised the concerns of Mr Bayoh's family that he had been treated differently to a white man, that an unwarranted link had been made to an apparent terrorist warning because of his colour, that the degree of threat that he posed that morning had been exaggerated and that he had been subjected to disproportionate force resulting in his death. These three principles were

Standing the criticism by the family of the length of time it took for police to provide statements and the suspicions that had been expressed regarding this process, our focus was on the medical evidence and investigations we carried out with non police witnesses, combined with reliance on footage and airwaves broadcasts in order to provide a comprehensive timeline of events. Accordingly we did not place undue reliance on the statements of the officers and were rigorous in testing these against other evidential sources.

That it was never our approach throughout the investigation to place undue emphasis on evidence that suggested that Mr Bayoh was apparently behaving out of character, that allegedly he had been carrying and using a knife earlier and had taken drugs that were likely to have affected his behaviour. Rather our focus was on whether we could establish that the officers individually or collectively committed a crime using a criminal degree of force, and in doing so we looked at the totality of the period of restraint and whether we could establish a point at

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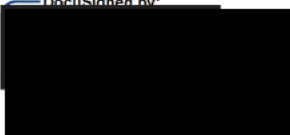
which he was fully under control and whether disproportionate and potentially unlawful force continued thereafter.

That throughout the investigation where possible we took into account the concerns of the family and those of Mr Anwar and were mindful that there may well be lessons to be learned and that consideration required to be given to the proper forum to address these.

However it is the case that the decision that was ultimately taken by Crown Counsel related only to potential criminal liability and that had a public inquiry not been proceeded with, that significant further investigation by the Crown would have taken place once the forum for the next stage of the case had been determined. The focus of the inquiry by COPFS and the preparation of the precognition was to permit Crown Counsel to take this limited decision with confidence.

The team were encouraged by me to think creatively and critically about the strategy and to challenge each other throughout the investigation and there were a number of meetings with Crown Counsel and the Lord Advocate to review progress and discuss next steps.

I engaged regularly with the team and we would explore hypothesis and emerging information. I was satisfied that each member of the team was empathetic and committed to our approach and was encouraged by their refusal to accept things at face value as reflected in the investigations to explore the

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source of the terrorism warning and how the rib fracture was sustained. In particular I was aware that Mr MacLeod had experience of investigating and preparing a case that related to police officers committing perjury and could bring important investigative and analytical skills to this investigation, particularly in relation to allegations of false or misleading accounts being provided by officers.

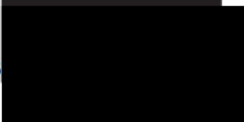
Overall, the approach was to contextualise potential racial motivation in relation to specific concerns attaching to the particular circumstances of this case, both in relation to the incident itself and its aftermath, including inappropriate conferring and allegations of perjury and attempting to pervert the course of justice, and to pursue these investigations with determination.

The primary focus of the precognition itself was on whether there was a sufficiency of evidence to institute criminal proceedings, but the analysis of evidence carried out during this phase would have informed subsequent inquiry by the Crown, particularly in relation to the impact of race and considerations of implicit bias, had a Fatal Accident Inquiry been instructed.

Had Crown Counsel instructed prosecution for any offence by officers in relation to the restraint of Mr Bayoh consideration would have been given to libelling a racial aggravation to permit relevant evidence to be led.

103-104

The lines of inquiry set out in the IPCC guidelines SBPI-00386 relate to the investigation of allegations of discrimination and



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are highly relevant to the focus of the type of inquiry that could have been progressed by COPFS after the issue of potential criminality had been decided by Crown Counsel. In particular the guidelines contemplate probing accounts to test for assumptions made by police and this line of inquiry could not be pursued by COPFS while criminal proceedings were a possibility.

105

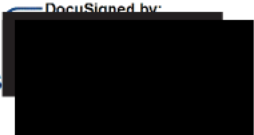
A key element of the incremental strategy approved by the Lord Advocate was to separate out and resolve the issue of potential criminality and to get to a point where Crown Counsel could take a decision in this regard with the necessary confidence, thus permitting the investigation to move forward to other areas in anticipation of an inquiry whose forum had yet to be determined. It had been hoped initially that the necessary further inquiries could be completed relatively quickly.

The precognition that was requested by Crown Counsel was created for the limited purpose of enabling Crown Counsel to take a decision on potential criminality but was not intended to be the end of the investigative process by the Crown particularly in relation to race and implicit bias and further detailed inquiry would likely have been undertaken had an FAI been instructed. This would in my opinion have been highly likely to have required precognition of the police officers involved where their approach to the incident would have been probed, scrutinised and evaluated.

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The investigative team at COPFS, Crown Counsel and the Lord Advocate approached the analysis of evidence in the light of observations and questions communicated by Mr Anwar that appeared relevant to the issue of potential criminality. In early 2018 I reminded the team of the issues raised by Mr Anwar that he wished addressed as part of Crown investigation and highlighted the case studies of deaths in custody in England including Sean Rigg and Thomas Orchard. Inquiries made on behalf of the family were also forwarded to PIRC to be factored into their investigation. A review of correspondence was carried out as part of the decision-making process to identify lines of inquiry which were relevant to the consideration of criminality that had been progressed following correspondence with Mr Anwar. These included whether there was evidence of inappropriate conferring between officers, allegations of inappropriate interrogation of police systems, whether there was evidence of perjury or attempt to pervert the course of justice, whether there was any connection with a racism investigation in Fife, concerns over the approach by PIRC in relation to the taking of civilian statements and the source of misinformation conveyed to the family of Mr Bayoh.

To the best of my knowledge all of the matters raised by Mr Anwar were addressed and responded to and where correspondence requested provision of material the Lord Advocate was content with the approach taken in the light of the stage the investigation had reached.

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The question of further procedure including the holding of a Fatal Accident Inquiry could not be progressed before a decision on potential criminal proceedings had been resolved. As a matter of practicality my recollection is that the Lord Advocate indicated to Mr Anwar at an early stage in the investigation by PIRC that at least a Fatal Accident Inquiry would be held. In respect of whether any such inquiry would be mandatory consideration would have had to be applied to whether Mr Bayoh had at any time been in legal custody as defined in s1 subsection 4 of the 1976 Act. My own opinion is that the definition is restrictive and may not apply to the circumstances of the death of Mr Bayoh which occurred before he was taken into custody.

The decision to recommend proceeding by way of Public Inquiry was one taken by the Lord Advocate and following analysis of the areas that could be covered by both forms of inquiry prepared by me. The issue of potential criminal proceedings was not resolved until the conclusion of the review process and for this reason to my knowledge no preparations could be progressed while this decision was pending.

Post Mortem Examination

108-109

I had limited engagement in the post mortem process that took place prior to my first involvement in the case and the Scottish Fatalities Investigation Unit (SFIU) were engaged in the

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arrangements for carrying out the post mortem examination. SFIU were the unit within COPFS who had expertise and familiarity with processes and the early investigative structure in relation to sudden deaths and for receipt of reports following further analysis of biological samples. To my knowledge this was the first time CAAPD had been involved in a sudden death investigation that was normally conducted and overseen by SFIU.

COPFS has an on-call capacity to facilitate the attendance of a procurator fiscal at the post mortem examination in relation to a death that is likely to result in significant investigation or criminal proceedings. A death in custody or following contact with the police would in my experience normally result in the attendance of a procurator fiscal at the examination. In my experience their role in attending is generally to oversee the carrying out of the examination, to ensure that identification requirements are complied with, to oversee the obtaining of samples and ensure these are corroborated and to identify any potential evidential opportunities to progress the investigation.

110

I have read all of the entries in the notebook COPFS-05205 and regret that I have no recollection of their background.

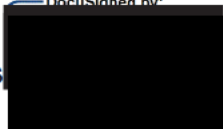
111

I was not involved in the issuing of instructions to SPA and am unaware as to whether the instructions included reference to steroids. I do not recollect being consulted on this point.

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I was very aware that Mr Bayoh's body had not been released to the family for a considerable time and I wanted to progress the release of the body to them to permit them to make funeral arrangements and to minimise further distress to them. The Lord Advocate (Mulholland) had taken a personal interest in expediting release of Mr Bayoh's body and had made it clear to me that he did not want any unnecessary delay. As I recollect a further CT scan of his body was considered unlikely to reveal new findings particularly in relation to fractures. I was of the view however that all possible procedures should be undertaken to obtain as full a picture as possible regarding potential injuries and that this further procedure should take place. I am sure that I discussed the matter with David Green and it was agreed to proceed with this. I recollect that this procedure would require the movement of Mr Bayoh's body from the mortuary to the equipment that was located in another building. I had discussed this with Dr Kerry Anne Shearer the pathologist and indicated that I considered it important to achieve this transfer in as discrete and dignified a way as possible and asked her to consider this. As I recollect she later advised that the body of Mr Bayoh could be transferred by using a corridor underneath buildings and I understand that this was used.

The CT scan was completed and Dr Kerry Anne Shearer advised that it had revealed some issues that she considered likely to be post mortem artefacts but indicated that she and Dr Bouhaider would view the body in person the following day and requested that the release of the body be postponed until this had taken place. From the attached email chain it appears clear that viewing was to take place on 29 May 2015 and my email to Dr Shearer was to permit release of the body after all outstanding work had been completed to their satisfaction. PIRC had also contacted me on 29 May requesting an update on the release of Mr Bayoh's body. It is the case that the

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examination on this date did indicate for the first time a fracture of the rib and I took steps to advise the Lord Advocate of this as well as PIRC and Mr Anwar that day.

In respect of the email to Dr Shearer ^{COPFS-06137} [REDACTED] in relation to hair samples my recollection is that it related to an inquiry by me as to what analysis of hair could indicate regarding potential drug consumption but I do not recollect that this led to any further samples being required.

113

I understand that the results of the toxicological analysis were included in the Post Mortem report that was disclosed to Mr Anwar immediately on receipt on 18 June 2015

114

I considered that it would not compromise the independence of the investigation to meet with Deborah Coles of Inquest along with Lyndsey Miller and that it would be valuable to hear her views and perspectives in relation to deaths in custody.

115

I recollect that PIRC encountered initial difficulties in obtaining the weight of officers involved in the incident on 3 May 2015. My communication with Mr Anwar COPFS-04784 at this time was intended to permit a direct approach to be made to PIRC for this information that I agreed was important in relation to investigation of the role of restraint. PIRC were instructed to pursue enquiries in relation to the weight of officers and were aware of the importance of obtaining this information.

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Please see answer to question 112 above.

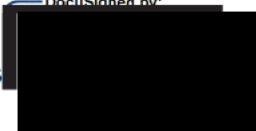
Learning From Other Investigations

117

Prior to my involvement in this case I had awareness through media coverage of cases in England and Wales where black men and women had died following restraint by authorities. I was aware that restraint can present a risk of rapid decline and that postural asphyxiation was a danger during such procedures. During the meeting with Deborah Coles, she referred to the case of Sean Rigg, a black man who died following restraint during a mental health episode, and I read materials associated with this investigation and in particular the criticisms of the initial IPCC review. I highlighted the circumstances of the case to investigators, to Crown Counsel and to the Lord Advocate. I considered that the Sean Rigg investigation highlighted the crucial importance of authorities carrying out a critical analysis of the evidence and of securing an independent view on the police evidence. This informed the review of the first PIRC report and the subsequent instruction to PIRC to critically analyse the accounts given by police and to highlight and attempt to resolve any inconsistencies. Thereafter an independent analysis of the actions of the police was

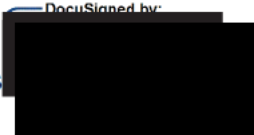
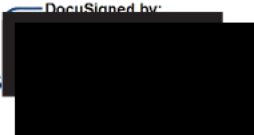
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necessary and an opinion obtained as to whether the techniques and practices used were justified and proportionate having regard to the circumstances. The case of Sean Rigg emphasised the requirement for police to recognise the signs of someone who is undergoing a mental health crisis and how a duty of care is owed to them and that restraint techniques had to be proportionate to the threat posed to officers. These considerations informed the approach to the present case.

During the case I was generally aware of other deaths of black people following restraint. These included the death of Roger Sylvester, Joy Gardner and Christopher Alder. A common theme in respect of all these deaths was a disproportionate use of force used having regard to the degree of threat posed and an apparent indifference to the deceased and a lack of dignity and respect for them. I was also aware of the death of Dalian Atkinson, the black ex footballer, who had been having a mental health episode at the time he died after being repeatedly tasered and kicked. The police officer who was convicted of his manslaughter apparently exaggerated the degree of violence shown to him at the time of his apprehension and this reinforced the requirement to analyse the accounts of officers involved with Mr Bayoh and his alleged actions towards them.

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I have read the minute COPFS-03998(a) that was prepared by me at the request of the Lord Advocate following the publication of the report by Dame Angiolini on restraint. As I recollect the request by the Lord Advocate was to inform him about the contents of the report as they potentially related to Scotland so he could consider how COPFS should respond in consultation with the wider Scottish Government and dedicated Crown Counsel were included in the distribution list of the minute. The observations and recommendations in the Angiolini report regarding current best practice in relation to training on restraint, processes for recognising those who may be suffering from a mental health crisis and the development of Police Scotland training on restraint were drawn to the attention of Crown Counsel and were areas that were considered in the precognition prepared. The minute and the passages highlighted set a context for the further inquiries set out in my minute of 21 November 2017 COPFS-02214 (a).

My recollection is that the response of COPFS and the wider Scottish Government following my minute would be taken forward by ministers with input from COPFS Policy Division and SFIU.

119

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PIRC were not to my knowledge advised of the views in my minute to the Lord Advocate of 6 November 2017 COPFS-02526(a) regarding response times to incidents at this time and I consider that Law Officers would have wished to be involved in any sharing of lessons with PIRC and with the Commissioner. The Inquiry will be aware that Dame Angiolini was commissioned by the Scottish Government to review arrangements for handling of police complaints and that she made recommendations in relation to the interactions between COPFS, Police Scotland and PIRC.

120

I consider that police officers do have a duty to provide a full and candid statement at the earliest opportunity and that the letter sent by the Lord Advocate to the Chief Constable COPFS-02855 sets out the correct position. The recommendation by Dame Angiolini seeks however to put the matter on a statutory basis which will provide clarity and consistency.

I consider that the failure of officers to provide statements at an early stage of the investigation into Mr Bayoh's death was a significant issue that caused difficulties to PIRC investigators, and with hindsight could have prevented the investigation from progressing expeditiously, particularly in relation to the question of potential criminality. The refusal

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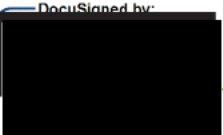
to provide statements took place following clarification of their status as witnesses and apparently following advice.

121

The use of terms and language referred to in my minute of 6 November 2017 COPFS-02526(a) related to considerations of implicit bias. Such considerations as they affected the way Mr Bayoh was dealt with by police were part of the discussions with PIRC in relation to race and would have been assessed by the COPFS team as to whether they had relevance to considerations of criminality but would also have been a focus of further investigations following Crown Counsel's decision.

122

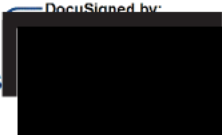
I had forwarded a copy of the Review into the death of Sean Rigg to Stephen McGowan and Lindsey Miller following the meeting with Deborah Coles in July 2015. I had read the report in relation to Mr Rigg and was of the view that the first PIRC report which was expected in a matter of days might have to be considered in the light of the contents of the review. That assessment took place and I was mindful that the review into the investigation Mr Rigg's death was critical of the IPCC report that was described as narrative based and lacking in rigorous analysis and testing of the

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accounts provided by police officers who were involved with Mr Rigg. There was apparent evidence of a failure to properly analyse CCTV footage by the IPCC. It seemed to me that a key consideration was to ascertain the point that Mr Rigg was under control and to view the behaviour of officers who had left him in an unsafe position for some time from that perspective. In respect of race the review indicated that there had been a total failure to acknowledge the race of Mr Rigg and whether this may have influenced the lack of empathy shown to him, the failure to recognise his mental health condition and the apparent absence of humanity towards him in leaving him unattended and in distress.

These considerations were incorporated into the analysis of the first PIRC report submitted to the Lord Advocate and instructions for further investigation issued to PIRC, particularly in relation to the requirement to test the accounts provided by officers, the need to focus on race and to explore the reasoning and impact of Mr Bayoh remaining handcuffed until he was removed to hospital.

The requirement for a rigorous analysis of the evidence and to test accounts provided by officers was a key element of the strategy adopted by Crown investigators and by Crown Counsel. This included precognition of eye witnesses to ensure all relevant evidence was available, preparation of a detailed and comprehensive timeline, analysis of airwaves and sources of information to officers prior to their arrival at the locus and the design of a multi media presentation of

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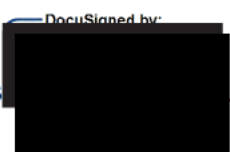
the incident that made full use of the somewhat limited footage that had been obtained by PIRC.

123

I met with Ms Coles with Lindsey Miller at Mr Anwar's office in July 2015. I also recollect that she was present with the Bayoh family and Mr Anwar when the Lord Advocate informed them of the decision not to take criminal proceedings. As indicated above Ms Coles made reference to the case of Sean Rigg during the meeting and the importance of there being a rigorous investigation into the death of Mr Bayoh. I also recollect her making reference to use of stereotypical language in other investigations and this influenced the decision to precognosce all civilian witnesses in the present case. I have no specific recollection of a discussion in relation to a potential FAI.

124 and 125

Prior to making the decision in relation to criminal proceedings the dedicated Advocate Depute Ashley Edwards KC and I had a meeting with a senior Crown Prosecutor at the CPS in London. The purpose of this meeting as I recollect was to compare the methodology of the investigation in the case of Mr Bayoh with that undertaken in a series of deaths in custody in England involving restraint and to see whether any further investigative opportunities should be explored standing that the CPS had considerable organisational experience in relation to such cases. As I recollect Crown

Signature of Witness 

Counsel were reassured that the approach taken in the case of Mr Bayoh was appropriate and consistent with CPS experience.

126-128

I had very limited involvement in the instruction of SPA Forensics and from my experience PIRC took the lead in instructing such examination. I have no recollection of providing instructions to SPA Forensics and no experience of receiving SOCO statements in PIRC directed investigations.

129-130

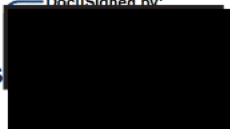
The examination of PC Short's vest for comparison with Mr Bayoh's boots was agreed at a forensic strategy meeting held on 12 May 2015 and chaired by PIRC and attended by me. I was not involved in the direction to SPA in relation to any fingerprint examination of PC Short's vest and was not aware that this might hinder further examination.

Expert Witnesses

131-132

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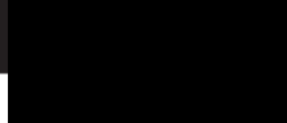


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The Lord Advocate had clearly indicated at an early stage of the PIRC investigation that the instruction of further experts was necessary to explore the cause and mechanism of death and to clarify the significance of the role that drugs and restraint played in the death and the extent to which they interacted. It was also important that the cause and mechanism of death were not considered in isolation but that proper consideration was applied to how they related to the accounts given by eye witnesses and police, with a particular focus on whether the deterioration in the condition of Mr Bayoh was likely to have occurred suddenly and without warning or otherwise. I suggested specific questions in relation to the significance of the continued application of handcuffs and leg restraints and whether that could have affected resuscitation efforts.

The rationale behind instruction of experts was to bring expertise in relation to potentially significant areas of specialisms that could bring clarity in relation to these critical questions. For my part I was aware that the Lord Advocate had taken a personal interest in the selection of experts with and expressed desire to use experts from the international community. The identification of experts was informed by two key considerations; do they appear to possess the necessary skills, qualifications and experience to comment on a particular issue; and does it appear that expert opinion on that particular issue will be of material assistance to the decision maker or the court in determining a crucial issue.

For the Crown it is an overriding and important principle that the identification of experts must be carried out independently. Expert witnesses also have an overriding duty to report their

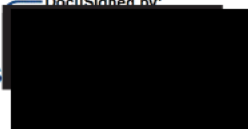
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opinions in a balanced and professional manner. To fulfil the requirement of independence an expert must not be instructed with a view to obtaining a predetermined view or to advance a particular theory.

In addition I would say that in general the instruction of an expert report is the beginning of a process rather than an end. It is not the case that by instructing an opinion that the Crown or indeed any other agency is obliged to accept that opinion without further investigation or testing. It was always the case that any opinions obtained would be assessed by independent Crown Counsel and tested against the opinions of other experts. From an early stage the Lord Advocate approved a strategy whereby an opinion would be sought by a reviewing expert on the cause and mechanism of death who would bring their expertise to all of the material ultimately obtained. In the Bayoh case it was always the intention at the end of this process to bring any conclusions back to the original pathologists who carried out the post mortem examination to permit them to indicate whether they agreed with the approach taken and any opinions or conclusions reached. It was never the case that the results from the original post mortem examination or the cause of death were in some way to be revised or discredited. It is not the case that experts were instructed on the basis that they were likely to form a conclusion that fitted with some pre-determined agenda and the letter of instruction to experts was amended on my instruction to include specific reference to the fact that Mr Bayoh remained handcuffed after becoming unresponsive. Rather the process was intended to bring additional expert perspective on the precise cause and mechanism of death and

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to assist the ultimate decision maker, in this case Crown Counsel, to firstly make a properly informed decision on whether criminality could be excluded in relation to the death of Mr Bayoh.

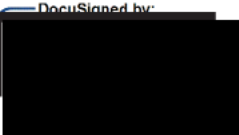
The communications with Mr Anwar acknowledged that a key issue was separating out the potential causes of death and the contribution of restraint. The approach taken to the instruction of experts was to keep an open mind on these issues, and to allow the experts instructed to consider the significance of each of these and not to focus on one, but always to consider the role that restraint had in potential combination with other factors. That was a constant thread in relation to Crown considerations and was at the centre of the Crown Counsel's approach to the investigation.

In respect of Dr Karch and Dr Jason Payne James these experts were identified by PIRC and their CVs were carefully considered before a decision was made to instruct a report. My recollection is that the Lord Advocate was sighted and content with this course of action. I recollect that Mr Aamer had indicated concerns that positional asphyxiation had to be a focus of expert opinion. During June 2015 I had contacted Dr John Clark, whom I regarded as a highly experienced and respected pathologist to see whether he could assist in providing opinion, either from him or from someone he could recommend, in relation to deaths associated with restraint and including positional asphyxiation. John Clark indicated that it would be preferable to approach someone who had a particular interest and expertise in such deaths and suggested Dick Shepherd and Nat Carey. He undertook to have an

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informal word as I recollect Dr Clark was attending an event where both those were attending, but he later confirmed that Dick Shepherd would prefer to decline due to other work commitments. As Dr Clark was aware that Nat Carey was instructed by the family he suggested someone he regarded as equally good namely Dr William Lawler.

The instruction of further experts took place following consultation with Mr Anwar and he was given the opportunity to comment and to suggest further experts who were ultimately instructed to provide reports. The Lord Advocate was fully engaged in this process and noted all of the observations of Mr Anwar in relation to this. He considered that the Crown had a responsibility to explore all relevant lines of inquiry and had a duty to 'follow the evidence.' He was content with the decision to instruct further expert opinion on cardiology standing the opinions produced by other expert witnesses including Dr Payne James. The Lord Advocate was also willing to consider further representations by Mr Anwar in relation to the instruction of Dr Maurice Lipsedge who had been suggested by the family and in particular to offer views on psychosis and the effect of drugs. This resulted in Dr Lipsedge being instructed to provide opinion in a report in relation to this and an instruction to consider behavioural aspects and whether police were behaving as group were included at the request of Mr Anwar as he considered Dr Lipsedge could offer opinion on this. It is also the case that PIRC were directed to share the reports by Dr Karch and Dr Payne James with the original pathologists.

Signature of Witness 

I relation to the expert witnesses approached for opinion by the Crown or PIRC my recollection is that Dr Karch and Dr Payne James were identified by PIRC and their CVs sent to the Crown for consideration. As I recollect Mr Anwar was advised that opinion had been sought from these two experts but was not asked to comment prior to their instruction. Dr Crane and Dr Lipsedge were identified by Mr Anwar. Dr Soilleux, Dr Bleetman and Dr Parkes were identified by PIRC and again CVs were considered by the Crown. Dr Sheppard's CV was forwarded to the Crown by PIRC although my recollection is that she was first suggested by David Green. The instruction of all these experts was as I recollect approved by the Lord Advocate who wrote to Mr Anwar to advise of their instruction and was invited to comment. The identification of Prof Eddleston, Prof Freemont, Prof Lucas and Martin Graves was by COPFS and approved by Crown Counsel. As I recollect Prof Freemont was identified by the dedicated Advocate Depute as he had been involved in a previous case.

From my recollection I reviewed the CVs of all of the experts who were suggested along with others in COPFS and was satisfied that it was appropriate that they be instructed having regard to their qualification and experience and that there was no apparent conflict of interest. In particular Martin Graves was selected in the knowledge that he was based outwith Scotland and had limited association with Police Scotland. Again from recollection PIRC forwarded letters of instruction to me for review and I recollect that I had suggested inclusion of a question related to the impact that the continued application of handcuffs to Mr Bayoh would have had. My recollection is

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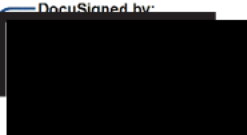
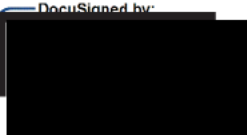
that draft letters of instruction would have been forwarded to me and Crown Counsel in relation to COPFS experts.

As I recollect PIRC had compiled an expert pack of materials that was sent to all experts instructed by them and the investigative team at COPFS prepared and forwarded material for consideration of experts instructed at a later stage. I do not recall taking any issue with the material that was provided.

The instruction of experts and the desire to take account of views of family and to secure their confidence were key considerations of the Lord Advocate and me and my colleagues. It is obvious however that care had to be taken to avoid a perception being created that the instruction of experts was being influenced and that the overriding duty to act independently was being compromised and a careful balance required to be struck. At all times the Crown was motivated by the duty to act independently and to obtain opinions that were considered of assistance and relevant.

133

Throughout the process of instruction of expert witnesses it was recognised that it was important that the provision of information to those instructed was consistent and Mr Anwar had sought reassurance on this point. This formed the background to the email exchange with Ms Campbell COPFS-03625 and was intended to address an undertaking that Mr Anwar would receive consistent provision of information and to make sure so far as possible that his experts received relevant information to properly inform their opinion.

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134

It is open to Crown Counsel to decide to consult with expert witnesses at any time during the investigation of a case. From my experience the purposes of such consultations are to permit further exploration of the reasoning behind any opinion and to seek opinion on any contrasting or contradictory information that may be available. A consultation will permit exploration of hypothesis and whether an opinion will change in the light of different information.

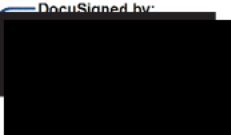
I accompanied Ashley Edwards KC in relation to consultations with Dr Lawler, Dr Bleetman, Dr Rees and Martin Graves. I consulted with Dr Soilleux as Ashley Edwards was unavailable and travel arrangements from England had already been made. As I recollect Ashley Edwards consulted with Dr Shearer along with Mr McLeod.

135

Analysis of the expert reports and of the consultations was made in the precognition submitted to Crown Counsel

136

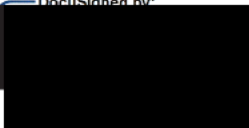
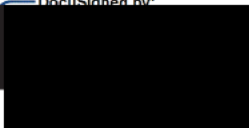
The material provided to experts was intended to assist them to form a properly informed opinion on the questions asked of them. There was no attempt to provide a partial or misleading picture of events. The materials provided included witness statements and other original material. The investigative team

Signature of Witness 

were mindful of the need to present a balanced and fair representation of events to experts and where a narrative or summary of key events was required to avoid presenting a misleading account. In respect of the letter of instruction to Martin Graves this was repeatedly circulated around investigators and Crown Counsel and changes suggested and incorporated so that it was considered a fair representation of events. It is accepted that a careful balance required to be struck between reflecting what the investigation considered was likely to have happened while avoiding speculation and risk of overstating the position but bearing in mind that an expert on restraint would require some factual basis on which to offer an opinion of this type. Particular care was taken to separate out information that would not have been known to police officers on their attendance but that was spoken to by other witnesses. Accounts of individual witnesses were summarised but differences were highlighted and original statements provided to permit the expert to assess the significance of these. Mr MacLeod's note recognises that the value of an opinion could be undermined if information was provided that was inaccurate and this is reflected in the work undertaken to correct the information that was provided in the statement of Ashley Wyse.

The consultation with experts, particularly Martin Graves, would provide an opportunity for Crown Counsel to explore their reasoning further in relation to the basis for their opinion.

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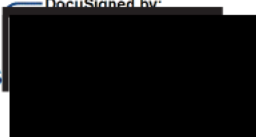
The instruction of Dr Parkes COPFS-06008 was to enable him to provide opinion on the restraint techniques applied by the police on Mr Bayoh and whether these were necessary and appropriate according to the circumstances and their training and the questions asked of him in the letter of instruction reflected this. The CV of Dr Parkes set out the range of his experience and expertise which had a particular focus on the safety of restraint and positional asphyxia. He was author of a number of associated academic papers and had experience of writing restraint guidance. As with all experts, the basis for any opinion expressed requires to be justified and the report and opinions of Dr Parkes were reviewed by Dr Lawler.

138

In relation to emails between me and Ashley Edwards in November 2017 COPFS-04192 and COPFS-04192(b) as I recollect these emails were exchanged during a period where significant difficulties were being experienced by the team in identifying and instructing a suitable independent expert to comment on the restraint techniques used from a police perspective and also in relation to the quality of training delivered to officers. From my recollection Martin Graves was first suggested during December 2017 and standing that he had extensive police background on response and restraint Crown Counsel instructed that he be approached for opinion on this matter at this time. I have no recollection of matters being taken further with Dr Parkes at this time standing that Crown

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Counsel were satisfied that opinion be sought from Martin Graves who had a police background and could accordingly provide expert evidence on all areas where this was required including the adequacy of police training.

139


I consider the account provided on pages 2 and 3 of the report by Dr Anthony Bleetman COPFS-00028 is brief and contains minimal description of what each officer did. It is the case that significant further information has been provided to Dr Bleetman from individual witnesses as listed in his report. The letter from Mr MacLeod COPFS-02353 was sent to rectify a specific omission of important information from a witness and to ensure consistency in the provision of information.

140

I am confident that COPFS-05204 is not my notebook. Prof David Rees was approached regarding the significance of sickle cell trait and indicated to the Crown that it was likely that Prof Sebastian Lucas had more expertise in this area and consequently opinion was sought from him.

141

The background to my note and the email exchange COPFS-05205 and COPFS-03758 was that the Health and Safety Executive had declined to carry out an investigation into the circumstances of the restraint of Mr Bayoh, or indeed the separate investigation into the M9 incident, following meetings

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with the Crown. Rod Sylvester Evans is an expert consultant in relation to health and safety investigations and the Crown wished to explore the possibility of instructing him to review the circumstances in both cases. The note must have been made in the light of the proposal to approach him but in the event he declined to become involved in the case of Mr Bayoh and input was sought from the specialist Health and Safety Unit in COPFS.

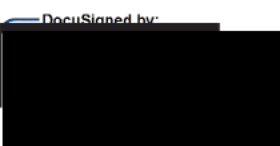
142

As I recollect Mr Anwar had suggested an opinion should be sought from Dr Lipsedge and had requested that he be asked to comment on the behavioural science aspects of the case. The response from Dr Lipsedge was communicated to Mr Anwar. I indicated that Mr Anwar may wish to discuss the matter with PIRC and I also asked how he wished matters to proceed. I do not recall any response nor any other expert being suggested on this matter.

143

I was unaware that a response had not been received from Prof Crane to Mr MacLeod's letter enclosing a corrected version of the statement of Ms Wyse. Mr MacLeod's letter makes clear that the relevant information had been contained in the briefing pack given to witnesses but not the statement.

144

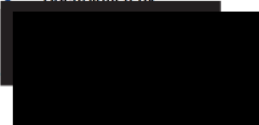
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To the best of my recollection the body positions images were created at the request of Crown Counsel and I had limited involvement in this. It is my recollection that the dedicated Advocate Depute wished to have 3D images available that would permit the body position to be viewed from a number of angles and that she attended at Gartcosh to clarify what she wanted to be prepared. The purpose of this was as I understand to consider whether some witnesses could have regarded Mr Bayoh as being fully prone depending on the angle of view of the witness but where he was in fact on his side or with an arm underneath him. In particular the Advocate Depute wished to explore the significance of the application of handcuffs to Mr Bayoh and how this might affect both his actual body position and the perception of it by other witnesses. Those body images created were to be sent to Dr Lawler for comment for completeness but as I recollect they were not intended to reflect all of the body positions that Mr Bayoh was described as being in by witnesses.

In relation to the email from Dr Bleetman COPFS-04239 the expression fully prone means face down lying flat on the ground in my view. I do not recollect the terms of the comment to Dr Bleetman concerning prone restraint but the reference to reconstruction may be connected to the body position images where the arm is underneath the body and where the significance of handcuffing was being explored. My recollection is that I was aware that some witnesses described Mr Bayoh as being in the prone position during restraint but that the length and duration of that position was a matter that was explored during the investigation and in the precognition. As I recollect

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Dr Bleetman's report and opinion had been prepared on the basis that a significant part of the restraint of Mr Bayoh had occurred in the prone position and accordingly his opinion was available from that perspective and Crown Counsel were satisfied that nothing further was required in the light of his email.

145

In relation to notes at page 2 of my notebook COPFS-05210 these questions were prepared in consultation with Crown Counsel prior to the consultation with Dr Lawler in January 2018. Whilst I cannot recollect the context of the questions regarding Dr Parkes and Dr Karch it is the case that the report by Dr Lawler does contain comment by him on aspects of the report by Dr Parkes including petichae.

I agree with the transcription subject to the following minor amendments

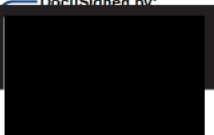
1 Confirm carrier of sickle cell Disease-what if any is impact

2-no amendment

3confirm reasoning and opinion on....

P17-is it your view if asked that drugs combination would.....

4occurred in this case from pm results

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5is part 6 only stating one possibility for causes of petechial haemorrhaging

6view of conclusions expressed by Karch

7 No amendment

8fractured rib taking all information into account...

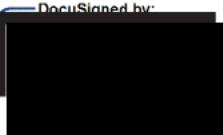
Could drugs alone....

146

In relation to the email from Prof Sebastian Lucas of 4 June 2018 COPFS 03682 I shared the email with senior colleagues in the light of his opinion on sickle cell trait and the impact on this case. I do not recollect any discussion of his views on prosecution which were entirely unsolicited and would have no impact on the decision making process. Prof Lucas was selected solely on the basis of his scientific expertise and I do not recall any discussion regarding his unsolicited comment.

147

I considered that the expert evidence that had been obtained in the case was of assistance to Crown Counsel in relation to the decision that they had to reach in relation to potential criminal proceedings. Crown Counsel had been involved in the investigation for some time and had consulted with experts as they considered appropriate and considered that a decision could be taken with confidence in relation to criminality.

Signature of Witness 

The Health and Safety Executive (HSE)

148

I do not recollect leading or supervising any large scale investigations involving the HSE prior to this case.

149-153

From my experience in this case Stephen McGowan and myself approached senior managers in HSE and shared information on the circumstances of Mr Bayoh's death as it appeared that there were areas that required investigation and it was considered appropriate to invite the HSE to utilise their investigative skills and experience to prepare a report. The circumstances of Mr Bayoh's death appeared to potentially fall within the scope of s 3 of the Health and Safety at Work Act 1974 which requires employers to avoid risks to persons affected by their interactions. The main focus of the approach to HSE was to engage their skills and experience in an investigation rather than any consideration of resources. In respect of PIRC I am of the view that similar considerations apply and that expert input into such investigations is desirable. As I recollect the main focus of potential HSE involvement would have been on Police Scotland as an organisation. In the present case my recollection is that HSE considered that the

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criteria for investigation had not been met according to their own policy approach. From my limited experience, had the death of Mr Bayoh been notified through RIDDOR, established protocols with COPFS would have been engaged and the notification to HSE of the circumstances of the death of Mr Bayoh would have been unnecessary.

154

My recollection is that these notes referring to a meeting with Mr Anwar and the Bayoh family in February 2017 COPFS-05205 were a reflection of views expressed by Mr Anwar in relation to potential offences that may have been committed by Police Scotland including corporate homicide. The reference to training and Sandeman would have related to the inquiry into the death of a Mr Sandeman that followed restraint by police. The question of potential proceedings against Police Scotland on a corporate basis including for contraventions of Health and Safety legislation and the quality and application of training was a clear line of investigation and inquiry from an early stage in the Bayoh Inquiry and both before and after receipt of the PIRC report.

155

The letters COPFS-01953, COPFS-01954, PIRC-02047(c), COPFS-04978(a), COPFS-01955 and COPFS-04735(a) with senior HSE

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[Redacted Signature]

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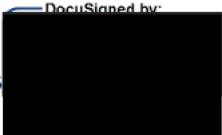
officials reflect the continued efforts of COPFS to engage with HSE senior managers so that their expertise and experience could be factored into the investigation. Despite provision of additional information HSE declined to investigate and the correspondence reflects their reasoning for this. The Law Officers were kept updated in relation to the approaches and responses received against a background that the Lord Advocate does not have the power to direct HSE to carry out an investigation and submit a report.

The approach of the HSE did not prevent investigation by COPFS of potential corporate offences by Police Scotland and the preparation and analysis of evidence in relation to this part of the case was carried out in consultation with COPFS Health and Safety prosecution specialists.

ECHR

156-157

The provisions of ECHR and obligations in respect of art 2 and 14 were important considerations throughout the investigation into the death of Mr Bayoh and the Lord Advocate was fully aware of their potential impact. In particular the requirement of an effective independent investigation into the circumstances of his death, the disclosure of evidential material and the extent to which the family of Mr Bayoh could participate in the investigation and the perception that race had influenced the approach of officers were all matters that the Lord Advocate was aware of. It was the view of the Lord Advocate that compliance with ECHR rights and obligations

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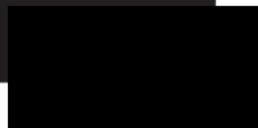
could only be assessed at the conclusion of all of the investigations. The role of the Lord Advocate, Crown Counsel and COPFS in having independent oversight of the investigation informed the approach to the investigation and I would say that there was acute recognition that the investigative framework was being tested and was under scrutiny standing that there had been involvement by the state in the death, a consideration that affected both PIRC as part of the investigative structure and Police Scotland who were part of the state.

158

These notes at page 38 of my notebook COPFS-05205 are accurately transcribed and appear to relate to comments made at the meeting on 8 February 2017 by Mr Anwar referring to the imminent release of a report by Dame Elish on deaths in custody and to his belief that article 2 ECHR had been breached in relation to the post incident procedure followed in the present case. The Lord Advocate considered that assessment of article 2 implications could only be made at the conclusion of the investigation. The issue of improper conferring by police and potential attempt to pervert the course of justice was a focus of the investigation and decision by Crown Counsel.

Media engagement

159-161

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This case was the first time I was involved in such a case and consequently I have very limited prior experience of media engagement in a case of this nature. From my perspective the COPFS press team will provide the media with general information in relation to the role of COPFS in any investigation. Proposed media lines in a case such as this would be circulated for comment with senior officials and potentially Law Officers. In a Crown directed investigation PIRC may submit a draft press release to COPFS for comment.

I was not influenced by any media reporting in relation to the investigation of the case and was not aware that any colleagues were so influenced.

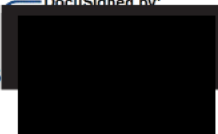
Throughout the investigation there would be occasions where I and other senior officials would be consulted on the wording of a COPFS or PIRC press release that had been drafted by the relevant press office and my approach, and that of others, was to keep these brief, general and procedural.

162-163

I was not involved in discussions or decisions regarding the two statements at PS02751 or the statement that was apparently released by Ch Supt Garry McEwan on 3 May 2015.

164

I had involvement in a proposed PIRC press statement on 6 May 2015 that was sent to me for comment but this did not include any

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reference to asphyxiation. The email from the PIRC simply attached the draft for consideration with no reference to purpose or background other than that it was in response to requests from the media, in particular the Scotsman. I was entirely unaware as were those within COPFS to whom I circulated it that the draft may have been intended to address any allegation that Mr Bayoh had been asphyxiated and I would have expected the communication from PIRC to have referred to this if that was the case. The email from Irene Scullion at PIRC read

See attached press release for your consideration. This is in response to requests from the media, in particular, the Scotsman.

Can you confirm that COPFS is content with this?

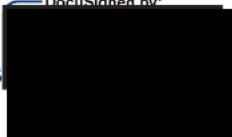
The proposed text in the attachment was

Enquiries by the Police Investigations and Review Commissioner (PIRC) continue into the circumstances leading to the death of SHEKU-AHMED TEJAN BAYOH (31) on 3 May 2015. The post mortem examination has as yet failed to identify the cause of death and further specialist forensic examination continues.

A meeting was held with the family and their solicitor today and they have been updated with the progress of the investigation. Liaison with the family will continue.

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PIRC investigators are continuing with house to house investigations in Hayfield Road, Kirkcaldy.

The response for information from the local community has been heartening but it is important that anyone else with information about the incident which occurred in Hayfield Road near to Hendry Road, Kirkcaldy between 7am and 8am on Sunday 3 May 2015 make contact with the PIRC investigators. PIRC investigators can be contacted on [REDACTED] or [REDACTED].

I circulated this to others in COPFS including our Press Officer, John Logue and Private Office and indicated that I was uncomfortable with reference to the results of the post mortem examination and ultimately the matter was amended and approved by the Lord Advocate who shared my concerns by removing all reference to the post mortem examination so that it read

Enquiries by the Police Investigations and Review Commissioner (PIRC) continue into the circumstances leading to the death of SHEKU-AHMED TEJAN BAYOH (31) on 3 May 2015.

A meeting was held with the family and their solicitor today and they have been updated with the progress of the investigation. Liaison with the family will continue.

PIRC investigators are continuing with house to house investigations in Hayfield Road, Kirkcaldy.

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Signature of Witness [REDACTED]

The response for information from the local community has been heartening but it is important that anyone else with information about the incident which occurred in Hayfield Road near to Hendry Road, Kirkcaldy between 7am and 8am on Sunday 3 May 2015 make contact with the PIRC investigators. PIRC investigators can be contacted on [REDACTED] or [REDACTED].”

165

I consider that SPF's primary role is to represent the interests as they perceive them of police officers in Scotland. I had no role in relation to SPF and would not expect them to seek COPFS approval in relation to a proposed press release. As I recollect the focus of COPFS at all times was to preserve the independence, integrity and confidentiality of the PIRC investigation. In my opinion the release of information to the press at an early stage of a sensitive investigation is inappropriate and creates a risk that it will compromise the integrity and independence of the investigation. I consider that this approach was consistent with the views of the Lord Advocate (Mulholland).

166

As I recollect I was aware of the article referring to Dr Karch apparently making comments to the Sun newspaper on the day of its publication and the Lord Advocate was made aware. The Lord Advocate was extremely displeased at the situation and expressed

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Signature of Witness [REDACTED]

his frustration to Mr Anwar at a meeting shortly afterwards and considered that it impacted on the independence and reliability of Dr Karch. Crown Counsel were aware of the criticism and I consider it unlikely that Crown Counsel would have placed reliance on the opinion of Dr Karch.

167

I was aware of the article concerning the decision not to prosecute officers that was published prior to the Bayoh family being informed. I was aware that there was an internal investigation into the source of the information within COPFS but was not involved directly this.

168

I have read these notes at pages 4 and 5 of my notebook [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

Signature of Witness [REDACTED]

[REDACTED]

169

In relation to the COPFS media response to the 2018 Angiolini Report [REDACTED] my recollection is that I took no issue with the content of the Scottish Government line in relation to the Report and that the final text was forwarded to and approved by the Lord Advocate.

Parallel Investigation

170-173

[REDACTED]

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Signature of Witness [REDACTED]

[REDACTED]

Race

173

I have no previous experience of racism being a factor to investigate in an investigation relating to a death in custody of death during or following police contact or the actions of on duty police officers.

174

Throughout the investigation I consider that I was acutely conscious of the concerns and perspective of the Bayoh family and how the manner of his death and aftermath had a profound impact on them individually and collectively, particularly his mother who attended the first meeting with the Lord Advocate shortly after his death. Mr Bayoh's race and the understandable concern that many people felt

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Signature of Witness [REDACTED]

in the wider community informed my overall approach to the case and that of others in COPFS involved in the investigation.

175

I consider that the overall approach of COPFS to investigations of deaths in custody or following police restraint is now more focused, particularly in relation to the creation of a specialist unit within COPFS to investigate deaths in custody and that it is recognition that these types of cases require a significant degree of expertise.


Handover to Mr Justin Farrell

176

In November 2019 I was appointed as Procurator Fiscal for South Strathclyde and moved from CAAPD as a result.

177

In relation to COPFS-02126(a) this appears to be a minute prepared by Mr MacLeod to advise the new Head of CAAPD, Mr Farrell, of the background to the investigation into the death of Mr Bayoh and the work that had been undertaken as part of the investigation.

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Although I have not seen the minute in its present form I have seen parts of it as I was aware that Mr MacLeod had prepared an account of the work carried out by the investigative team and I had indicated to him that such a record could be important. I take no issue with the terms of the minute that was intended to reflect the purpose and extent of the investigations carried out by COPFS to permit Crown Counsel to take a decision on potential criminal proceedings.

Training

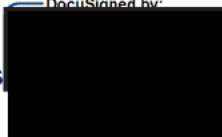
178-180

At the time of my involvement in the investigation I had completed the online training provided by COPFS on equality and diversity. My recollection is that this focused on workplace scenarios and the importance of respecting cultural diversity. I had undertaken online training for recruitment and selection that included reference to unconscious bias.

I had also successfully completed around 2002 a course on Professional Practice in Race Equality that was organised jointly by the University of Paisley and the West of Scotland Community Relations Council. I undertook this class over 13 weeks in evenings in my own time because I had an interest in the topic and it was relevant to my role in COPFS who paid the fees. I recall it covering the Race Relations Legislation and examination of newspaper articles and how they used certain language particularly in relation to asylum seekers and refugees.

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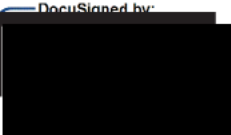
The course also explored the historical background to racial matters in the UK, examining the concept of race in the colonial context and understanding notions of culture ethnicity and identity. There was also a focus on the ability to distinguish between direct and indirect discrimination and the importance of organisations being able to build and maintain a diverse staff profile.

In previous roles within COPFS as District Procurator Fiscal at Kilmarnock and Stirling I would regularly attend multi agency groups that sought to engage with minority ethnic groups and build their confidence in the wider criminal justice system. This involved reviewing racial incidents to ensure compliance with Crown Prosecution policy and that the police had complied with their responsibilities to provide all necessary information to allow prosecutors to make a properly informed decision. Representatives from local ethnic minority groups would regularly seek to discuss perceptions that police were behaving in a way that undermined confidence.

Between 2010 and 2013 I successfully completed an MSc in Strategic Leadership that included a module on organisational values that included examination of police attitudes in America and in particular the response to the racial assault on Rodney King in Los Angeles.

In relation to specific areas of case preparation and family liaison I did not undertake specific training on these matters prior to taking up my post in CAAPD but had been a public prosecutor for 30 years and had considerable training and experience during that period on the investigation of complex and sensitive cases and in meeting bereaved next of kin.

181-182

Signature of Witness 

I made reference to materials highlighted by Inquest during the investigation and considered the reports of death in custody cases including Thomas Orchard and Sean Rigg. I consider that there are clear and specific challenges to investigating a case of this nature and that training on how to identify implicit bias and how to devise strategies to explore and investigate this would be of benefit. On reflection I consider that organisations such as Inquest have much to offer investigative organisations and that there is scope to incorporate their experience and perspective in a structured and challenging way.

Records

183-184

I am not aware of a requirement to take contemporaneous notes or other record of personal involvement in an investigation. At the time of this investigation CAAPD had a bespoke and historical method of case preparation that was not fully integrated with wider COPFS systems. This is a matter that was being addressed at a departmental level at the time of my transfer.

In respect of retention of material my practice is to retain all relevant material within the unit including notes and so far as I am aware all emails relevant to the case were retained. My approach to record keeping in this case was informed by a need for transparency but also to ensure that the extent and chronology of work carried out was preserved.

Miscellaneous

186

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I do consider that the overall time taken to get to the stage of excluding criminality in this case was significant and lengthy. However, I also consider that the extent of further work and analysis that was undertaken by COPFS was necessary to ensure that Crown Counsel could take this decision with the necessary degree of confidence. The considerations of criminality were not limited to the actions of the officers directly involved in the incident but also related to potential offences of perjury, attempt to pervert the course of justice, contraventions of Data Protection legislation as well as potential corporate liability in respect of Police Scotland. I consider that the investigation as a whole was particularly challenging and that to an extent it involved circumstances that had not been addressed before, particularly in relation to post incident management procedures. I do consider that the failure of police to provide accounts immediately following the incident frustrated the progress of the inquiry and potentially delayed the critical decision on criminality.

186

As I recollect from an early stage in the investigation Mr Anwar had raised the possibility of a Public Inquiry, maintaining to successive Lord Advocates that he believed the scope of a Fatal Accident Inquiry was inadequate.

The Crown enquiries were not affected by this consideration as they were focused on whether there was a basis for criminal proceedings and the decision on what forum further inquiry should take was for the future. As I recollect the possibility of a public inquiry as opposed to a Fatal Accident Inquiry became more sharply focused at the time Crown Counsel were considering their decision on criminal liability and the option of a Fatal Accident Inquiry remained a live consideration up until the time the intention to hold a Public Inquiry was announced.

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187

In relation to the entry at page 32 of my notebook COPFS-0525 these notes appear to relate to a meeting with Aamer Anwar at his office where the Bayoh family were not present attended by Lindsey Miller and me. To the best of my recollection the possibility of a public inquiry was a matter probably raised by Aamer and this is consistent with his position that a public inquiry was preferred to a fatal accident inquiry.


188

In relation to an entry at page 38 of my notebook COPFS-05205 the note is- FAI not minimal enquiry-can be lengthy. As I recollect these notes relate to a discussion with Mr Anwar in February 2017 in relation to the purposes of a Fatal Accident Inquiry where the Lord Advocate (Wolffe) was making the point that such an inquiry is not a minimal procedure but can be lengthy such as that in the Rosepark Care Home tragic fire event, and that it can explore defects in systems of work.

189

The note of 26/2/16 does not appear on p13 and I am advised by the Assistant Solicitor to the Sheku Bayoh Inquiry that I do not require to answer this question.

190

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Signature of Witness 

The reference at page 16 of my notebook COPFS-05205 appears to be to [REDACTED], a senior officer in Police Scotland, who had no connection to the investigation into this matter.

191

The level of engagement and involvement of Law Officers and Crown Counsel throughout the investigation was highly significant and the expectation was that investigative progress and strategy would be reviewed and approved by them reflecting the importance that the case had for the organisation.

192

One of the main challenges in relation to this investigation was to try to maintain the confidence of the Bayoh family when there had been an apparent breakdown in trust with the PIRC and a more structured and developed arrangement to address this during the PIRC investigation, with input from Crown Counsel or Law Officers may have been of assistance in addressing this.

193

In my experience COPFS would not share the findings of a PIRC report or a Crown precognition while there was a possibility of criminal proceedings in any case. From my experience in CAAPD on occasion COPFS would suggest to Police Scotland that consideration should be given to misconduct proceedings where Crown Counsel so instructed following a decision in relation to criminal proceedings. I am unaware if any material was requested or shared with Police Scotland following my move from CAAPD

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Signature of Witness [REDACTED]

194

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

195

Signed

Leslie [REDACTED] Brown

24 November.

DocuSigned by: [REDACTED]
Signature of Witness [REDACTED] Date November 27, 2023 | 1:27 PM GMT