

1. My full name is Stephen [REDACTED] McGowan. I was born on [REDACTED] 1973. My business address is Crown Office, 25 Chambers Street, Edinburgh, EH1 1LA.

Role and Experience

Question 1

2. I am currently the Deputy Crown Agent for Litigation and have held that role since April 2023. I hold the degree of LLB(Hons) from the University of Strathclyde (1995) and the Diploma in Legal Practice from the University of Strathclyde (1996). I qualified as a Solicitor in Scotland in 1997. I am a member of the Law Society of Scotland. I was a member of the Law Society's Criminal Law Committee between 2011 and 2021 and have been a member of the Council of the Law Society since 2017.

3. In 1999, I joined the Crown Office and Procurator Fiscal Service (COPFS) as a Procurator Fiscal Depute. Since then I have held a number of different promoted posts in COPFS.

4. I held a number of roles during this investigation. In Spring 2012 when I was the Procurator Fiscal for Edinburgh and Haddington, a Senior Civil Service 1A grade post, I was transferred to Crown Office to become Deputy Director of Serious Casework(DDSC) on level transfer. Reporting to the Director of Serious Casework (a post which became the Deputy Crown Agent, Serious Casework in 2016), I was responsible for the day to day running of the Crown Office national operational units including High Court Division, Appeals Division, Serious and Organised Crime Division and Health and Safety Division and for Media Relations. Due to a desire by Law Officers for prosecutors to specialise I was tasked with setting up a number of new units during that period including the Scottish Fatalities Investigation Unit (SFIU), which became a national unit dealing with all deaths investigations which were not criminal and a new Criminal Allegations Against the Police Division (CAAPD) which took on the investigation of criminal allegations of the police which had formally been dealt with by Area Procurators Fiscal.

5. I was DDSC until March 2014, when due to the expanding size of the command that I held, the post was split. Two new roles were created, Procurator Fiscal Major Crime and Fatalities Investigation and Procurator Fiscal Organised Crime and Counter Terrorism. I became Procurator Fiscal Major Crime and Fatalities Investigation and retained responsibility for High Court Division, Appeals Division, Health and Safety Division, SFIU and I also retained a role on media relations. The Procurator Fiscal For Organised Crime and Counter Terrorism took over responsibility for among other things Serious and Organised Crime Division and CAAPD. My recollection is that CAAPD moved there partly [REDACTED]

[REDACTED]

██████ it was a good business fit, and partly to balance the responsibilities of the respective postholders.

6. In May 2016, following a further restructuring of the wider organisation I became Procurator Fiscal for High Court. In that role I had responsibility for the all High Court business from report to disposal. I had no direct responsibility for SFIU or CAAPD from then until April 2021 when as DCA Serious Casework I resumed responsibility for these areas of work.

Question 2

7. I first became aware of the death of Sheku Bayoh on Sunday 3 May 2015 at about 9.30am. I was at home when David Green, the Head of SFIU called me. I was Mr Green's line manager and had an expectation that he would advise me of significant incidents that occurred out of hours. A death following police contact particularly where the deceased was from an ethnic minority community was evidently a significant incident. Mr Green explained that he had instructed PIRC to investigate the death of Mr Bayoh by telephone. He was calling to advise me that because Law Officers would have to be advised of the circumstances and also because I understood that there was a desire by the police to issue media lines which went further, and into more detail than he was comfortable with. I agreed with his advice to the police and from recollection reiterated this to Chief Superintendent McEwen and ACC Nicolson that morning. I later provided an email briefing to Law Officers on what was known about the circumstances at that stage and cleared lines from Police, PIRC and COPFS. This is covered in more detail later in my statement.

Question 3

8. COPFS is Scotland's prosecution service and death investigation authority. The Lord Advocate is the ministerial head of COPFS, leading the system of criminal prosecutions and the investigation of deaths. She is assisted in her work by the Solicitor General for Scotland. Together, the Lord Advocate and Solicitor General are known as the Law Officers. The Law Officers set the strategic priorities, objectives and prosecution policy for COPFS.

9. The Lord Advocate is a Minister of the Scottish Government and is accountable to the Scottish Parliament, but her role as head of the systems of prosecution of crime and investigation of deaths in Scotland are functions exercised by her independently of other Scottish Ministers and of any other person. The duty to act independently in these matters long precedes, but is expressly set out in, statute (Scotland Act 1998 section 48(5)).

10. The Lord Advocate appoints Advocate Deputes, who are independent prosecutors who may be drawn from the ranks of the Scottish Bar, or Solicitor Advocates, to assist her where required in

making decisions in criminal cases, prosecuting before the High Court, and in the investigation of deaths. The Law Officers and Advocate Deputes are collectively known as Crown Counsel.

11. The Crown Agent is the civil service head of COPFS and head of profession for Procurators Fiscal. He is the principal legal advisor to the Lord Advocate on prosecution matters and the Chief Executive of COPFS. The Crown Agent is accountable to the Law Officers for the delivery of efficient and effective prosecution of crime and investigation of deaths, in accordance with their priorities and prosecution policies. The Crown Agent is the Accountable Officer for COPFS and, as such, answerable to the Scottish Parliament for the regularity and propriety of COPFS' finance and the stewardship of public monies.

12. Procurators Fiscal are professional lawyers employed by COPFS. They prosecute in courts across Scotland, and work in specialist units, having been granted a commission to do so by the Lord Advocate.

13. The roles of the Lord Advocate and Procurator Fiscal are hundreds of years old, predating the establishment of a police force in Scotland. The responsibility of the prosecutor to investigate crime; the power of the prosecutor to direct the police in the investigation of crime; and this power being exclusive to the prosecutor; is enshrined in the common law of Scotland. That the two functions of the prosecutor and the police are quite distinct is also recognised in the common law, with the police as investigators subject to the supervision and direction of the prosecutor, obliged to put before the prosecutor all material that may be relevant to the investigation of a particular offence. In recent years, these duties have been put on a statutory footing.

14. In practice, most criminal investigations will start with the police who almost always act on their own initiative. The police have discretion as to whether to investigate an alleged crime. The resources applied to any investigation are a matter for the police to consider. In general, where they consider there is sufficient evidence that a crime has been committed by a particular person, it is their duty to report on their investigation to the Procurator Fiscal by means of submitting a Standard Prosecution Report (SPR) and to act upon the instructions of the Procurator Fiscal. In general, if the police consider that there is insufficient evidence of a crime being committed, they will not make a report to the Procurator Fiscal. In some instances, particularly in more serious cases, where police are not sure there is sufficient evidence that a crime had been committed, they may report the matter to the Procurator Fiscal for advice and direction. In case involving allegations of criminality against police officers, PIRC act in the same way as police, save that their investigation is initiated by an instruction from the procurator fiscal.

15. In cases of homicide or suspected homicide, the Procurator Fiscal is called immediately by the police and is able to exercise direction from the earliest stages in the inquiry.

16. This structure recognises the expertise of the police (and PIRC) in investigating crime, the responsibility of prosecutors in respect of the investigation of crime, and the independence of prosecutorial decision-making.

17. As Scotland's death investigation authority COPFS investigates all sudden, suspicious, or unexplained deaths that occur in Scotland. The purpose of a death investigation is to identify the cause of death; eliminate the risk of undetected homicide; to eradicate dangers to life and the health and safety of the public; to allay public anxiety; to assist in the maintenance of accurate statistics; to secure and preserve evidence; and to satisfy domestic and international obligations in relation to the preservation of the right to life. In this capacity COPFS performs a function broadly similar to the Coronial system elsewhere in the UK, although the way in which this broad function is discharged is very different to other UK jurisdictions.

18. In general, deaths are reported to the Scottish Fatalities Investigation Unit (SFIU) of COPFS by the police or by doctors who have attended a deceased person and have decided that they cannot issue a death certificate, or that the death falls into one of the categories that requires to be reported to the Procurator Fiscal.

19. Many deaths reported require limited investigation: for example, the Procurator Fiscal may instruct a post mortem examination of the deceased following which a cause of death is certified and he may be satisfied that there are no concerns that require to be explored further.

20. A small number of deaths require, often significant, further investigation to determine whether the death has involved any criminality; or whether the death has occurred in circumstances where the Procurator Fiscal is required, or has discretion, to instruct a Fatal Accident Inquiry (FAI). The Procurator Fiscal has a duty to investigate and arrange for the holding of an FAI into all deaths occurring in Scotland that result from an accident in the course of the deceased's employment or occupation and all deaths occurring while the deceased was in legal custody (Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 section 2(3) and (4)). The Lord Advocate has discretion to instruct the holding of an FAI where she considers that the death was sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern, and that it is in the public interest for an inquiry to be held into the circumstances of the death (2016 Act, section 4). All decisions as to whether to instruct an FAI are taken by Crown Counsel.

21. Prior to the enactment of the Police and Fire Reform (Scotland) Act 2012, there were 8 territorial police forces in Scotland. Where a serious criminal allegation was made in one force, or an allegation against a senior officer, one of the other territorial forces or the Scottish Drugs Enforcement Agency would be brought in to investigate the offence. I had

experience in overseeing such investigations whilst I was DDSC. None of the cases had a racial element.

22. The creation of a single national police force meant that it was no longer possible to bring in an external force to investigate criminal allegations and therefore the Police Complaints Commissioner for Scotland was transformed into the Police Investigations and Review Commissioner.

Question 4

23. Between 2012 and 2014 as DDSC every case in which there was a possibility of criminal proceedings in relation to a police officer went to Law Officers for instruction through me. Each case was sent with a final covering note and recommendation from me. There were a number of cases in which there had been deaths in police custody or deaths in police contact. None of these cases involved race.

Question 5

24. I had extensive experience meeting families in deaths cases. I had done so in various roles in PFs offices. As a District Procurator Fiscal the families I saw were cases which were generally the more complex cases or cases in which there had been complaints. When I became DDSC I continued to meet families in the most sensitive cases and in cases where there were complaints at a national level. I also supported Law Officers where they had such meetings.

25. do not recall any of the cases involving deaths investigation having a racial element.

Question 6

26. I have a role in dealing with complaints about my area of the business. In respect of a complaint by Mrs Pamela Paton, I became involved in that matter on 23 December 2016. I received an email from Assistant Chief Constable Wayne Mawson that day. I attach a copy of that chain that I have found (email 23 December 2016 Sheku Bayoh from Wayne Mawson). The email is referred to for its terms. I am unable to say why ACC Mawson messaged me in particular in relation to this matter. On the same date Mr Mawson's staff officer messaged Pamela Paton, advising her that Mr Mawson had raised the matter with me. Mrs Paton sent that message on to me, which is what prompted me to deal with the complaint. I produce a copy of the email from Pamela Paton Pamela Paton's email to SMcG 23 December 2016 at 15.53).

27. From my reply I can tell that I dealt with the matter in terms of the COPFS Comments and Complaints Policy, a copy of which I attached to my reply. No formal investigation was required. The matter could be considered informally via the papers. It was not and is not COPFS policy that any person who may be impacted by an investigation will be contacted by the PF in relation to every detail of an investigation. Whilst nearest relatives of a deceased have are provided with a service from

Victim Information and Advice, and/or the case preparation team, rights underpinned by the Human Rights Act 1998, those who are more remotely impacted are not so entitled. In any event Mrs Paton's complaint amounted to a complaint that changes had been made to Sheku Bayoh's publicly available death certificate. The terms of the information held on the Register of Deaths and the legislation enacting that were matters for procurators fiscal to work to rather than matters within COPFS control. It was not ultimately a matter for COPFS. The information had appeared in the media as it was public information but was evident that the matters complained about were not within COPFS control. Mrs Paton complained that the investigation was biased because the family of Mr Bayoh were being provided with information and she was not. There was no evidence of the investigation being biased against any party and Mrs Paton had already been given an explanation of why the family of Mr Bayoh were being provided with information following previous correspondence to the Lord Advocate to which I had been asked to reply in November 2015.

The Police Investigations and Review Commissioner ("PIRC")

Question 7

28. Prior to this incident I had been involved with PIRC since it was set up. During late 2012 I attended a number of meetings convened by the Scottish Government as PIRC was being set up. The purposes of these meetings as I understood them was to work out how PIRC was going to work in practice. There were many meetings about how the PIRC would be effective and investigate various types of case. Initially it was envisaged that PIRC would take on the inquiries that had hitherto been passed to an external force to investigate, typically high profile cases and cases against senior officers. This was envisaged to be a small number of cases in the low single figures each year. The decision in *Ruddy v Lord Advocate [2013] CSIH 73* made it clear that the previous system of criminal cases being investigated by the force overseen by the PF was not lawful and therefore PIRC had to take on these cases as well.

29. When PIRC became operational I was responsible for CAAPD and SFIU, the two areas of COPFS which had most dealings with PIRC. I had regular liaison with the Commissioners (both John McNeill and Kate Frame) and Director of Investigations. I was responsible for putting in place the Memorandum of Understanding with PIRC from a COPFS perspective.

30. At the time of this incident in early May 2015, the system of PIRC investigating cases on behalf of the Crown was still immature, and there was an element of learning as we went.

Question 8

31. Where there was a criminal allegation about the police, or a death where the police were involved, PIRC would be instructed to undertake an investigation in terms of section 33A(b) of the Police, Public Order and

Criminal Justice (Scotland) Act 2006. Depending on the circumstances that instruction could be by phone (for example if there were a death out of hours) followed up by letter, or by letter.

Question 9

32. My understanding was always that PIRC acted in the same way as police in these investigations. They had a degree of operational discretion as to how they carried out their investigations, but were subject to the overarching instruction and direction of the Crown via the procurator fiscal (from CAAPD and/or SFIU as appropriate). That interaction was similar to that with the police in an investigation.

Question 10

33. During this investigation I was responsible for SFIU. I had involvement in the initial stages of the investigation. Thereafter when the investigation was led by CAAPD I remained involved until about the start of the precognition process given my experience in PIRC cases over the previous few years. I had no formal role in relation to line management of CAAPD or the Head of CAAPD, but acted as a sounding board and provided advice and guidance to the team. I still attended the liaison meetings that we had with PIRC given my role in relation to deaths. As my role changed in 2016 and SFIU became part of Specialist Casework, I had no further formal liaison with PIRC and other than dealing with what I would describe as legacy matters such as the complaint from Pamela Paton my role in the case gradually decreased. I continued to act as a sounding board where that was thought to be valuable by the team until 2018 when I was appointed Deputy Crown Agent, Local Court.

Question 11

34. The first instruction to PIRC was given by telephone by David Green on 3 May 2023. Thereafter instructions to PIRC were sent in writing. The first instruction was confirmed by me on 4 May 2015. I have been provided with a list of instructions to PIRC and copy documents. I do not see any obvious omissions in the that list. I do not disagree with the overview given in the Briefing Note to Justin Farrell (COPFS-02126 (a)) that has been provided to me.

Question 12

35. No one from COPFS attended Kirkcaldy in person on 3 May 2015. Whilst the investigation is that of the Crown and there will be a investigation by the procurator fiscal in the form of precognition of witnesses, the initial fact finding investigation on the ground will be that of the reporting agency, in this case the PIRC. PIRC had a staff of very experienced investigators at their disposal. I and other COPFS colleagues had experience of these investigators in other cases before and after they joined the PIRC. They were held in high regard and had all of the correct professional skills to carry out such an investigation. Whilst the PF could give general guidance the real investigation was for PIRC to undertake.

It was not clear to me at that time what in practical terms the attendance of a prosecutor at the Crime Scene or in Kirkcaldy more generally would have achieved. That view is based on attendance at many crime scenes over the years. Crown colleagues were on hand by telephone and by email if their assistance was required and there were a number of calls and messages that day. I understand that Mr Bernard Ablett attended the post mortem examination and was available for a forensic strategy meeting which is in accordance with standard practice. There would have been no benefit in attending a Police Scotland Gold Group in this case. My understanding of a Police Gold Group is that it is to manage the incident. The Gold Group will go well beyond the investigation. However, police were not the investigating agency in this case. PIRC were instructed to investigate. Police Gold Group's are not confined to the investigation. In fact, given that it was possible that the actions of Police Scotland could be the subject of a criminal inquiry, it would have been highly inappropriate for a prosecutor to have been sitting at such a meeting as it may have created an unfairness. Had PIRC required input beyond that which was given over the course of the weekend there was ample opportunity to request it, or for that matter for the PF to intervene with PIRC.

Question 13

36. I was aware that David Green was attending at the scene of an aircraft crash near Dundee on 3 May 2015. My recollection is that it was David Green's decision to go there, but it is likely that we would have discussed this and I agreed with his decision. The dynamics of an aircraft crash are complex. Where a death arises as a result of an aircraft crash in Scotland in practical terms there are two investigations. There will be a death investigation led by the procurator fiscal and a safety investigation led by the Air Accident Investigation Branch (AAIB). The AAIB investigation is governed by the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996. That ensures that AAIB have first access to the aircraft or wreckage in keeping with their expertise. In such investigations in the past there had been delays in the procurator fiscal being able to meaningfully investigate the cause of death due to the interpretation of AAIB of their independence and the regulations. A significant amount of work had been put in by COPFS and in particular Mr Green and I to try to build a close relationship with AAIB in the years preceding 2015 borne out of experience in a number of high profile helicopter crashes. However, we had recently had to petition the Court of Session for access to material (see *The Lord Advocate for an Order in Terms Of Regulation 18 Of The Civil Aviation (Investigation Of Air Accidents And Incidents) Regulations 1996* [2015] CSOH 80).

37. In our experience it was vital to have an early rapport with the lead AAIB Inspector who in our experience tended to fly in for 24-48 hours before returning to their base in South East England. There was a chance to influence the relationship and investigation in relation to the air crash. That was what informed the decision to attend the air accident. It was a

chance to make a difference to the investigation on the ground. No such benefit would have been had by attending at Kirkcaldy where PIRC were the lead investigators and acting on the instructions of the PF.

38. With the benefit of hindsight, I would reflect that we (COPFS, PIRC and Police) underestimated the importance of the way in which police in major incidents manage and secure multiple locations, and perhaps overestimated the ability of PIRC to deploy to an incident and take over the investigation, particularly out of hours. That meant that the police most likely had to do more initial investigation than I would have anticipated prior to this case. Where at the time I would have thought the PIRC would start the investigation, we were unaware of the extent to which police would have begun to investigate the case in the sense of securing multiple loci, and getting an initial account from or beginning to identify possible witnesses.

39. Whilst we (that is COPFS, PIRC and police) had worked together to walk through various scenarios that PIRC might face, all of the scenarios we worked through were confined to one locus which could be easily secured. That was not what we were presented with in Kirkcaldy. I do not think that the presence of a fiscal at the scene on 3 May 2015 would have cured the issue that I have identified. The system cannot rely on a single individual. As a system my reflection with the benefit of hindsight is that a group, chaired by the PF and attended by the PIRC lead investigator and police, would have ensured smooth passing of the initial police finding to PIRC. That might not have been immediately on 3 May but would have been soon thereafter. In other cases, where there we have had parallel investigations, we did this through an Investigative Strategy Group-chaired by the PF. An early meeting here may on reflection have benefitted and ensured clarity of roles.

Question 14

40. My recollection is that 4 May was a public holiday. I was returning from a period [REDACTED] leave on 5 May, though I had been in to check emails and the like on 30 April. As it was a public holiday, and I was still officially on leave I had little involvement in the events of that day. I would observe at this stage is that having been involved in many high profile and significant incidents, the initial briefing in relation to what happened is often incomplete, or one finds that the information has been synthesised through the minds of those passing the information on which has the effect of finding order, or logic, where there is perhaps none. The facts do not emerge until the painstaking task of taking detailed statements has been completed. It should therefore come as no great surprise that facts were emerging throughout the first few days after the incident. I would also observe that the written instructions to PIRC were never intended to be treated as a formal terms of reference with heads of investigation to be satisfied. The intention when we started to produce these was to make it clear that the PIRC were carrying out an investigation on behalf of the Crown, which had the effect of giving

additional powers to PIRC investigators, as opposed to an investigation at the request of the Chief Constable or Commissioner's own instance. A copy went to the Designated Deputy Chief Constable as a courtesy.

41. As I noted above, I do not think that presence at the scene of the PF at the scene would have meant that we were clearer as to what happened. The fundamental issue was that the facts on the ground were confused, which is not unusual.

Question 15

42. I do not believe that lack of a formal letter of instruction would in any way have compromised PIRCs ability to carry out an investigation into the circumstances surrounding the death any more than the absence of a PF at the scene or in Kirkcaldy. The task that they were asked to undertake was clear. A man had died and they were to establish what had happened.

Question 16

43. I am referred again to COPFS-02126 (a). I have not previously seen this document. It appears to be a handover note produced by Les Brown when he was leaving CAAPD for the benefit of Justin Farrell who took over from him. Some of the instructions come from a point in time when I was no longer involved in the case. I have no reason to believe that it is not accurate and there are no obvious omissions.

Question 17

44. COPFS direct PIRC investigations. In practice, that means COPFS commissions PIRC to carry out investigations, and gets updates, verbally, in writing or both, and exercises such direction as is required in the investigation progresses. COPFS is not involved in day to day supervision of the investigation as PIRC has a wide degree of latitude to carry out their task in accordance with their professional skills. There is no material difference in the relationship between Crown and Police, and Crown and PIRC.

Question 18

45. I note that Mr Ablett has told the inquiry,

"I have been asked whether COPFS supervised or directed the PIRC. Again, because I have no experience of COPFS liaison with the PIRC, I cannot say. In terms of S.33A of the Police, Public Order and Criminal Justice (Scotland) Act 2006 it is a duty of the Commissioner to carry out an investigation where directed to do so by the appropriate prosecutor. The provision is silent as to whether the prosecutor has the authority to supervise the PIRC in its day-to-day investigations. By contrast, the terms of s.17 of the Police (Scotland) Act 1967 make the police subordinate to the prosecutor: "...in relation to the investigation of offences the chief constable

shall comply with such lawful instructions as he may receive from the appropriate prosecutor." I cannot comment as to whether this makes a practical difference."

46. In my view there is no difference between the position of the Commissioner and the Chief Constable.

47. Section 41A of the Police, Public Order and Criminal Justice (Scotland) Act as amended by the Police and Fire Reform Scotland Act 2012 in setting out the functions of the Commissioner states;

"41A Investigations under supervision of Lord Advocate or procurator fiscal

The Commissioner, when carrying out an investigation in pursuance of a direction issued under paragraph (b) of section 33A, must comply with—

(a) any lawful instruction given by the appropriate prosecutor who issued the direction; and

(b) in the case of an investigation carried out in pursuance of a direction issued under sub-paragraph (i) of that paragraph, any instruction issued by the Lord Advocate in relation to the reporting, for consideration of the question of prosecution, of alleged offences."

48. Section 17(3) of the Police and Fire Reform (Scotland) Act 2012 in respect of the duties of the Chief Constable states;

"17 Chief constable's responsibility for the policing of Scotland

...

(3) The chief constable must, when directing constables, police cadets and police staff in the carrying out of their functions, comply with any lawful instruction given by—

(a) the appropriate prosecutor in relation to the investigation of offences,

..."

49. The sections use similar language to describe the relationships. Consequently, my understanding is that the "appropriate prosecutor" may instruct either the police or the PIRC. In practice in a PIRC investigation the PF would give instructions on the initiation of the investigation and give instructions at material points in the investigation for to PIRC to follow particular avenues of inquiry or to collect evidence to a particular standard. The day to day supervision of investigators and the PIRC investigation was a matter for PIRC, not for prosecutors. PIRC Senior Investigators provided day to day supervision of the investigation subject to the overarching direction of COPFS.

50. In practice there was no difference between the way in which the procurator fiscal dealt with the police and PIRC. The only difference was that more often than not the police initiated their own investigations into crime which they then brought to the PF (although from time to time the PF may instruct the police to initiate an inquiry), whereas for a PIRC investigation into a crime to commence an instruction from the prosecutor was required. I have no concerns that Police and PIRC are in a different position either in fact or law.

Question 19

51. I have read COPFS-02796 an email chain that I am copied into and to which I reply on 8 July 2015. In that chain the Commissioner is seeking guidance as to whether the family of Mr Bayoh can see all of the relevant CCTV in relation to Mr Bayoh's death. This was a novel situation in my experience. Despite having dealt with hundreds of suspicious deaths I do not recall a case where at such a relatively early stage of the investigation a family wanted to view the CCTV of an incident. Since there was no established practice my reply suggests a further discussion about the matter. I recall that access to the CCTV was facilitated at Crown Office via the Bayoh family's solicitor. I have no recollection of the detail of the further discussions that led to this arrangement, but access was given.

Question 20

52. I have been referred to COPFS-04661(a), a letter of instruction that I sent to the Head of Investigations at PIRC on 5 May 2015 which states that Mr Green of SFIU would be the senior prosecutor with oversight of the case with such assistance from COPFS as required. Mr Green had been on call and responded to the initial report of a death in police contact and had been leading that weekend. The use of the phrase 'such assistance from COPFS as required' in my letter indicates that I was aware that this was not an investigation that would be confined to SFIU, and indeed over the course of the first few days since the death there had been involvement from SFIU, CAAPD and the East Homicide team. There was no assumption as to who would deal with the case for the duration of the investigation on my part. It was apparent at that early stage that a bespoke team would have to be put in place to prepare the case. I note that in the final version of the letter to PIRC, COPFS-02539, Les Brown the Head of CAAPD is named as the senior Fiscal with oversight of the case. This no doubt reflected discussions that were ongoing during the course of the day with colleagues during which the decision was made that CAAPD would lead.

Question 21

53. I note that prior to sending the email to Irene Scullion we had had a discussion by phone. I recall that this was simply to confirm that the letter of instruction was to be sent over, and sent to Irene Scullion, rather than to the Director of Investigations. My practice had been to send letters of instruction for PIRC to the Director of Investigations. I recall that

he was on leave and so it was sent to Irene Scullion, the Head of Investigations and his Deputy in his absence. I do not recall any discussion of substance that morning, and had there been it is likely that it would have been reflected in the email.

Question 22

54. A copy of the letter was sent to the DCC Designate and DCC Crime. This was in accordance with normal practice. I had agreed with PIRC and the Police Scotland shadow team prior to the creation of Police Scotland that I would copy the initial letter of instruction to the DCC Designate and any other relevant senior officer. This was because of my interpretation of the statutory scheme that set up PIRC. In my view there was a hierarchy of investigations in section 33A. A PIRC investigation could be initiated by the relevant prosecutor, during which investigation PIRC investigators had the power of a constable, by the Chief Constable or SPA on request, or self-initiated by the Commissioner themselves. I could anticipate a situation whereby a critical incident could occur, and the Chief Constable would want to refer it to PIRC for an independent review, and the Commissioner may also consider it in the public interest to review at their own hand. However, a Crown instructed investigation, which may result in criminal charges or be the states response to its Article 2 obligations was in my view qualitatively different and took precedence over any other investigation. In order that everyone was absolutely clear of the position in any case, I felt that it was appropriate to ensure that everyone was aware that the investigation was Crown instructed. This had been discussed with PIRC and Police Scotland. This also had the effect of putting the police on notice that they were potentially subject to investigation ensuring that they could secure relevant material or take legal advice as the case may be. That was in my view entirely appropriate. There was nothing confidential in any initial letter of instruction which tended to be broad, and in the nature of a request to tell COPFS what had happened. Subsequent letters directing the investigation were generally not shared. Only the initial letter. This was consistent with the practice adopted in every other PIRC investigation.

Question 23

55. I am referred to an email chain, COPFS-04814. This is an email that I sent to colleagues following contact from ACC Wayne Mawson who was passing on a complaint on behalf of Pamela Paton. In his original message to me of 23 December 2016, ACC Mawson suggested a tripartite protocol in relation to information sharing during a PIRC investigation.

56. Mrs Paton's husband was one of a number of officers involved in the incident which led to the death of Sheku Bayoh. Furthermore, the systems, training protocols and procedures employed by Police Scotland were also subject to scrutiny. [REDACTED]

[REDACTED] I recall that shortly before receiving this

email from ACC Mawson I had received a message from Chief Superintendent Carol Auld, who I think was Head of Professional Standards at the time, seeking information and an update on another case involving the police and the deaths of members of the public on the M9 motorway.

57. I was concerned to receive communication directly from a senior officer with Executive authority in Police Scotland, a potential accused, seeking information directly without apparently taking legal advice or considering that they may organisationally be a potential suspect. I thought that was at best naïve and perhaps inappropriate. It is axiomatic that any criminal investigation must be fair. But it appeared that there was a danger caused by a potential accused not thinking things through and making direct contact with the prosecutor seeking information. It seemed to me that this was almost a reflexive action for the police to do as they did so routinely in other cases where they were the investigating agency. They seemed to have contacted the Fiscal, without actually applying their minds to the matter. I was concerned that this situation be addressed. This is the same approach that I would take to an approach from any accused whether they be a natural or legal person who contacted a prosecutor directly. I would advise them to take legal advice. That is what I was doing here.

Question 24

58. My attention has been drawn to a note from Mr Macleod to Mr Farrell in the following terms;

"The precognoscers found it of interest that the information about the rib fracture which was only made known to PIRC on 29th May 2015 was somehow potentially being explained away by three of the officers when they provided statements on 4th June 2015. After careful consideration of all the evidence there was insufficient evidence to make any more of it other than to say it was suspicious, and potentially called into question the integrity of the PIRC investigation at that point."

59. I have never seen either the note from which this passage has been extracted, or this passage before. However, I was aware in May/June 2015 that there was a general concern about the position of the police officers in relation to the rib fracture. My recollection is that the rib fracture was not detected during the initial post mortem dissection. Rather, it was discovered during a scan of the body that Mr Brown had arranged. From memory, it was in the nature of a hairline fracture. The police officers involved had not provided statements immediately following the death. If I recall correctly least one officer described hearing an audible crack to the rib which was explained, as having been occasioned during CPR. That appeared not to be consistent with the initial pathology evidence which found a hairline fracture of a type that would be unlikely to have caused an audible crack. This caused as general concern of

subornation of perjury or other impropriety in the officers being aware of an injury and trying to provide an innocent explanation for evidence. This line of inquiry was investigated including through the instruction of an osteo-pathologist. As I understand it no evidence was found of impropriety or criminality in the PIRC investigation.

Question 25

60. I am referred to my Notebook 4 (COPFS-05233) at page 20. These appear to be notes that I have made in advance of a meeting with PIRC or for the purpose of proposing a debrief. They are the beginnings of reflections on the initial stages of the investigation. In relation to the issues re the initial response, I would have been referring to in relation to the first few hours of the case and the speed with which PIRC were able to respond and the interaction with the police at that time. My reflections are more fully set out elsewhere in my statement. The points did not reflect upon the PIRCs integrity. They reflected upon capacity and ability to respond to an incident across multiple loci. I do not recall if they were ever shared them with PIRC. There was no real capacity for a debrief at that stage.

Question 26

61. During the early part of PIRCs investigation I was involved in assisting and providing guidance to David Green and then to Les Brown in direction of the PIRC investigation. I did so due to my recent experience in dealing with CAAP cases and deaths, and did so to the best of my ability. PIRC was at the time a very immature organisation, but insofar as there had developed a standard procedure it was followed. I use the description immature not as a criticism but to reflect the fact that PIRC was a very new organisation, carrying out a new function, and had expanded its role at short notice due to the demands of the *Ruddy* decision.

62. The same approach was adopted with PIRC as would have been adopted in a case led by Police Scotland.

Question 27

63. In my view everyone was aware that race was a matter at the heart of this investigation. From the first telephone call I had from David Green the question of the deceased's race and whether it was a factor was discussed. No one was in any doubt that it was an issue. Whilst no specific instructions were given to consider race as a motive my recollection was that it was clearly discussed at the time and everyone involved was seized of the requirement to investigate the potential for race to have been a motive.

Question 28

64. PIRC-04453 is a Memorandum of Understanding between COPFS and PIRC dated December 2013. I am familiar with this document and was involved in its preparation. PIRC were instructed to report the matter

by full report given the nature of the investigation. In due course they provided such a report with appendices. I do not recall that specific timescales were set. This was a complex inquiry. Substantial expert evidence was required. Any timescales at the point of instruction would have been arbitrary.

Question 29

65. I recall that there were regular liaison meetings with PIRC and recall that I attended them. They were generally quarterly, but I recall that we met more regularly in 2015/16 due to the demands of this case. Cases and the operation of the MoU were discussed. At that time we never had cause to change the terms of the MoU, but a new iteration of it which contains some of the lessons learned from this case was issued in 2021.

Question 30

66. I do not recall the dates of the meetings with PIRC or the specifics that were discussed. I have searched my outlook calendar and I have not been able to isolate the dates of the quarterly meetings, though it discloses numerous dates of meetings with PIRC. Whilst it discloses numerous meetings, I do not believe that this is a full record of the meetings. I have not been able to find agendas or notes of the meetings.

67. My role was to represent COPFS at these meetings which would typically discuss updates on investigations and any thematic issues which arose.

Question 31

68. I am referred to an email chain in relation to media lines in relation to this case (COPFS-02682).

69. In late August 2015 there was a discussion about media lines. Generally speaking, the key to these lines is to ensure that whatever is said will enhance the public's understanding of an investigation where appropriate and not prejudice the ongoing inquiry.

70. Initially on Friday 28 August, a line was discussed with Les Brown and was agreed by COPFS and the Lord Advocate. On 29 August following contact from the Sunday Mail to PIRC in relation to a story that was to run on Sunday 30 August which was critical of PIRC, PIRC proposed new lines. Those lines directly responded to the criticism. My own view was that it was inadvisable to become involved in a public discussion about the investigation. Whilst I do not think that there was anything of substance said in the line, and therefore it was unlikely to cause prejudice to any future case, it was unlikely to assist in dealing with the Bayoh family and might harm that relationship. I was of the view that it was inappropriate to issue the PIRC line in the face of the view of the Lord Advocate and other prosecutors, however, I did not consider it to be a breach of the PIRC's statutory duties as set out in section 33A of the Police, Public Order and Criminal Justice (Scotland) Act 2006. The statutory duties of the PIRC

in this context as set out in the Act in are to follow instructions in relation to the investigation. I did not consider the issuing of the press release to be a breach of the PIRCs statutory duties, but it was highly inadvisable.

Question 32

71. I do not recall the Lord Advocate's reaction to the line that the PIRC issued. There was a discussion between the Head of Media Relations at COPFS and Head of Media relations at PIRC about the line and I recall a discussion with the Commissioner at her offices when it was discussed. The Commissioner felt that she and her staff were being unfairly criticised and not able to respond. To some extent that is a hazard of the role of an investigator or prosecutor. More often than not if there is criticism we cannot respond to it for fear of prejudicing the ongoing investigation, or the relationship with the newest relatives of the deceased.

Question 33

72. I am asked about the funding of expert witnesses. For criminal or deaths investigations the usual rule is that the investigating agency will pay for expert witness reports up until the point that the case is reported to the procurator fiscal. After the case is reported to the PF it is a matter for COPFS to fund. I understand that this practice is set out in a Practice Note issued by the Scottish Government Finance Department. I have not been able to locate a copy of the document, but that is usual practice. I have read COPFS-05126 an email from Mr Logue's PA's email to me dated 9 September 2015 regarding COPFS funding PIRC's expert witnesses. I do not know if I ever replied. The costs of expert witnesses were a matter for PIRC at that stage. COPFS was not funded to meet them. I was not aware of PIRC's costs.

Lord Advocate

Question 34

73. I have set out the role of the Lord Advocate at paragraphs 8-13. The responsibility to investigate and prosecute crime and investigate sudden or suspicious deaths vests in the Lord Advocate. In a high profile case such as a death in police contact, the Lord Advocate would always want to be briefed. At the time I had weekly or fortnightly meetings with the Lord Advocate with the Director of Serious Casework (DCS). These were informal meetings to discuss topical matters. During those meetings I would keep the Lord Advocate abreast of progress in the case. Many of the rough notes to be found in my notebooks were written for the purpose of having the most up to date information for those meetings.

Question 35

74. I attended a number of meetings between the Lord Advocate of the day and the Bayoh family. According to my outlook calendar I attended a meeting between the Lord Advocate, Lord Mullholland and Aamer Anwar the family's solicitor on 26 August 2025. Also attended meetings with the

Lord Advocate and the family on 5 November 2015 and 9 May 2016. I attended a further meeting with the family and James Wolffe KC who had by that time become Lord Advocate on 8 February 2017. Other COPFS officials attended at those meetings as well. I have little recollection of the meetings themselves due to the passage of time but made notes which are referred to elsewhere in my statement.

Questions 36 and 37

75. In my experience it is not unusual for the Lord Advocate to meet bereaved nearest relatives, in particular in high profile cases or in case where wider public confidence on the criminal justice system or system of deaths investigation might be impacted. It was not a surprise to me that the Lord Advocates of the day met the family. Each Lord Advocate will approach matters in their own way, but I do not recall any particular difference in approach between Lord Mulholland and James Wolffe to meeting the family. More information was shared at the early stage. As suspicion began to grow that a crime may have been committed less information was shared. That may have coincided with James Wolffe coming into office but I do not think that was to do with a difference in approach between individual Law Officers.

Question 38

76. I have read John Logue's email to the Lord Advocate dated 5 May 2015 (COPFS-02685), the PIRC Briefing Document that was attached to the email (PIRC-03694) and Irene Scullion's email to John Logue dated 5 May 2015 (COP S-03875). I do not recall why the briefing document was sent to Mr Logue specifically rather than others but note that David Green and I have received the email from Ms Scullion (COP S-03875) as well as Mr Logue. There is nothing unusual about that or it being sent to Mr Logue. I have noted earlier that I had not been at work on 4 May, John was the DSC and my direct line manager and David as Head of SFIU was also involved in the investigation at that stage. John Logue as DSC was ultimately responsible for SFIU and CAAPD. I note that Mr Logue's email states that PIRC were instructed in terms of Section 33A(b)(i) of the 2006 Act. My subsequent letter to PIRC giving them formal instructions (COPFS-02539) did not specify which sub paragraph of section 33A(b) that the instruction was from. That was deliberate from my perspective. At the time the letter was sent it was unclear as to what had happened. It was apparent though that violence had been used by the police, and so to my mind the question may become whether that violence was justified in Law, but that was speculative.

77. I understood from the briefing that PIRC FLOs had engaged with Mr Bayoh's family the night before and PIRC were confident that a relationship could be established.

Question 39

78. I have been referred to COPFS-01309 an email chain between David Stewart, the Lord Advocate's Private Secretary and John Logue on 10 June 2015 in relation to PIRC powers. Mr Stewart at 22.20 refers to a promise being made by the Lord Advocate to Mr Bayoh's family that he would make no public statement on this case until concluded. I was not present when the Lord Advocate made these comments. My understanding is that Lord Mulholland told the family solicitor that he would make no public comment on the detail of the case. My understanding of the nature of the promise is that it was a personal one and not one that I would think be binding on his successors in any legal sense.

Question 40

79. COPFS-05040 is email exchange with John Logue on 9 July 2015. In my email I am asking John Logue for a steer from the Lord Advocate on the extent of the information to be given to the family's pathologist. I have been unable to locate any further emails on this matter but I think that the families pathologist received the expert witnesses package to which I refer. I refer in the email to the Lord Advocate having "committed to us giving assistance". I understood that assistance to be assisting the family to instruct their own expert witnesses. I understood that he made this commitment to the family's solicitor at a meeting in May 2015. The commitment was in relation to pathology and so was in effect time bound and no longer relevant by the time James Wolffe became Lord Advocate

Question 41

80. I have read my email chain with media colleagues dated 20 July 2015 (COPFS-05535) and the letter from the Lord Advocate to Mr David Torrance MSP dated 19 June 2015 (COPFS-01483). At this stage whilst we did not have the benefit of the full PIRC report our emerging view was that criminal proceedings were a possibility, but there would be an FAI. There was no concluded view on criminal proceedings as we did not have the PIRC report or the expert reports, but our view was that whilst the circumstances did not meet the statutory definition of death in custody from the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 which would have led to a "mandatory" Fatal Accident Inquiry, Mr Bayoh was in effect in the custody of police officers and so a FAI would clearly be in the public interest.

81. The Lord Advocate's position that there would be an FAI had no impact on the investigation. His position was informed by the investigation rather than informing the investigation.

Question 42

82. On 23 October 2017 I wrote to KM Law Solicitors who acted on behalf of one of the officers involved in the incident (COPFS-01542). I confirmed the Lord Advocate's commitment to an FAI. My understanding

is that Mr Wolffe KC maintained this position as it reflected the COPFS position of the case at that stage, and no doubt his own view.

83. At some point in the investigation it became clear that it may be appropriate to consider a wider range of matters than could be considered within the confines of the FAI legislation. Our view was then that a wider Public Inquiry would be preferable to an FAI. That was regardless of whether there was to be a prosecution. However, a decision on a Public Inquiry is one for Scottish Ministers in terms of the Public Inquiries Act 2005, rather than the Lord Advocate. Any announcement of a Public Inquiry was not for COPFS and so our public position remained that there would be an FAI until Scottish Ministers announced a Public Inquiry.

Question 43

84. On 5 November 2015, there was a meeting between the Lord Advocate and the Bayoh family at Crown Office. I was present at that meeting. I do not recall an issue being raised by Mr Anwar at the meeting relating to harassment of the black community in Kirkcaldy. I have looked at COPFS-05235 my note of the meeting. The note suggests that Ade Johnson, Mr Bayoh's brother in law had complained about someone being stopped for a "winter check" and whether that was being used to gather information rather than because of the standard of his driving and whether checks were being made by police officers. It looks like I have noted that I should speak to ACC [REDACTED] about that. I do not recall what happened or how I took this forward.

Question 44

85. I was aware that Professor Peter Watson of PBW Law was engaged by the Scottish Police Federation to represent some of the police officers involved in the incident. I wrote to PBW Law on 10 November 2015 (COPFS-01557) in relation to the issue of business cards which is covered in more detail elsewhere in this statement.

Question 45

86. My Notebook 4 (COPFS-05233) on pages 8 to 11 has an entry headed "Sheku Bayoh LA Sol Gen APCC PS CA DCA PF". This is a rough plan of a minute to Law Officers, copied to Assistant Principal Crown Counsel (APCC), the Crown Agent (via his private secretary, PS/CA), the Director of Serious Casework (via his personal assistant PA/DCA), PF Specialist Casework and Head of CAAPD. The final minute is to be found in COP S-05119(b) Minute to Law Officers dated 29 August 2016. The purpose of this minute is to update on progress and to propose timescale for further work.

Question 46

87. At page 11 of the notebook I have written "Timescale. Aim to have decision on criminal proceedings v. indiv (individuals) by end calendar year." I am proposing that we aim to make a decision on individual

criminal proceedings by the end of 2016. On 25 August 2016 there was a meeting at which I attended via Video Conference with Lindsey Miller, DCA Serious Casework, [REDACTED], PF Specialist Casework, and Les Brown, Head of CAAPD. We discussed what would be in the minute and the timescale would have been considered reasonable but challenging by all of the attendees or it would not have appeared in the minute. It was not achieved because considerable further precognition of witnesses was expected.

Question 47

88. In most serious cases which are reported to COPFS a decision on criminal proceedings must be made within a fixed timescale as an accused will have appeared on petition and be subject to statutory time bars. There is always a danger in cases not subject to a statutory timebar that they will take longer as resources are directed to cases with a timebar or the case will otherwise drift. The setting of a target date is good practice as it gives a date to work to and provides focus. That was particularly so in a case like the death of Mr Bayoh where the time that the case took could impact on the confidence of the family and wider public in the investigation.

89. I note that the pages presented in Notebook 4 (COPFS-05233) look as though they are presented out of order as they do not run in a logical order.

Question 48

90. COPFS-04515 is an email to Ms Ashely Edwards KC dated 7 February 2017. Ashley Edwards was Assistant Principal Crown Counsel at the time and had been recently appointed as allocated Crown Counsel to the case. In that role she would provide Crown Counsel's instructions when required and it was expected that she would make the final decision in the case. At the time of the email she had just been appointed as allocated Crown Counsel. The meeting with the family referred to in the email was the family's first meeting with James Wolffe. The family meeting was with him and its purpose would have been to provide reassurance that a change in law officers did not mean a change in commitment to the case. It was not at this stage necessary for allocated CC to meet the family. That was particularly so as Ashley Edwards was not properly read into the case and it was unlikely that she would be able to add anything of substance. In fact, by attending when she was not familiar with the case, there was a danger that rather than add to the family's confidence in the investigation it may damage it. There were likely to be further opportunities for her to meet the family on her own which seemed the best way to proceed. In hindsight, the use of 'inappropriate' is probably putting the matter too strongly. A better way of describing it might be to say that it was preferable if she didn't attend.

Expert witnesses

Question 49

91. In general terms, where expert evidence is required for a sufficiency of evidence in a criminal case the reporting agency, in this case PIRC, will be responsible for finding and instructing expert witnesses. However, given that the expert witness will be likely to have a significant role in any future proceedings or FAI, the procurator fiscal or even Crown Counsel will commonly want to be involved in the selection and instruction of experts. That was what happened in relation to the death of Mr Bayoh.

Question 50

92. I was involved in discussions about the expert witnesses to be used by the Crown. I was also involved in discussions with colleagues in COPFS, in particular with Les Brown in relation to possible experts that were identified by PIRC. That included discussions about the choice of experts including consideration of their qualifications, expertise and independence. I do not recall having direct involvement in preparing letters of instruction. Beyond the email exchange with John Logue on 9 July 2015 set out in COPFS-05040 and associated discussions with Mr Brown at that time I do not recall being involved in discussion of what material was provided to expert witnesses.

Question 51

93. I recall that Dr Steven Karch was instructed. He was identified by PIRC as having the relevant experience to assist the investigation. There were no initial concerns about him and his CV was apparently impressive. We were happy that he was instructed as he seemed to give us an insight into the effects of Alpha-PVP. Alpha-PVP was not common in Europe.

Question 52

94. In COPFS-05234 (a) my Notebook 5, part 1 at page 2 there is a note of a telephone conversation with Les Brown in the following terms:-

"25/8/15 Les Brown

J MacSporran was with Nat Carey. He sd the experts are the best we could get. Karch world renowned"

95. This reflects a conversation with Les Brown. In it he is advising me that John MacSporran, a Senior Investigator at PIRC, had a discussion with Dr Nat Carey, the Forensic Pathologist engaged by the family. Les Brown was telling me that John MacSporran had told him Dr Carey was advising that the experts we had engaged were the best we could get and that Dr Karch was world renowned. My recollection was that the decision had already been taken to instruct Dr Karch at this stage. The information being passed on by Mr MacSporran was not in any way determinative of Karch's instruction, instructions having already been given, but it did give

us confidence that an eminent pathologist in Dr Carey spoke highly of a witness that we had instructed.

Question 53

96. The choice of witnesses was discussed with the Lord Advocate at the time. I recall that these discussions were collaborative rather than being a case of the Lord Advocate personally directing the names of the specific witnesses to be instructed. He could have so directed had he chosen to, and no doubt he suggested witnesses to consider, but my recollection was that PIRC sourced potential experts, and these were discussed in COPFS and with the Lord Advocate and we agreed, collectively as COPFS and the Lord Advocate, who fitted the bill. Those witnesses were so instructed. PIRC-04246 is a letter from the Commissioner dated 12 October 2015. The letter says that the Lord Advocate selected Dr Karch and Dr Payne-James. As I have noted the selection of experts was discussed with the Lord Advocate, but I do not recall that this was his personal decision alone. I recall it being a process of discussion between senior procurators fiscal and the Lord Advocate.

Question 54

97. I am referred to COPFS-05234, my Notebook 5 part 1 at pages 4 and 5 where I have written:-

"Bayoh Family Meeting 26/8/15

.....

Concerns re Payne James / Karsh

Instructed in defence of police / etc in USA.

....

Experts:- In just few days PIRC had concluded view that was an open & shut case. Partic re the use of "excited delirium". PIRC thought it was open & shut.

Dr Carey serious concerns. Proponents of excited delirium.

Sit on panel in US who exclude restraint techniques & positional asphyxiation.

Carey says not acceptable if

Karsh: Acc to Carey will try to have us believe that restraint techniques not part of COD.

Deborah Coles – says WHO says excited delirium is not an accepted term. Introduced by Karsh to UK. She has similar concerns

Carey & Coles sy not independent."

98. My recollection is that this is a note of comments from the family in relation to the expert witnesses that were to be used. The criticisms were

more specific and pointed in relation to Dr Karch. The criticism of Dr Payne-James were less specific. In consequence of the issues raised we did further research on the witnesses. I recall material to assist us with this was provided by the family solicitor Mr Anwar. When we looked at Dr Karch in more detail it did seem that his research was funded entirely by US military and law enforcement which gave us cause to consider whether Dr Karch should be used by us and whether he was independent.

Question 55

99. COPFS-05234 my Notebook 5, part 1 at pages 16 and 17 has an entry as follows:

"13/10/15 PIRC / LA -> Experts LA/KF/LB/JM/

...

Karch (has seen histo slide)

Histological abnormalities. Deceased had pre-existing heart disease. So damaged that worthy of academic (consideration).

Karch is saying anabolic steroid use has so damaged the heart that it was fundamentally compromised.

Aside from heart combination of drugs could have caused death. Alpha PVP is + dangerous than MDA or MDMA.

Whilst heart chronically damaged long term drug use can cause death anyway.

Dismisses excited delirium.

He says the heart. Doesn't mention mechanical asphyxia."

100. I have no independent recollection of the meeting beyond these notes. The attendees in addition to me were the Lord Advocate (LA), the Commissioner Kate Frame (KF), Les Brown (LB) and John Mitchell (JM), the Director of Investigations at PIRC. I assume from the title of the note that the purpose of the meeting was to discuss the Expert reports that had been provided. In fact, it seems that PIRC brought the draft reports to the meeting (there is reference to Dr Payne-James' report having been handed to the Lord Advocate in the notes). I would have expected the issues about Dr Karch to have been discussed, although that issue is likely to have been discussed with PIRC separately and more recently after the family meeting than this meeting.

Question 56

101. SBPI-00216 is an extract from the Sun newspaper on 1 November 2015 which reports that Dr Karch commented on his examination of the case. I cannot recall if COPFS was asked for comment by the Sun on the story the day before the article appeared (this often happened in relation to media stories) or whether I first became aware of the story when it

appeared, which I would have seen in the COPFS media summary. It was entirely inappropriate for a witness to comment on an ongoing investigation in the media. The place to comment was in his report. These comments as well as the additional research that we had done were crucial factors in the Crown deciding not to rely on Karch as a witness in the case. This took place before Crown Counsel were allocated to the case. I was not involved in the precognition process and so am unaware as to how these concerns were made known to Crown Counsel at the decision making stage.

Question 57

102. In COPFS-05234 my Notebook 5, part 1 at page 22 I have written:-

"2/11/15 LA/Les/Sheku Bayoh Family Pre-meet

Letter to PIRC. Karch public. Not asked. Would have simply advised not to do it. Unhelpful. V disappointed.

Read it to family at the meeting.

Letter to AA. Look forward to meet. Angry to see Karch. Issues re objectivity. Points re instructions

Cardiopath in instruction of Payne James. Duty to follow evidence.

Happy to instruct Lipsedge. What might he bring.

Discuss at the meeting"

103. This is a discussion of the approach to be taken at the forthcoming meeting. The suggestion of reading the letter to the family at the meeting came from the Lord Advocate. The letter was to Dr Karch and was to set out our disapproval of his actions.

Question 58

104. I have read my Notebook 5 part 1 at pages 24 and 25 and Notebook 5 part 2 at pages 1 and 2 (COPFS-05235) :-

"5/11/15

L■B

- Erin C part of the team
- Formal PIRC report still to be sent
- List of instructions to PIRC
- Reconciliation of statement vs CCTV footage
- HSE and PIRC in touch
- Tripartite meeting asap

LA

HSE issue is in re PSOS system of work (+explanation)

LB

- *Other issue racial motivation*
- *Re Fife constabulary and individuals involved*
- *Experts*
- *Dr Karch, extreme disquiet re remarks. Gross breach of confidentiality. Tainted/not impartial*

LA *Karch comment a surprise.*

Les raised with

AA *Who was it in PIRC?*

Concern re Alpha PVP and other information he had

AB *Do/will experts sign confidentiality?*

In London mum saw. New to us re heart disease? Do ors in family have heart disease?

Following evidence

Not found any evidence

LA v. concerned at constant carping & discussion by Peter Watson & SPF.

Personally v concerned re Karch

AB *Even more concerned as meet or families in London.*

AB

If Sheku does not come across any of the police officer that Sunday morning, is he still alive, or is he still dead?

Take police out of situation is he still alive or is he dead.

If alive duty of care kicks in.

LA If Sheku had a knife had drugs in system & if discarded the knife in advance, the police have a duty of care to him

Re the heart, P-J raises. Other pathologists have not. We have duty to get your answers. Duty to instruct best experts

If after we have done all we can you are satisfied that we have got all of the evidence + that you have no further Qs I will take a decision

Want you to have confidence... you lose confidence. My job & duty to give you all of the answers

No confidence in Karch due to gross breach of confidence.”

105. These are my notes of a meeting with the Bayoh family in November 2015 at which I was present. I have not noted who was there but the Lord Advocate (LA) was there as was Les Brown (LAB). AB is Ade Johnson, Mr Bayoh's brother and Mr Anwar the family solicitor was also present. The Lord Advocate was addressing Mr Bayoh's family in the notes attributed to him. I agree that there is a duty to instruct the best experts and to give Mr Bayoh's family all of the answers that we could. The Lord Advocate's comment on Dr Karch reflects our view of him at that stage. We had no intention of positively relying upon it to make a case as our view was that his independence was compromised. It was, however, evidence in a case and could not be ignored. We could not unknow his view and whilst we may not put a great deal of weight on it, if any, it couldn't simply be disregarded. Whilst the Crown may take a view on how we intended to use, or not use the material, it would have to be disclosed and considered with the other evidence, albeit that we thought it compromised. The family would have been in no doubt that we were not going to positively rely on Karch's report in a prosecution.

Question 59

106. I have read the narrative and the analysis from the precognition (COP S-06360 and COP S-06361 respectively). I was not involved in the precognition and have not seen these documents before. As I noted, the report from Dr Karch is evidence. Given that it seems that his report proposes contributory factors to the deaths that the other experts did not, it is entirely appropriate that it was considered in the narrative and analysis. Not to have done so would have given Crown Counsel an incomplete picture. However, given the view that we had formed in 2015, I would have expected the concerns in relation to Karch that we had formed then to be reflected somewhere. Having not been involved in reporting the case to Crown Counsel I am unable to say why they were not.

Family liaison

Question 60

107. In a deaths case, initial liaison with the family is usually with Victim Information and Advice (VIA). In 2015 in a deaths case my recollection is that following a death report from the police, a letter would be sent to the nearest relatives initiating contact. In those cases there would be no Family Liaison Officers (FLOs) and initial contact from police with the family would be through the inquiry team.

108. In cases where there was criminality, after an accused was reported to the PF, there would be what was termed a 'handover meeting' at which the family would attend with the FLOs and meet the VIA officer who would deal with the case, and if possible, the precognoscer. That process has now been formalised with clearer timelines in the COPFS Family Liaison

Charter. Section 8 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 creates a statutory obligation on the Lord Advocate to consult upon and issue a charter setting out how the procurator fiscal will liaise with families setting out the information that they can expect to be given and the timescales for receiving this information. The Charter was laid before the Scottish Parliament on 5 September 2016. Whilst the Charter post dates Mr Bayoh's death, in most cases the processes described in the Charter were followed at that time.

Question 61

109. In some cases, where it was not known whether there was criminality, the process for liaising with families was more *ad hoc* and fluid. Mr Bayoh's death was one of those cases. I do not recall any material VIA involvement in the case at the stages where I was involved and material updates went directly to the family solicitor, at the family's request, from a member of the legal staff. I do not recall any handover meeting, although since I would not have been involved in such a meeting one may have happened.

Question 62

110. I have read COPFS-04967 an email chain between the Crown Agent Ms Catherine Dyer, Mr Logue and I dated 6 May 2015. In the draft minute to the Scottish Ministers set out in Mr Logue's email of 14:34, the Lord Advocate explains that it would be important to build and maintain the confidence of the deceased's family in the independence and thoroughness of the investigation. This was vital. If the family did not have confidence in the investigation, then wider public confidence in the system of investigation of deaths and prosecution of crime could suffer. In order to try and maintain confidence, the Lord Advocate met with the family at an early stage of the case and met the family on other occasions. We did our best to ensure that the family's voice was heard during the investigation and that they were involved in, for example, the choice of experts. It is difficult for me to say whether we did maintain their confidence. I suspect that as time went on the family became frustrated at the time the case was taking to come to a conclusion.

Question 63

111. I was involved in some of the meetings that Lord Mulholland and James Wolffe KC had with the family, in a supporting role and have set out the dates of those meetings elsewhere in my statement. In the first week or so after the death I also spoke to the family's solicitor on a number of occasions.

112. There were early discussions involving the Lord Advocate and senior members of COPFS about what to disclose. Consistent with the family's Article 2 rights they were provided with early access to expert reports and consulted them on the choice of experts. Whilst the decision was for the PF or Crown Counsel at the end of the day, this went further than legally

necessary and was informed by a desire to build confidence in the investigation.

Question 64

113. I have had the opportunity to read COPFS-02126 (a) Mr MacLeod's letter to Mr Farrell dated 28 February 2020 which states at page 3;

"From the outset the Anwar & Co were on an exceptional basis provided with significant disclosure. This disclosure was provided solely to enable them to instruct their own medical experts. The family were also from the beginning invited by the Crown to provide input to the Crown investigation and did so by e.g. suggesting particular lines of enquiry and providing the details of a number of expert medical witnesses some of who subsequently provided reports to the Crown."

114. I agree with the summary. What made the basis of the disclosure exceptional is that whilst we endeavoured to comply with our Article 2 obligations to ensure that the nearest relatives were involved insofar as necessary to protect their civil rights and obligations, we had never gone as far in my experience of consulting families on the identity of experts that the Crown would use. It was also unusual for a family to be instructing their own experts. I had never experienced this before either at this stage of an investigation. It was not inconsistent with the legal obligations that we were subject to under Article 2.

115. I am asked about a statement by PIRC's Mr John McSporran who has stated:

"There was the potential for PIRC FLOs and COPFS to be providing different information to the family and their solicitor, which would undermine confidence in the PIRC FLOs and the overall investigation. In my experience, it was highly unusual for COPFS to provide such information direct to the family and their solicitor during a live investigation, particularly during its early stages."

116. I have noted that it was unusual to give such information to the family, but we were trying to ensure that we built confidence in the investigation with the family. Part of the reason that we made such efforts was because Mr Bayoh's race was a potential factor in his death and we wanted to ensure that we were as transparent as possible.

Question 65

117. I understood Mr Bayoh's family had a difficult relationship with PIRC during the early months of the inquiry. Concerns about the inquiry on their behalf appeared in the media. The family expressed their concerns at a meeting in May 2016. During that meeting concerns were raised about a perception of different treatment being afforded to one of the police officers involved in the case, Alan Paton and his wife, and that to members of his extended family who had made allegations against him. I

recorded these in my notebook COPFS-05231 at pages 7 to 13. The family felt that the concerns of Mr Paton's family were not being taken seriously by PIRC and also recall that PIRC felt that they were being unfairly criticised by the family and the media. That concern came through in the August 2015 incident in relation to media lines where the Commissioner went further than we thought advisable in response to criticisms from the family solicitor. All the Crown could do in response to this was to ensure that the investigation was as thorough as possible and reassure the family in relation to this.

Question 66

118. I have read my notes in Notebook 2 (COPFS-05231) on pages 7 and 8 the relevant extracts of which are in the following terms;

"9/6/16 *S Bayoh Family Meet*

...

FAI/ Public Inquiry

FAI

PI is for Scot Govt not for Crown

Timescale

-When get PIRC

-Experts

-Family timescale.

...

Family fed up hearing FAI will happen.

K this is the minimum of what can happen. K not at fault/blame.

FAI useless as doesn't see that it doesn't do something."

119. This reflects a discussion in which the family had raised the question of a Public Inquiry and been advised that this was not a matter for the Crown, but for Scottish Ministers, but what the Crown would commit to was a Fatal Accident Inquiry as we had committed to in the past. The discussion turned to timescales which we could not commit to in the absence of the PIRC report and we also cautioned that the timing of expert reports was outwith our hands. At that stage the family expressed frustration that they wanted answers and were aware that the nature of an FAI was that it did not attribute blame. I think they also commented on the recommendations being unenforceable.

Question 67

120. I have read my notes in my Notebook 3 (COPFS-05232) at pages 9 and 10. This is a note of a meeting with the family on 8 February 2017. The note contains the following note:

"8/2/17 Bayoh Family Meeting... Will be an FAI... Family despair when hear will be FAI. That's bare minimum."

121. I have no independent recollection of this part of the meeting. From my notes it appears that the family or Mr Anwar made COPFS aware in the meeting on 9 June 2016 that the family did not want to hear about an FAI and it was discussed again in the meeting on 8 February 2017. It is likely that it would have been raised as the family wanted a Public Inquiry and that was something that was not within the Crown's gift to agree to. An FAI was what the Crown had committed to. That was within the Crown's powers. I am unable to say what effect this had on the relationship with the family. However, where we were being asked about a Public Inquiry, as a matter of fact and law we could only point out that was for Scottish Ministers to consider a Public Inquiry and we were committed to an FAI.

Question 68

122. I have covered these matters in answer to questions 60 and 61.

Police officers' status

Question 69

123. Whether a person is a suspect goes to the fairness of the investigation, whether there are grounds for arrest and the admissibility of any comments that they might make to the authorities. In general terms, where a person is reasonably suspected of having committed a crime, they must be cautioned that they do not require to answer any questions.

Question 70 and 71

124. The determination of who is a suspect is almost always a decision for the investigator. More often than not such decisions are made without reference to the procurator fiscal. Exceptionally, particularly in long running or difficult cases there may be discussions about how to treat a particular person and the PF may give advice, but these are very unusual cases. As regards police officers the position is set out in a Letter from the Lord Advocate to the Chief Constable of 5 June 2015 (COPFS-02844).

125. In this case, at the stage where I was involved, PIRC determined whether a person was a suspect. That was entirely consistent with what would normally happen. I recall discussing their view that no one was a suspect at an early stage in the investigation with the Commissioner and Director of Investigations and agreed with that analysis.

126. I do not recall any specific reconsideration of the police officers' status.

Question 72

127. It would be possible for the procurator fiscal or more likely Crown Counsel to give an undertaking to any witness not to prosecute them or as to how a statement might be used. However, there are very strict legal rules about what a prosecutor may say to a witness or publicly and it would be unwise to give any undertaking before knowing what a witness might speak to for fear of falling foul of the rule in *Thom v HMA* which provides that where something is said by a prosecutor that amounts to an unequivocal renunciation of the right to prosecute, the Crown are barred from taking criminal proceedings. I cannot think of any example where such undertakings have been given in circumstances such as those in this case. In the context of this case where police officers who were witnesses might want undertakings as to how a statement would be used, to accede to that request would be very unwise indeed.

Question 73

128. I am asked what advantages, if any, would be gained from charging the officers and interviewing them under caution? What disadvantages, if any, would result from the officers being charged and interviewed under caution? To what extent were your decisions and actions in this regard influenced by reporting, or potential reporting, in the media?

129. Investigators, whether they be police, PIRC or others do not simply charge or caution someone. Someone is only charged where the police believe there is sufficient evidence that they have committed a crime. In practice interview would come before charge. Also in practice, interview usually (but not necessarily) comes with detention (in 2015) or arrest. Without a reasonable suspicion there is no basis for the caution. Usually an interview under caution would take place after arrest, or at the time detention. The law on detention at the time was set out in section 14 of the Criminal Procedure (Scotland) Act 1995. Section 14 stated;

"14 Detention And Questioning At Police Station

(1)Where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, the constable may, for the purpose of facilitating the carrying out of investigations—

(a)into the offence; and

(b)as to whether criminal proceedings should be instigated against the person, detain that person and take him as quickly as is reasonably practicable to a police station or other premises and may thereafter for that purpose take him to any other place and, subject to the following provisions of this section, the detention may continue at the police station or, as the case may be, the other premises or place."

130. The constable (or PIRC investigator who had the powers of a constable if instructed by the Crown) had to have reasonable grounds to suspect that a crime punishable by imprisonment had been committed. Further, they had to have as their purpose facilitating carrying out investigations into the offence and whether criminal proceedings should

be instigated against the suspect. It is only if these criteria were met that a person could be detained. Interview under caution engages the right to a solicitor. In practice the advice of solicitors to clients in Scotland is almost universally to make no comment.

131. No operational decisions were influenced by media reporting. All decisions were made following a proper consideration of the evidence and best practice. Prosecutors are well practiced in ignoring media commentary about cases and resisting external pressure. We jealously guard our independence in that respect. There is no reluctance to take criminal proceedings against police officers. Decisions are taken without fear or favour no matter the identity of an accused.

Question 74

132. In my Notebook 4 (COPFS-05233) at page 16 there is a note from 16 September 2016. It appears to reflect a discussion by telephone with Les Brown although I do not recollect the discussion. It appears that Les Brown has had a discussion with Ashley Edwards KC about the case from the notation 'AE' in the note. It looks as though Les has been updating me on the discussion.

133. The part of the note that I am referred to says:
"16/9/16 Sheku Bayoh... Spontaneous concert. Do we record the interviews -> Policy issues".

134. [REDACTED]
[REDACTED]
[REDACTED]. In relation to the question of a policy issue in relation to recording of interviews I cannot recall what that specifically referred to. If there was the potential for an instruction to have the officers interviewed under caution the policy issue would relate to where the interviews were recorded. Police offices are equipped with interview rooms that are set up for audio and visual recording of interviews. PIRC did not have that and would have to rely on Police Scotland to facilitate this. None of that was insurmountable but would have to be worked though. If the discussion related to an instruction to interview a witness, it was unusual at that time to visually record an interview with a witness and perhaps guidance was sought on that. Again none of that would be insurmountable.

135. Nothing in the note should be taken as indicating a reluctance to have police officers interviewed or arrested where appropriate.

Question 75

136. Notebook 1 (COPFS-05230) at page 5 states:

"1/2/16 PIRC
Bayoh

Dr Crane – [REDACTED]

Ricky Mason – statement awaited on why SID file re AA.

Thought had sorted but raising with ACC RN

[REDACTED]. Running

Alan Paton's no doesn't appear and neither does Nicole Short's

Statements from each of officers who looked at policing systems.
Checking vs audit log. Check if for policing purposes.

? Will need to interview under caution as suspects?

PIRC finding a policing purpose for PSoS. May still be a ½ doz to a doz where no policing purpose.

Expect to have done by end of Month

Then 2 weeks to write.

End of April realistically by the time the report comes to us.

[REDACTED]
[REDACTED]

Feedback on HSE meet next week

There will be a stand alone that we can give to HSE"

137. This is a note of a meeting with PIRC on 1 February 2016. The discussion started with a discussion about a report that was awaited from Dr Crane. We then discussed information that Police held on the Scottish Intelligence Database (SID) on Mr Anwar. A statement was awaited from the Head of Intelligence at Police, and the matter was to be raised by PIRC with Assistant Chief Constable Ruairaidh Nicolson. Following allegations of racist conduct by police in Fife there was an examination of various phones ongoing [REDACTED] PC Paton and PC Short's numbers were not found in the examination. There was an update on access by police officers and staff to various computer files relating to Sheku Bayoh's death. Most access was authorised and for a legitimate purpose but it was expected that that there would be 6-12 potential Data Protection cases for unauthorised access. In that context there was a need to interview those suspected of unauthorised access under caution. It was expected that the investigation would take a further 2 weeks then two weeks to write up. There was an update [REDACTED] [REDACTED] on engagement with HSE.

Question 76

138. COPFS-03635 is an email from me to Mr Les Brown dated 12 May 2015. It reflects my comments on a situational report. In the email I describe a sense of unease about the situational update. We were trying to get statements from the officers involved in the incident. It appeared that PIRC were trying to arrange this through Police Scotland and in particular from supervisory officers who had been appointed to consider amongst other things the officers welfare. Whilst in some circumstances it might be convenient to have Police Scotland facilitate the taking of a statement, here time was marching on and the lack of statements was holding up the inquiry. My concern was that professional courtesy was being given to the officers concerned that would not be afforded to any other witness. My view was that PIRC should simply be tracing the police officers and getting a witness statement. If the police officer declined, the PIRC investigator should submit a statement reflecting that the officer refused to give a statement. As it was we seemed to be in a negotiation. We also appeared to be conceptionally unclear as to the basis on which we were looking for a statement.

139, I was also concerned that PIRC had not yet taken a statement from the PIM (Post Incident Manager). The officers involved in the incident had been taken back to Kirkcaldy Police Office and a PIM appointed. There was always a concern here that the officers may have discussed the incident and therefore any recollection that they had of the incident may be impacted by discussing it with each other, which was important to know, or even that they had colluded. The PIM's statement would shed light on this. It would also potentially provide information as to what the officers were saying immediately after the incident which might be crucial evidence, or even if it was not admissible provide useful intelligence to help direct inquiries. I am sure that these views would have been shared by Les Brown.

Question 77

140. I was not aware of any agreement of standard practice between PIRC and Police Scotland whereby PIRC would approach senior police officers, at Inspector level or above, to obtain statements from subject officers. It was not something that I had actually applied my mind to until the sitrep report of May 2015. I can imagine that in routine circumstances, for example for a witness or even a subject officer, it might be administratively convenient to obtain a statement in this way particularly if there was no need or basis for arrest. Sometimes the police will make similar arrangements with solicitors for civilian witnesses. In the context of Mr Bayoh's death, and in particular the potential for the police to be an accused, and their separate interest in maintaining public confidence in them, it sat very uneasily with me that they were interposed between witnesses who were not cooperating and the investigators. It is definitely preferable for PIRC to approach police officers direct.

Question 78

141. The 'unhappy stand off' that I refer to is the fact that the officers appeared reluctant to give statements and were looking for undertaking about their status. I thought PIRC should be more on the front foot about this.

142. In my email I go on to discuss the basis upon which we were asking for statements. There had been an internal discussion in COPFS in relation to whether the police officers had a statutory duty in terms of the Police and Fire Reform (Scotland) Act to report a crime that they had witnessed (that is Mr Bayoh's conduct, or the conduct of other officers). Section 20 of the 2012 Act sets out the general duties of constables as follows;

"Constables: general duties

(1) It is the duty of a constable—

(a) to prevent and detect crime,

(b) to maintain order,

(c) to protect life and property,

(d) to take such lawful measures, and make such reports to the appropriate prosecutor, as may be needed to bring offenders with all due speed to justice,

(e) where required, to serve and execute a warrant, citation or deliverance issued, or process duly endorsed, by a Lord Commissioner of Justiciary, sheriff, justice of the peace or stipendiary magistrate in relation to criminal proceedings, and

(f) to attend court to give evidence.

(2) When taking lawful measures in pursuance of subsection (1)(d), a constable must take every precaution to ensure that a person charged with an offence is not unreasonably or unnecessarily detained in custody."

The discussion centred around subsection (d). The Lord Advocate at the time had a view that this meant that the police had an obligation to report what they had seen.

143. The second option was that we were instruction PIRC to take a witness statement from the officers. That was what I thought were doing in our instruction to PIRC. Whatever was the case, it was important that we were clear on this.

Question 79

144. I have read the undernoted correspondence discussing whether there is a requirement for the police officers to provide a statement detailing their involvement in engaging with Mr Bayoh:-

- the letter from the Chief Constable to the Lord Advocate dated 15 May 2015 (PS08484);
- the letter from the Lord Advocate to the Chief Constable dated 22 May 2015 COPFS(028550);
- the letter from Mr Brown to DCC Neil Richardson dated 22 May 2015 (COPFS-02851);

- the letter from the Chief Constable to the Lord Advocate dated 29 May 2015 (PS04250) ;
- the letter from the Lord Advocate to the Chief Constable dated 5 June 2015 (COPFS-02844) ;
- the letter from DCC Richardson to Mr Brown dated 10 June 2015 (COPFS-02850);
- the email chain between you, Mr Logue and Mr Brown dated 11 June 2015 (COPFS-06275); and
- the letter from Mr Brown to DCC Richardson dated 25 June 2015 (COPFS-02849).

145. The issue that is described in this correspondence relates to the provision of so-called "operational statements" by police officers. The different legacy police forces before Police Scotland had different practices on this. Some of them compelled subject officers, that is officers who were alleged to have committed a crime, to provide a statement covering what occurred in the incident in question. Others did not. We identified that there may be an unfairness if there was a practice whereby an officer was suspected of having committed a crime and yet were compelled to give a statement rather than have the benefit of the privilege against self incrimination. It was liable to render the statement inadmissible. In an effort to prevent this, and to ensure that the new force had consistent and fair regulations that complied with the ordinary rules of criminal procedure, we met Police Scotland to invite them to put in place arrangements that addressed this issue. What happen is broadly reflected in the letter from DCC Richardson to Mr Brown dated 10 June 2015 (COPFS-02850). In my email dated 11 June 2015 I said that I was struggling with what the inconsistency was. I did not see an inconsistency as the officers involved with Sheku Bayoh were not suspected of having committed a crime. I noted that I was happy to meet with Police Scotland and believe that we met on 23 July 2015. I do not have a clear recollection of the meeting but think that we would have explained the confusion. I understand that by that stage the officers concerned had prepared statement. I do not recall if we went so far as to envisage how the statement would be taken.

Question 80

146. I have read my email to Mr Logue dated 10 June 2015 (COPFS-06347) and the attached Minute to Law Officers and others relating to inconsistent practices in Police Scotland dated 24 June 2013 (COP S-06333(a)) and minutes of the meeting between the Solicitor General Ms Lesley Thomson QC, Kate Frame who was then Head of CAAPD and you on 3 March 2014 (COPFS-06347 (a)). As I noted in my answer to Question 79 we had identified an inconsistency in the way the police operated. Kate Frame, who was then Head of CAAPD minuted Law Officers and we met the Solicitor General who agreed with our recommendation that the ordinary rules of criminal evidence and procedure ought to apply to police officers. We left it to the police as to how best to take this forward. They had taken some time to do so, but had eventually stopped the practice of compelling operational statements from officers suspected of having committing a crime as described in DCC Richardson's letter to Mr Brown

dated 10 June 2015 (COPFS-02850). As far as we were concerned this was simply the application of the ordinary rules of criminal procedure, which police ought to have been aware of, to cases involving police officers.

Question 81

147. I have read my Notebook 5 part 2 (COPFS-05235) at page 2. There are notes that appear to be from the meeting with the family on 5 November 2015. I have noted the family or their solicitor stating:

"Next week the grandfather & Karen Swan will speak to PIRC in AA's office. PIRC need to understand that if there are threats to prec on oath, that hasn't been done with police. Double standards."

148. Precognition on oath is a relatively rarely used procedure for obtaining a precognition from a witness before a sheriff on the application of the procurator fiscal. I do not recall any question of precognition on oath of the officers ever being discussed and would be surprised if it had been. Precognition or precognition on oath is a matter for the prosecutor, not for investigators. In general, the practical effect of precognosing a witness is likely to mean that they could not be an accused. Whilst there was no basis for suspecting the officers of having committed a crime at that time, we were still an early stage in the investigation, too early to be making those sorts of definitive determinations. Since PIRC, who were to be seeing the Swanns did not have the power to precognosce on oath I do not see that there could be a double standard, although that was clearly not the perception.

Question 82

149. I have been provided with PIRC-01835(a) a letter from the Commissioner to Mr Anwar dated 10 September 2015. The Commissioner set out her response to a concern of the family in the following terms:-

"Firstly, I note that they suggested that the powers available to PIRC had either not been utilised or were lacking.

In particular, the family appear to be concerned that the police officers who engaged with Sheku Bayoh in Hayfield Road, were not detained immediately and interviewed.

As you will be aware, dependent on the circumstances of any case, a police officer may have the legal status of a witness or a suspect. If they are considered to be a witness, they may have the same rights as any civilian and therefore cannot be compelled to provide a statement. If on the other hand, they are considered to be a suspect, they may be detained for the purposes of giving a statement but cannot be compelled to speak or incriminate themselves.

For someone to be considered a suspect, you will appreciate that in terms of Section 14 of the Criminal Procedure (Scotland) Act 1995, there has to be a reasonable suspicion that they have committed a crime.

In this particular case, as you know, as it has not been possible (to date) to establish a precise cause of death, it has not so far been possible, in a legal context, to establish that a crime has been committed.

Accordingly, the police officers could not be detained as suspects in terms of the Criminal Procedure (Scotland) Act.

In these circumstances and in compliance with Scottish Criminal Law, the police officers have been considered meantime as witnesses. As you will know, there is nothing in law which compels a witness to provide evidence to investigators (be they police officers or PIRC investigators) and I am sure you will recognise the importance of my investigators acting within the law, so that any evidence obtained by them, may be admissible in the event of any future proceedings."

150. In a further letter to Mr Anwar dated 9 October 2015, ([REDACTED]) the Commissioner wrote:-

"With regard to your query relating to the detention of police officers in terms of Section 14 of the Criminal Procedure (Scotland) Act 1995, as you know, from the inconclusive Scottish post mortem, it has not been possible to establish a precise cause of death or to establish meantime, that a crime has been committed. In terms of Scots Law, it is not lawful to detain any person (police officer or member of the public) unless it has been established that an offence punishable by imprisonment has been committed. In compliance with Scottish Criminal law, PIRC has not, to date, detained any police officer in respect of this case."

151. Broadly speaking, I agree with the Commissioner's understanding of the law as it applied at the time. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. Further the question of the cause of death was unresolved at this stage. Interview of a suspect is something that should come at the end of the investigation. If it doesn't it is a wasted opportunity to put relevant matters to the accused, particularly in 2015 when detention was limited to 6 hours. Significant further investigation was required before we got to the point where all of this might be considered.

Question 83

152. The Lord Advocate in his letter to the Chief Constable dated 5 June 2015 COPFS-02844 sets out the following position:

"The discussions between Crown Office officials and Professional Standards Department did not in any event cover investigations conducted by PIRC on the instructions of the Lord Advocate. The concerns about compelling officers suspected of committing a crime to provide a statement only apply to investigations about police officers carried out by the police themselves. They do not apply to PIRC who when investigating allegations of criminality against police officers must make their own operational judgements as to who is a suspect and who is a witness."

153. I agree with the Lord Advocate's point that determining whether a police officer is a witness or a suspect is a matter for PIRC's own operational judgement and suspect that I had a hand in the drafting of the letter. This is consistent with the Commissioners view; that PIRC had to determine who was and was not a suspect in the circumstances.

Question 84

154. I have read my letter to Chief Superintendent Ellie Mitchell dated 25 August 2015 (COPFS-04012 (a)). I refer to allegations of criminality in respect of information being published in the Sunday Mail on 28 June 2015. I explain: *"In light of that I can see no basis on which there would be a reasonable suspicion to commence a criminal investigation into PIRC."* This amounted to advice to Police Scotland as to whether to begin an investigation. COPFS could instruct a PIRC investigation into allegations of criminality if that was thought to be appropriate. Similarly, we can and do instruct police investigations. During the course of the investigation advice is available to investigating agencies regardless of who they are. There requires to be a basis for a criminal investigation. In the Sunday Mail example, whilst I do not have the benefit of a copy the article, it seems from my letter that the information which was said to emanate from PIRC was information which was widely available. [REDACTED]

[REDACTED]

Question 85

154. I am referred to COPFS-04814 an email to Mr Brown and others in which I refer to Police Scotland as potential suspects. "Potential suspects" is not a term of art or a status that necessarily require a warning. I used the phrase simply to denote the possibility that Police Scotland may end

up being a suspect if there were defects in their system of work, a prospect that we were aware of and they ought to have been alive to.

155. [REDACTED]
[REDACTED]
[REDACTED]

Question 86

156. Where PIRC have been instructed by the Crown, it is expected that they will prepare a report to the procurator fiscal regardless of its conclusions. That is normal and occurs in every case. It is also normal, given that this was a death with the possibility of state involvement for a full precognition prepared for Crown Counsel's instructions. Regardless of the views of PIRC decisions in this case were for Crown Counsel.

Ingathering of evidence and analysis

Question 87

157. I have set out my understanding of COPFS' role in investigating a death in custody or death during or following contact with the police in response to Question 3. COPFS instruct PIRC to carry out the investigation. There are regular liaison meetings and case specific updates. Further instructions and directions may be prepared where required or appropriate.

Question 88

158. I am asked what description of the events leading up to and including Mr Bayoh's death was explained to me. The morning of the death I recall speaking to David Green, Chief Superintendent McEwan and Assistant Chief Constable Nicolson. The information I got from those conversations I distilled into the note I did for law officers sent at 1.24pm that day. It was addressed to Law Officers Private Secretaries and read;

" [REDACTED]

We have instructed an investigation into a death in custody of a black male, Sheku Bayoh in Kirkcaldy this morning.

The circumstances as far as we know are that at 7.15 this morning police received a call re a black male with a knife behaving erratically. 3 marked and 1 unmarked police vehicles (a total of 7 officers) responded.

On arrival the deceased ran towards the officers, striking the head of a female officer (not with the knife).

CS spray was used but appeared to have no effect. The deceased was repeatedly struck with batons and subdued to the point handcuffs and leg restraints were applied.

At that stage he collapsed.

CPR was carried out by police and paramedics who were summoned.

On arrival at Victoria Hospital Kirkcaldy further efforts were made to revive him but these were not successful.

It seems that the deceased was watching the World Championship boxing when he had fallen out with friends. His partner had apparently called the police at that stage though the response if any is unclear.

We are told there are no "blood injuries".

We are arranging a post mortem for tomorrow morning at Edinburgh.

Meanwhile there is likely to be media interest. PIRC will confirm if asked that we have instructed an investigation.

If there are developments we will keep law officers advised.

Regards

Stephen"

Question 89

159. It is difficult to say how, and when my understanding of the circumstances of the deaths changed. I have had experience of many significant incidents and providing briefings to law officers over the years. The original information that you receive often proves to be incomplete or even inaccurate. That can be so for many reasons including confusion at the scene, and a tendency for those briefing in at the scene to inadvertently try to make sense of incomplete information. It is only after investigation that things become clearer. In the case of Mr Bayoh's death, obviously after investigation we knew much more about what Mr Bayoh did in the hours before his death, the circumstances immediately before his death, more about the officers involved, more about the nature of the calls to police and the callers, and there was CCTV and recordings of calls. We also had the benefit of various expert reports.

Question 90

160. [REDACTED]

[REDACTED]

Question 91

161. I have read COPFS-02035 an email from Les Brown to me dated 24 August 2015 relating to the restraint of Mr Bayoh by the police officers. It followed on from an initial report from PIRC. The email confirms a telephone conversation in which Mr Brown had drawn my attention to passages of the report in which it was established that Mr Bayoh was handcuffed and in leg restraints on admission to hospital. Given that he was unresponsive at the locus and was said to be in the recovery position after attempts at CPR, our concern was how CPR could have been performed and how he could have been in the recovery position whilst so restrained. We also wondered whether the restraints, in particular the handcuffs had compromised attempts to resuscitate him by constricting Mr Bayoh's chest or breathing. Furthermore, we wondered what the justification for continued restraint was beyond the point where he was unresponsive. These became questions for resolution with the experts and were subject of instruction to PIRC, and precognition.

Question 92 and 93

162. I was involved in the supervision of, and advice to Mr Brown and CAAPD staff in relation to the actions of police officers and civilian staff relating to searches of Mr Bayoh and Mr Anwar in police databases. I gave a formal instruction to PIRC to investigate this matter which can be found in COPFS-02567, a letter to the Commissioner headed "Data Protection Act".

163. My notebook 1 COPFS-05230 at page 5 referred to above contains notes of a meeting with PIRC in which they updated on the question of searches being made of police databases for Mr Bayoh and Mr Anwar. At that stage, PIRC found that most of the searches were justified but a small number were expected to be without a legal basis. In the end I recall that Police Scotland as data controller said that the relevant access was justified and therefore no further proceedings were taken.

164. I had learned from PIRC that there was information on the Scottish Intelligence Database (SID) in relation to Mr Anwar some of which was categorised as 'counterterrorism'. From the information that I received it appeared that the entries related to Mr Anwar doing his job and in particular acting as a defence solicitor. None seemed to be counterterrorism related. It was of concern to me that material in relation to Mr Anwar's perfectly legitimate and important work as a solicitor was being categorised and held in this way. My concerns at the time are set out in the letter of instruction COP S-02567 PIRC investigated this matter and the results were passed to the Information Commissioners Office (ICO) as being the appropriate regulator for these matters. The ICO

took no action for the reasons set out in COP S-06360 Annex C – Narrative, at page 125. I was no longer involved in the case by the time ICO set out their view.

Question 94

165. In my Notebook 3 (COPFS-05232) at pages 3 and 4 I made the following notes;

"13/1/17 Les... Ashley watched CCTV footage. Ashley bullish about it. She thinks lots we can do to enhance. Approach folk who work out of [REDACTED]. Sightlines etc. Animation.

Ashley agrees shows on the ground for a long time.

Says seems clear from statements that he is face down & handcuffed but after that he is laid over."

166. This is a note of a telephone conversation with Les Brown in January 2017. I have no independent recollection of the conversation. According to this extract of the note Mr Brown was updating me that Ashley Edwards KC had watched the CCTV footage. It was better than she had expected and she was positive from previous experience in other cases that we would be able to have it enhanced. The Scottish Police Authority Forensic Services at [REDACTED] had a team who could do this, and they were to be approached. They also had experience of producing multimedia packages which could aid in demonstrating the sightlines that individual witnesses had and in producing accurate animations of incidents that would be used as an investigative and presentational aid.

167. [REDACTED]

168. [REDACTED]

Question 95

169. The question of race or more particularly whether there was any racial motivation behind these events was a factor from the very start. From the first telephone conversation I had with Mr Green it was apparent that questions of racial motivation would require to be investigated. In the years since the reports following the murder of Surjit Singh Chhokar reports these were matters that were considered routinely and in every case. One of the reasons that the case was considered to be so high profile and sensitive was because of Mr Bayoh's race. At an early stage specific allegations of racist conduct on the part of specific officers were brought to our attention. That caused Mr Brown to write to PIRC to give specific instructions on that matter but even before then, no one was under any doubt that this was something that required to be investigated. On reflection and looking at the documents provided to me it is unfortunate that this was not more explicitly documented. Separate

allegations were made of more general racist conduct in the former Fife Constabulary and Fife Division. These were separately investigated and reported to CAAPD. I was satisfied that questions of race were being explored appropriately.

Question 96

170. I have read my Notebook 5 (COPFS-05234) part 1 at pages 12 and 13 where I have made notes at a meeting with PIRC on 11 September 2015. In the middle of the notes I have written:

"11/9/15 PIRC... Race issue -> covered but a Police Scotland issue."

171. I do not specifically recall what this referred to, nor do I recall what the context was. There were a number of issues in relation to race that were raised at various points in time. From the context of other notes I am of the view that this may be in relation to the concerns of a wider racist culture in Fife Constabulary and PIRC were updating that in fact the allegations were at a time, or continued to a point when Police Scotland had responsibility for policing in Fife which is why I have underlined it. The allegations would be more recent, as opposed to historical. Whatever it was it was being investigated by PIRC. Others present at the meeting may have a better recollection.

Question 97

172. In the same notebook, Notebook 5 (COPFS-05234) part 1 at page 15 there is a note of a meeting on 13 October 2015 with the Lord Advocate and Media relations.

"13/10/15 LA/Media..."

Sheku Bayoh ->

Investigate racism -> was it endemic?"

173. There were weekly meetings with the Lord Advocate to discuss media handling. This appears to relate to one of them. Again I have no specific recollection of the matter but expect that either there had been a story about the wider allegations of racist behaviour within policing in Fife, or we had had a media inquiry about this. These were not meetings where operational briefings were provided to Law Officers or instructions were issued.

Question 98

174. Moving forward in the same notebook, Notebook 5 (COPFS-05234) at pages 16, 19 and 20 there are notes of a meeting on 13 October 2015 attended by the Lord Advocate, the Commissioner Kate Frame (KF), Les Brown (LB), the PIRC Director of Investigations John Mitchell (JM) and I. At the bottom of page 19 there is a note of a discussion which was prompted by knowledge that the BBC were proposing a documentary in relation to the death. The focus was on allegations of racist conduct by

one of the officers involved in Mr Bayoh's restraint, PC Alan Paton. The relevant portion of the note states;

"13/10/15 PIRC/LA -> Experts LA/KF/LB/JM

...

BBC

Race allegations against PC Alan Paton.

*Inquiry alive to racial motivation and found 0. Also alive to racism
[REDACTED] Fife racism in the former constabulary...*

PIRC to look generally re the racial conduct in Fife Constabulary.

*Looked at Paton. Got corrective advice re not getting a muslim lady
an interview.*

Daly says he made comments which are racist re this.

[REDACTED]
[REDACTED]

PIRC to look generally re the racial conduct in Fife Constabulary.

*Supp Report to be done by end of the month before LA meet with
the family."*

175. This was a meeting the primary purpose of which was to update on where the investigation was in relation to the expert reports. At around that time a BBC investigative journalist, Mark Daly was working on a documentary in relation to aspects of the death. An area of interest was in relation to the background of PC Alan Paton whose family had made various allegations against him. These were being investigated by PIRC at our instruction.

176. The note says that the BBC are looking at race allegations against PC Alan Paton.

177. The PIRC Inquiry was alive to the question of whether there was a racial motivation to the incident involving Sheku Bayoh, but had found no evidence of that. PIRC were also alive to specific allegations of racism [REDACTED]. Further they were also aware of allegations of racism more generally in the former Fife Constabulary.

178. PIRC were looking generally re culture and allegations of racial conduct in Fife Constabulary.

179. PIRC had investigated at Alan Paton. He received 'corrective advice', that is management action of some description to warn/guide in relation to future behaviour concerning an incident involving a muslim lady in relation to an interview.

180. Mark Daly alleged that Paton made comments which are racist regarding this.

181. [REDACTED]
[REDACTED]
[REDACTED].

182. PIRC were to look generally re the racial conduct in Fife Constabulary. A supplementary report would be produced before the end of the month for the Lord Advocate's forthcoming meeting with the family in order that he could be briefed about these issues.

Question 99

183. In the same notebook, Notebook 5(COPFS-05234) part 1 at page 24 there is a note of a meeting between the Lord Advocate (LA) Les Brown (L■B) and I. I am directed to a portion of the note in the following terms.

- "5/11/15
- ...
- L■B
- other aspect racial motivation
- Re Fife Constabulary + individuals involved
- Experts
- Dr Karch...

184. I have no independent recollection of the meeting beyond the notes. I expect that Les Brown was updating on where PIRC were in relation to the wider allegations of racism that had been made and which were discussed at the earlier meeting with PIRC on 13 October. There was no connection between these allegations and Dr Karch. The update on Karch was simply a discussion about his public comments.

Question 100

185. My Notebook 4 (COPFS-05233) at pages 12 and 13 contains a note of a discussion on 25 August 2016 between the DCA Serious Casework Lindsey Miller (L■M), the PF Specialist Casework ([REDACTED]y), the Head of CAAPD (Les Brown and I). The parts of the note I am directed to are as follows;

- "Sheku Bayoh L■M / LM / L■B 25/8/16
- Meeting with Aamer Anwar
- Need to do
- ...
- ? Racism allegations ? – Not part of the precognition"

186. It notes that there was to be a meeting with the family solicitor Aamer Anwar. I assume briefing would be required for that meeting for the attendees. Having noted that we then discussed the approach to the ongoing precognition starting with the words "need to". We discussed in general terms the strategy of who would be precognosed in what order and the composition of the team.

187. The entry, "*? Racism allegations ? – Not part of the precognition*" relates to the wider allegations in relation into allegations racism in Fife Constabulary. Any criminality arising from that was not thought to be directly relevant to the incident with Mr Bayoh and could not be linked to that incident and so was to be prepared separately. To do otherwise would make the case in relation to the circumstances of the death too unwieldy in the absence of an evidential link to Mr Bayoh's death. The wider question of whether there was a racial motivation to the incident in relation to Mr Bayoh was still open and would remain open at precognition but no evidence had been found by PIRC of that. As it turns out, I have now seen from the Narrative of the precognition that these matters were in fact covered in the same report to Crown Counsel as the death of Mr Bayoh.

Question 101

188. In the same notebook, Notebook 4 (COPFS-05233) at pages 16 and 17 there are notes of a telephone call with Les Brown. I have no specific recollection of the call. I am referred to the following aspects of the note

"16/9/16 *Sheku Bayoh*

...

- *excited delirium*

- *The "superhuman strength" issue.*

- *Analysis, Analysis, Analysis"*

189. The "superhuman strength" issue was a source of frustration, like the question of "excited delirium". These were phrases that were being used in relation to Mr Bayoh's death. However, they did very little to inform the position. We were being told by the instigators that Alpha-PVP caused individuals to have "superhuman strength". The deceased had ingested Alpha-PVP. It was an unusual drug in Scotland and the wider UK. It was important to understand what its effect might be, both on the length of the struggle and in relation to the cause of death. We were being advised that Alpha-PVP led to superhuman strength. It was a description of how an individual may feel in a struggle with an individual who had taken the drug, but that seemed to me to be a fundamentally unscientific conclusion of limited value. It seemed to me that physiologically an individual would have a certain amount of strength. The ingestion of drugs may impact on how that strength was deployed and for how long. Descriptions like 'superhuman strength' were unhelpful. Similarly the use

of the term 'excited delirium' was not helpful. Its purported use by Dr Karch was a contributory factor to our concerns about his objectivity. We had discussed with the family the WHO's view that it was not, of itself a useful term. A review of Deaths in Custody by Dame Elish Angiolini had fairly concluded that "excited delirium" as a cause of death was unknown outwith deaths in custody. Our conversation was about these issues.

Question 102

190. I am directed to my Notebook 3 a (COPFS-05232) at pages 6 and 7 headed: "24/1/17 Death of Sheku Bayoh SMcG/LB/EC/AEQC+LM".

192. This appears to be a meeting to discuss the timeline of the incident and in particular how long Sheku Bayoh was restrained for. I was present (SMcG) along with Les Brown (LB), Erin Campbell (EC), Ashley Edwards KC (AEQC) and Linsey Miller (LM).

193. According to the note, the discussion started by estimating that by the end of the year there would be a report for CCI in relation to criminality. Under the heading "Current Progress" I have noted that all relevant witnesses have been seen with the exception of Sean Mullen. Sean Mullen is noted as having stopped more than once and being present during the process (of restraint). I have then noted 'continue informal efforts meantime' by which I assume that we were having difficulties engaging with Mr Mullen.

194. I have then noted:

"-How long is SB on the ground?"

-How long is he under control?"

-1 or more officers on top of him?"

Crucial Qs re whether can take proceedings

2 or 3 entries in timeline where he's under control or doesn't present a risk

At the end of the process.

Window of restraint is 7.21.37-7.25

Who is get off him – in the witness statements – officers speak to this

After leg restraints put on, they remain on top of him.

CCTV Footage

The "enhanced" PIRC footage is zoomed in and slightly sharper.

Enhancing in real terms not possible

But they could ID individuals. Track individuals

Can overlay the airwave

-family and what we tell them

-HSE

-PIRC

Medical Evidence

Osteo pathologist"

195. I have not made any notes about race at the meeting. That was not because race was seen as resolved. Race would be a consideration as to whether any crime was aggravated by prejudice until Crown Counsel had given their instructions on the matter. However, this meeting was about the timeline of the incident and in particular whether the force used was justified.

Question 103

196. My Notebook 3 (COPFS-05232) contains notes at pages 9 to 11 as they relate to a Public Inquiry:

"8/2/17 Bayoh Family Meeting

LA intro. Committed to investigation.

...

Public Inquiry: Procedures / guidelines / Race / PIRC & the way the invest done...

...

No inquiry is legally binding re the recommendations

L Mulholland sd pushing at an open door re a public inquiry."

197. I have no independent recollection of the meeting itself. It appears that Mr Anwar on behalf of the family raised the question of a Public Inquiry as there were matters such as procedures, guidance, race and PIRC that went beyond the remit of an FAI, which could only deal with matters that contributed to the death. I am hesitant to confirm that the note "L Mulholland sd pushing at an open door re a public inquiry" is a direct quote attributable to the Lord Advocate. Whilst it is consistent with my general recollection of an emerging view that was shared by him, it is perhaps a quote from someone else at the meeting, rather than a direct quote from the Lord Advocate himself. It may have been a typographical error on my part, but I don't think I would have referred to the Lord Advocate as Lord Mulholland, though I was aware that from time to time members of the public in particular would assume that the Lord Advocate was a "Lord".

198. On the substantive issue of a Public Inquiry itself, by that stage the thinking in Crown Office which was shared by the Lord Advocate was that

the investigation was raising a wider series of issue that may be worthy of discussion at a Public Inquiry. It may have been that these thoughts had been shared with the family at that meeting or elsewhere and there is a note that initial discussions had been had with Ministers. I understand the reference to pushing at an open door to be with the Lord Advocate and Crown Office, as opposed to wider Scottish Ministers, but the note indicates that he had at least discussed this with Ministers. I am asked did I make Mr Bayoh's family aware, per the above note, that the racism allegations were not going to form part of the precognition? I did not say that as the entry in relation to the racism allegations was, as I have explained elsewhere in my statement, concerned with wider allegations in Fife as opposed to racial motivation in connection with Mr Bayoh's death. In fact the racism allegations to which I referred to in the note were covered in the precognition.

Post Mortem Examination And The Release Of Mr Bayoh's Body

Question 104

199. Where there is a death in custody, it is automatically treated as being a suspicious death and the PF would ordinarily attend the post mortem as they would in a case of homicide. A two doctor post mortem will be instructed. That happened in Mr Bayoh's case. A two doctor PM took place and Mr Ablett attended.

Question 105

200. Mr Green made the arrangements for the PM. I was not directly involved. That was consistent with normal practice.

Question 106

201. I am referred to COPFS-06079 my emails with Mr David Green dated 5 May 2015 regarding the post mortem examination. I understood that the Lord Advocate and Mr Anwar had spoken by telephone and that Mr Anwar had instructed, or proposed to instruct Professor Busuttill, a forensic pathologist, to review the pathology. I have clearly understood that the Lord Advocate has suggested a draft would be available for Professor Busuttill to consider the next day and was trying to arrange that.

Question 107

202. I am referred to COPFS-04924 an email chain between Mr Green, Mr Logue and I relating to neuropathology. Neuropathology for central belt cases was usually carried out for us by Dr Colin Smith. There was a general shortage of neuropathologists. We understood that the family were keen to have Mr Bayoh returned as quickly as possible for the purposes of a funeral. We also understood that Dr Smith was due to go on holiday which would potentially mean either the brain being retained whilst the rest of Mr Bayoh's remains were released, which was not an attractive option, or a delay in the PM being finalised and a consequent delay in the funeral which was also not attractive.

203. I understood that in discussion between the Lord Advocate and Mr Anwar, the Lord Advocate had said that Professor Busuttill or someone else instructed by the family was to be present or at least given the chance to comment or have input on the neuropathology. As it turned out Dr Smith, in the knowledge that his neuropathology examination was time critical in terms of return of the body had come into the mortuary before he flew off on holiday. We had not foreseen that this would happen. As a result, the family was not able to input into the neuropathology in the way that the Lord Advocate had hoped. There was in fact no delay caused by this incident. On the contrary it meant that the body was ready for release.

Question 107

204. Mr Green commented on the independence of the pathologists and NHS staff to help me reassure the Lord Advocate, and the family that the pathology could still be reviewed and was independent. I passed that information to the Lord Advocate as is reflected in COPFS-04967 an email chain between the Mr Logue and I dated 6 May 2015. I explained the background and that Dr Colin Smith was able to do the examination on Mr Bayoh's body before going on holiday and that the Lord Advocate was irate and demanded Dr Smith's report as soon as possible because appearance is everything. I do not recall the conversation with Mr Logue but expect that I simply elaborated on what I had noted in the email for his information in the event that the LA raised the matter with him. By commenting "appearance is everything" I understood that the Lord Advocate was concerned that having been briefed in good faith that Dr Smith was unable to do the neuropathology, causing him in good faith to offer the family the chance to have input into who did the examination, or who might review it, that could not happen. That might give the impression that we did not have a grip on a crucial aspect of the investigation. In fact we did, but had not anticipated Dr Smith might attend in the early hours before his flight to conduct his examination. None of what happened here impacted upon the quality of the work done by the experts.

Question 109

205. The investigation into the death of Mr Bayoh was being done by PIRC at COPFS instruction. As a result, I did not expect that a police officer would be in attendance at the post mortem and was surprised that DCI Keith Hardie was present. Ultimately the PF instructs the PM and so this is a COPFS responsibility. The fact that PIRC was involved in these types of investigations was new and procedures and processes had not quite settled down. No prejudice occurred as a result. I suspect that this all occurred due to inadvertence. My purpose in raising it was so that it didn't happen again and I am not aware of another case where a police officer has been present.

Question 110

206. The formalities of body release were dealt with by CAAPD. Before the body was formally released, Les Brown called me to discuss the possibility of a further scan of the body. In conversation with Dr Shearer they considered it best to do wither a CT scan or xray. I agreed that this should be done. Dr Shearer was the expert and considered it important. This further examination necessitated a short delay in return of the body but was important as it was this scan which detected a fracture to the rib which had not been detected on dissection.

European Convention on Human Rights ("ECHR")

Question 111 and 112

207. The investigation by PIRC as directed by CAAPD was as we understood it at the time the way in which the state would satisfy its Article 2 and Article 14 obligations. This was central to our understanding of the purpose of our investigation. The Article 2 rights are twofold. Firstly the substantive right to life, or the protection of life, and secondly the procedural rights to an impartial investigation carried out effectively.

Question 113

208. In my notebook, Notebook 3 (COPFS-05232), I have been directed to notes at pages 9 and 13 in the following terms.

"8/2/17 Bayoh Family Meeting

LA Intro

Committed to investigation

...

Art 2

In E+W inquiry. Due to come shortly. Issues will come

Seems (S) is behind in contrast to E+W.

Procedures & guidelines down there. PIRC stuck on extra

Article 2 breach as all in one room. Everyone says clear Art 2 breach. No robustness & transparency"

209. These reflect my notes of a criticism of the Scottish system from an Article 2 perspective made by the families representatives. It talks about their being an Inquiry in England and Wales in relation to Deaths in Police Custody (Lady Angiolini's report which was due to report in the near future) and which was expected to document issues with the system in England and Wales. There were, however, more detailed procedures and guidance in England and Wales in contrast to Scotland. The PIRC system was described as an add on ('stuck on extra'). A more specific criticism was then discussed in relation to the fact that the officers involved in the

incident with Mr Bayoh were all put into one room in the aftermath of the incident which was said to represent a clear Article 2 breach by those who the family and their representatives had consulted. This was dealt with by assuring the family that there would be a thorough investigation. As regards the specific point in relation to post incident procedure and all of the officers being in the same room, that was already done. All we could do was investigate what happened.

Questions 114 and 115

210. I have read my minute to Law Officers (COPFS-03252a) which is a briefing document sent to the Lord Advocate in advance of the forthcoming family meeting and my email to the Law Officers dated 7 February 2017 (COPFS-04513). The briefing document was at a deliberately high level. The email was produced at short notice and elaborated on some of the points made in the minute, including the issue of disclosure. This was in response to a letter and 42 point submission by the family and associated press release in advance of a meeting between the family and James Wolffe KC, the Lord Advocate. This was first meeting between James Wolffe and the family. One of the requests made was for access to unredacted statements of witnesses. In my email I elaborate on a point made in the minute and note that there had been disclosure to the family throughout the investigation from its earliest stages consistent with the families Article 2 rights. Part of the rights afforded to bereaved relatives as Article 2 has been interpreted by the courts is the right to be involved and kept updated in respect of the ongoing investigation so in so far as is necessary for them to take steps to enforce their civil rights and obligations. In my view the provision of material had at least satisfied or gone beyond that right. However, we were now at a stage where criminal proceedings were in active contemplation. Those who were suspected of having committed a crime enjoyed rights to due process under Article 5 and a fair trial under Article 6 of the convention. Some of the deceased's family would be witnesses at a criminal trial in relation to the deceased's movements and behaviour before the incident. The rights of all of those involved had to be balanced and the balance of those rights at that stage meant delaying further detailed disclose to the family until a decision was taken. That decision was one to be taken by the Crown and the Crown alone. The balance at that stage favoured caution and no further disclosure meantime but did not mean that no further disclosure would be provided at a later stage.

211. I then went on to deal with the suggestion at paragraph 42 that there had a breach of the procedural rights associated with Article 2 in the manner that the investigation had been carried out. I stated that our position, in the ongoing investigation, was that there was no breach. The state has initiated an impartial investigation which was thorough and ongoing. The family had, and continued to be involved in that investigation. There was in my view a distinction between involvement in the investigation to enable the family to protect their interests and full

disclosure to allow them to be involved in decision making which is for the Lord Advocate independently of any other person. The family would have disclosure of fruits of the investigation before the FAI. In relation to the guidance promulgated in England and Wales, my advice was that we could not accept that because police in another jurisdiction had promulgated guidelines, the fact that such guidelines exist means that the lack of similar guidance to officers in Scotland means there is a breach of article 2. I went on to say that in any event, the effectiveness of the investigation (that is compliance with the procedural rights from Article 2) could only be considered retrospectively.

212. Generally speaking Article 2 compliance in terms of the procedural rights as to whether the investigation was effective can only be considered retrospectively, that is after the inquiry (or inquiries) have been completed. It is only at that stage that it can be considered whether the investigation complied with the states obligations. It may be that certain departures from the procedural obligations are so egregious as to mean that the investigation was fundamentally compromised, such as a biased or non-independent investigation. However, we had confidence that this investigation was independent and was compliant. My understanding of this was not restricted to the role of COPFS, but to the role of PIRC as well. I did not take Police Scotland into account in this analysis as they were subject to investigation. By making this comment it was not that I was saying that we didn't have to consider whether the investigation was Article 2 compliant until it finished, but that in our view we were complying with our obligations and in that context it was only post investigation that a determination could be made on its effectiveness by a court or tribunal.

Question 116

213. I have read the letter from the Commissioner to the Crown Agent dated 14 February 2017 (PIRC-02100) and my reply (COPFS-02576) dated 15 March 2017. The Commissioner raised the issue of lack of response to the public criticism of the PIRC investigation by Mr Anwar, no response from COPFS in relation to Mr Anwar's comments and concern that the Lord Advocate shared Mr Anwar's views. These matters were addressed in my reply where I noted that at the meeting we had advised that the further work being done did not imply criticism of PIRC and that given that this was a live investigation we would not be commenting further. I do not recall being at the further meeting between the Commissioner and the Deputy Crown Agent that I referred to. This is likely to have been a reference to a routine quarterly PIRC meeting.

Question 117

214. In my letter to the Commissioner dated 15 March 2017 I stated:

"The position of the Crown is that the investigation into the death of Mr Bayoh is live and ongoing and that accordingly it is premature to

consider any issue relating to compliance with Article 2 of the Convention."

215. I have explained earlier that the effectiveness of the investigation can only be properly determined at its conclusion. That is not, of course, to say that we were not concerned to ensure that the investigation was being properly carried out in accordance with the procedural rights under Article 2. It was simply noting as a matter of fact that a determination on whether the investigation was Article 2 compliant could only be taken by a court or tribunal at its conclusion.

The Health and Safety Executive ("HSE")

Question 118

216. Prior to my involvement in this Investigation, I had experience in many investigations involving HSE including HMA v Transco plc, HMA v Scottish Fire and Rescue Service, HMA v Clydeport and had line management responsibility for the COPFS Health and Safety Division from 2012.

Question 119

217. The Health and Safety Executive had expertise in the enforcement of the Health and Safety and Work etc Act 1974 and in consideration of systems and processes of work. In most cases where HSE were involved, they were in fact the statutory enforcement agency per the 1974 Act. From time to time in cases where they were not the statutory enforcement agency we looked to them to become involved because in our view issues in terms of the 1974 Act may arise, or where there expertise in systems and processes was germane to the investigation.

Question 120

218. I was involved in liaising with HSE in relation to this investigation. I considered that the way in which Police Scotland responded to the calls in relation to Mr Bayoh, how officers were tasked to attend, how they interacted with him at the scene, the training they had in how to engage with suspects who may be armed with weapons or have ingested drugs, and the techniques used to restrain Mr Bayoh were all systems and processes which might give rise to liability in terms of the 1974 Act.

Question 121

219. I am asked 'Was consideration given to any disparity in resources between HSE and PIRC insofar as it may impact on the investigation into the death of Mr Bayoh?'. In practice HSE in Scotland were a relatively small organisation which had suffered from reductions in size in the years immediately preceding Mr Bayoh's death. Whilst we thought that their experience was of benefit, it was for us to persuade them to become involved. We could not direct them. Ultimately, they decided not to become involved. The fact that they were not involved no doubt slowed

down the investigation. Ultimately PIRC were able to instruct experts to consider the relevant systems and processes, but this took longer than it would have with the benefit of HSE involvement.

Question 122

220. Proceedings against individuals under the 1974 Act couldn't be completely ruled out, but the focus was very much on Police Scotland.

Question 123

221. I am asked whether in my view should COPFS have received notification of a work-related death via the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, also known as RIDDOR? Where RIDDOR is engaged a report must be made to HSE. The fact that a report is made to HSE does not in itself mean that HSE will proactively investigate the death.

Question 124

222. I believe that I discussed this case with Alistair McNab, who was in charge of HSE in Scotland at the side of other meetings during 2015. Looking at my notes and correspondence, Notebook 1 (COPFS-05230) contains a note. I am no longer clear as to who this call or meeting was with or whether it was a note to myself. It may have been with the Lord Advocate or Les Brown. I have made a note to contact Alistair McNab in relation to the death of Sheku Bayoh [REDACTED].

223. On 11 January 2016 I wrote to Mr McNab (COPFS-01953) explaining the background and why I considered HSE involvement would assist. That led to a meeting on 24 March 2016 at which HSE gave an initial view that the circumstances did not meet HSE's criteria for investigating. Mr McNab set out those reasons by letter of 31 March 2016. We disagreed with HSE's analysis by reference to their own guidance and I sent a letter to the Commissioner dated 5 April 2016 explaining this (PIRC-02047(c)).

224. On 13 September 2016, after PIRC had completed their report I wrote to Mr Barry Baker of HSE who had taken over as Director of Operations in Scotland following Mr McNab's retirement and invited a meeting to discuss the matter further (COPFS-04978).

225. Mr Baker responded on 17 November 2016 suggesting we meet, but indicating that he did not think that the failures we were considering would meet their threshold for reporting to COPFS. A meeting took place between Barry Baker, Les Brown and I at which we again tried to get HSE involved and on 24 January 2017 Barry Baker confirmed to Les Brown by letter that HSE would not get involved (COP S-04735(a) [REDACTED]).

226. I was dissatisfied with this outcome as I thought there were matters here which could benefit from HSE consideration but appreciated that it was ultimately a matter for them.

Question 125

227. There are notes in my Notebook 2 (COPFS-05231) at pages 3 to 5 relating to HSE and PIRC in the context of Mr Bayoh's death. These appear to be notes of the meeting between Mr McNab and I on 24 March 2016. The HSE document "Striking the Balance" is the policy that HSE applied as to when they became involved in an investigation. I have noted Mr McNab as saying that PIRC were the Regulator here. In my view PIRC were not a Regulator. They were instructed to carry out an investigation by the Crown.

Question 126

228. In the same notebook at the bottom of page 4, I have written:

"Not prepared to investigate, but prepared to deal with the issue of CS/PAVA and PSoS prepared to work with them re that."

229. My understanding is that HSE were going to use one of their powers short of reporting to the PF to look at improvements to the way CS/PAVA was deployed. During this incident the officers had deployed it in such a way that they became incapacitated with it. The work being proposed was in that connection. I do not recall the outcome of this.

Media engagement

Question 127

230. Following a death in custody or death during or following contact with the police there is likely to be significant media interest. COPFS is committed to supporting the media to report our activities accurately and with insight. In general terms where there is a COPFS instructed investigation we expected that there would be liaison between the respective media relations teams and where necessary senior prosecutors in relation to any media lines issued. The current iteration of the Memorandum of Understanding with PIRC contains a chapter on media relations. A separate MoU with ACPOS was used as the basis for engagement with Police Scotland.

Question 128

231. Senior staff at COPFS have the benefit of access to a media monitoring service that gives a daily press summary. In consequence I was able to follow the media reporting of the matter. It did not influence my decision making or the way in which I approached the matter. As I have noted earlier, prosecutors are well used to resisting external pressures and making decisions independently and impartially. I do not believe that it influenced the decision making or approach of colleagues for the same reasons.

Question 129

232. Between 2012 and 2014 I line managed the media relations team. Following a restructure, I no longer had line management responsibility for the media relations team, but for any publicly issued line I was part of

the chain for clearance of lines for public issue, and often had final sign off unless the line required Law Officer or Crown Agent authorisation. For lines that came from Police or from other reporting agencies such as PIRC for COPFS consideration I performed a similar role. In consequence I was usually involved in discussions about media lines, including in relation to the death of Sheku Bayoh.

Question 130

233. On 3 May 2015, Police Scotland prepared the following statement and shared it with PIRC and COPFS for approval:-

"Death in police custody, Kirkcaldy

At around 7am this morning (Sunday, May 3) police in Kirkcaldy responded to a number of calls from members of the public reporting a man brandishing a knife in the Hayfield Road area.

On arrival the officers encountered the man and whilst attempting the apprehend him, he lost consciousness and a female officer also sustained a head injury.

Police officers commenced first aid procedures and the man was taken to Victoria Hospital by the Scottish Ambulance Service, where he sadly died. The female officer was also taken to hospital, and she has now been released.

Divisional Commander Chief Superintendent Garry McEwan said: "This is a tragic set of circumstances and my condolences go to the man's family. We currently have officers with them to provide information and support where appropriate.

"We recognise that this is an extremely difficult and distressing time for both the family and the officers involved and I have instigated the necessary post-incident procedures.

"The investigation of deaths in Scotland is the responsibility of Crown Office and Procurator Fiscal Service, who have instructed the Police Investigations and Review Commissioner to lead on this enquiry. The circumstances into the death will be fully explored and reported to the Crown Office in early course"

Anyone with information regarding this incident is asked to contact Police Scotland on 101 or anonymously through Crimestoppers on 0800 555 111."

234. I was aware of versions of this statement and discussed them with others during the course of the morning which I describe below.

235. At the point that it was proposed to release this statement, PIRC had been instructed to conduct an investigation into the events in Kirkcaldy on behalf of the procurator fiscal. The timing was such that PIRC

would not yet have had the opportunity to deploy to Kirkcaldy to begin that investigation. From the initial briefing that we had, there was a realistic possibility even at that early stage, that one of the primary areas of focus for the investigation would be whether the actions of the police officers were justified. The investigation would cover the actions of the Police Service of Scotland itself. Statements from the Police in relation to crime are generally seen as being authoritative, independent and carry weight with the public. The proposed statement here, however, bore to set out a reasonably detailed account of events, with the implication being that police officers were doing their jobs to protect the public from a man with a weapon and were injured in doing so. That cut across the whole purpose of the investigation which was to determine what happened and could have had the impact of influencing the view of witnesses. The suggestion that witnesses might call 101 and speak to police was also not appropriate in a PIRC case. Whilst statements from the police generally carried weight as they were carrying out an independent investigation this statement was not independent. It was one party to the incident's version of events. The provenance of the version of events in the statement was also unclear and became less clear as time passed and we did not have an account from the officers involved. The police statement was much too detailed. The level of information proposed to be released would not in my view have been released in any other case.

236. When David Green had initially called me to advise me of the incident, one of the areas he briefed me on was that he had refused to authorise a version of this statement to be released. That had caused consternation within policing, and he expected me to be called by police to be asked to overrule him. I received a call from with Gary McEwan seeking to persuade me to authorise the police statement shortly after I had spoken to David Green. Shortly after that call I was phoned by Assistant Chief Constable Ruaraidh Nicolson who also made lengthy representations about it. I again said that I was not prepared to authorise a detailed statement that cut across the PIRC inquiry and which bore to set out unprovenanced material. I was advised that the police were anxious that public confidence in policing was not eroded by the incident. That increased my anxiety. Maintenance of public confidence in policing is a legitimate aim of senior police officers. However, my priority was an independent, impartial and effective investigation and I was concerned that the statement as proposed was deliberately or otherwise an exercise in reputation management.

Question 131

237. I am asked about my understanding of the Scottish Police Federation's role in Police Scotland's media engagement? I have no knowledge of what role if any SPF have on Police Scotland's media strategy or about SPF's approach to media engagement. I do not recall if SPF issued a statement in the wake of Sheku Bayoh's death. I have never been involved in a discussion about an SPF line which was sent to COPFS for approval.

Question 132

238. In preventing a statement, such as the above draft attributed to Chief Superintendent Garry McEwan, being released by Police Scotland, I did not consider whether the police officers involved would be unhappy that no comment was being made in response to the speculation in the media about what happened in the incident. My priority was that there was an effective investigation. Inaccurate information being issued to the public would have damaged the investigation. I do not recall being made aware of any concerns on the part of the officers involved. That was a matter for Police Scotland to manage with their employees and staff representatives. Had I been made aware their feelings it would have made no difference to my decisions or approach as my focus was the effectiveness and integrity of the investigation.

239. I am asked whether I expected the SPF to issue a statement on behalf of the officers following the lack of comment from Police Scotland, and whether if a statement had been made by Police Scotland, this would have prevented, or minimised to some extent, speculation in the media of what happened in the incident? It had not crossed my mind that SPF might issue a statement, but I have doubts as to whether a statement by Police Scotland would have prevented speculation.

Question 133

240. There was no impediment to a statement being issued by the police and one was issued in the evening of 3 May which included condolences to the Bayoh family. That statement was approved by me. My approval amounted to confirmation that there was nothing in the statement that would prejudice the inquiry. The sentiments and how they were expressed were not for me but for police.

241. The difficulty with the earlier drafts of the statement was the detail that they went into and in particular the insistence of the police to say that Mr Bayoh had a knife, which created the impression that officers were acting in self defence. In no other case had I experienced a such a desire to put crucial facts like the presence or otherwise of a knife into the public domain, nor had the police been so slow to take the advice offered. Usually, a police SIO would actively wish to prevent detail from being put into the public domain lest at a future time something said by an accused might amount to a circumstantial confession containing information that only the perpetrator might know. Had the advice of David Green been taken before 9.30am a statement could have been issued at that time. Although I do not have the times of the calls to me from Garry McEwan and Ruairidh Nicolson, I would estimate that those calls had finished by 10.30am. However, notwithstanding the fact that the police were in no doubt that COPFS view was that their proposed release was objectionable and the basis of that objection, which would have allowed them to adjust suitable lines relatively quickly, the matter went backwards and forwards all day and a police statement was finally agreed at about 6.30pm. The lack of comment by Police Scotland was not created by the Crown's refusal to authorise their line, but a departure from normal practice in

putting so much detail in their proposal and their inability to come up with something more suitable before 6,30pm. That was a matter for which they were responsible.

242. As to whether a line from Police would have prevented speculation in the media, I cannot say without speculating myself. However, I did not consider it appropriate for the police to be saying publicly that Me Bayoh had a knife and had injured police officers. That would be to prejudge the investigation.

Question 134

243. I have read the email chain (COPFS-02685) between Mr Logue and COPFS' Head of Communications at the time Ms Lorraine Davidson on 4 May 2015. Ms Davidson explains by way of update that the brother-in-law of Mr Bayoh is a lay advisor to Police Scotland and "*told Police Scotland FLOs his view is that police planted the knife on the deceased as an excuse for police brutality.*" Police Scotland are said to be concerned that "*the family will seek media attention for their views and they want to be in a position to defend themselves if that happens*". Police Scotland are also said to also want to clarify basic facts to correct inaccurate reporting at the time. In the email at 11:22am I am said to have advised Ms Davidson that PIRC can clarify the incident took place on Sunday morning not Saturday night however the police were advised to hold the line that PIRC are investigating.

244, I do not specifically recall giving this advice, but have no doubt that Ms Davidson's email was correct. As I noted part of our aim is to assist, insofar as it doesn't prejudice an investigation, with accurate media reporting of matters. Clarifying that an incident took place on Sunday not Saturday was of no consequence to the investigation. Whether a knife was planted or not was of huge consequence. Had that occurred it would have been of great significance as to whether any use of force was justified, and would in all likelihood have amounted to a crime in itself.

245. I am asked how in terms of media strategy, I and COPFS accommodated the concerns of Police Scotland that they would need to defend themselves in the media and correct inaccurate reporting? What was and was not accurate about this incident would be determined by the investigation that we had instructed. It was not for Police Scotland to determine what was and what was not accurate. They had a perspective, but they and their employees were under investigation. They were not an impartial authoritative voice in this incident.

Question 135

246. I have read an email chain with my colleagues dated 6 May 2015 between 15:49 and 17:01 and the draft PIRC media line that was attached thereto. Towards the end of that chain I noted that I spoke to Mr Anwar (AA) which I said went fine, and Mr Logue replied that "*He knows we are playing it straight*".

247. I do not recall precisely what I discussed with Mr Anwar. From earlier emails that I have been referred to (see for example COPFS-04924) I expect that I was updating Mr Anwar in relation to what had happened with the pathology in that Dr Smith had completed the neuropathology contrary to our expectation and what Mr Anwar had been advised by the Lord Advocate. I expect that I was explaining this, and that it had happened inadvertently, rather than because we were trying to prevent access to the neuropathology or prevent the family from having input into the choice of pathologist. It would have been important to be completely up front about that. I expect that this is what was discussed and that this was what Mr Logue meant. From my notes Mr Anwar accepted all of this.

Question 136

248. I am advised that here is evidence before the Inquiry that on or before 6 May 2015 PIRC: "...*tried to release a statement to media re allegation deceased had been asphyxiated, however the COPFS would not allow the statement to go out.*" A document, PIRC-04156, has been shared with me. I have not seen this document before. I do not recall this but it is likely that if PIRC lines had been shared with COPFS for approval I would have been involved in the discussions or have made the decision as to whether to approve it. Whilst I have no specific recollection of this, the reason that such a statement would not have been approved would have been for the same reasons as I discussed in relation to the Police Scotland statements. The cause of death was not fully established, the inquiry was ongoing and commenting on individual aspects of it were not helpful. That was borne out by the fact that the final cause of death remained a matter of debate among the experts.

Question 137

249. I have read the email chain between Mr Logue, Ms Davidson and I dated 6 May 2015 COPFS-06075. In relation to describing Mr Bayoh's death as a death in custody, Mr Logue states:

"Can we refine slightly by removing the reference to police custody in both paras? Don't want to cause any confusion in relation to the point as to whether or not it is a mandatory FAI - we think not, and describing it as police custody may confuse that position in future.

In first para we can just leave it as a death in Kirkcaldy on Sunday 3 May."

250. The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 which was the relevant legislation at the time provided in section 1 for two distinct grounds for a Fatal Accident Inquiry. Section 1(a) set out categories of death where there must be an FAI unless a very specific exception applied. These FAIs were known by the shorthand of mandatory inquiries and broadly related to deaths at work and deaths in custody. The second type of FAI took place where the Lord Advocate considered it to be in the public interest to have an inquiry (s1(b)).

251. A death in custody would be a mandatory FAI, but the statute defined custody at s1(4) as being where;

"(a) [the deceased] is detained in, or is subject to detention in, a prison, remand centre, detention centre, borstal institution, or young offenders institution, all within the meaning of the [1952 c. 61.] Prisons (Scotland) Act 1952 ; or

(b) [the deceased] is detained in a police station, police cell, or other similar place; or

(c) [the deceased] is being taken—

(i) to any of the places specified in paragraphs (a) and (b) of this subsection to be detained therein; or

(ii) from any such place in which immediately before such taking he was detained."

In the circumstances of Mr Bayoh's death it was far from clear that he was detained or arrested and he could not be said to being taken to a police station. We were therefore of the preliminary view that any FAI was not strictly speaking a mandatory inquiry, although we were absolutely clear that it was inconceivable that it would not in due course be in the public interest to hold an FAI as a minimum in relation to the death. That was not to say that we did not think that there may be prosecutions. That was a possible outcome, but we didn't know that as it would depend on where the evidence took us. During my involvement in the case and before the final decision to take no proceedings the only part of our view that changed in respect of this was the growing feeling that there were wider issues which would be suitable for a Public Inquiry rather than an FAI. I have addressed this elsewhere in my statement.

Question 138

252. In my Notebook 3 COPFS-05232 at page 3 there is the following note:-

"13/1/17 Les

BBC programme.

Personal doc. Follows family & funeral

Family will say what their position is.

Will be used as oppressive

They did say

Put pressure on them to satisfy the family"

253. I do not specifically recall this conversation. From the note it looks like Les Brown was briefing me on the BBC documentary that was being made. It seems he was recounting a view that had been expressed to him that the officers who were involved in the incident would suggest that the programme was oppressive and was putting pressure on them as individuals in order to satisfy Mr Bayoh's family.

Parallel investigation

Question 139

254. I was aware that PBW Law were instructed by the Scottish Police Federation and that they were making preparations for an FAI. I also recall that I was aware that Mr Sallens was employed as an investigator to assist making those investigations and preparations. Preparations by a solicitor on behalf of the officers involved was not unusual.

Question 140

255. I do not recall any witness accounts that said that they felt uncomfortable.

Question 141

[REDACTED]

Question 142

[REDACTED]

[REDACTED]

Question 143

259. I have read Notebook 5 part 2 COPFS-05234 at page 3 which are extracts of notes taken during a meeting with Mr Bayoh's family on 5 November 2015:

"Peter Watson. Leaving calling cards Fatal Accident Inquiry. KF wrote to PBW. Inadequate response. On 1/9 put on website criticism of AA + Family

But PIRC do 0 to SPF and PBW

**COPFS to write to PBW re Fatal Accident Inquiry.*

Info put into public domain by "police sources". Is there an inquiry. Family believes that PIRC + SPF are briefing the media."

260. KF in this context is the Commissioner, Kate Frame. My recollection is that these were quotes from the family or their representatives complaining about what they said was briefing by police sources (the SPF) and PBW law.

Question 144

261. I wrote to PBW Law on 10 November 2015 (COPFS-01557) to discharge the action marked in my note with a star (*). I wrote as follows;

"As you may be aware the Lord Advocate met with the family of Sheku Bayoh on 5 November 2015 at Crown Office. During the course of that meeting, concerns were raised in relation to cards apparently produced by your firm that include reference to 'Fatal Accident Enq' and that these are being used in connection with the

case. I am sure that you would agree that it would be unfortunate if an impression was to be created that a decision had been reached in relation to the investigation by PIRC. As you are aware, this investigation is ongoing and no decision will be taken by the Crown until PIRC has completed its enquiries and reported to the Lord Advocate.

I would accordingly be grateful if you would ensure that cards and other material produced by your firm are not open to misinterpretation on this important fact."

262. Until I have been shown (BBC-00070) by the Inquiry, I had not seen a copy of Mr Sallens' business card. My personal view is that this card is not likely to mislead a member of the public into thinking that Mr Sallens is carrying out an official state investigation, but I cannot discount that someone may have thought Mr Sallens to be involved in an official capacity. I considered the letter that I sent to have dealt with the matter raised. Given the passage of time I cannot discount that the issue which was raised was possible confusion in relation to Mr Sallens' capacity, but that is not how I read my note, or my letter which was sent a short time after the meeting.

Crown Precognition

Question 145

263. In an investigation into a sudden or suspicious death, or where a crime may have been committed, an investigation will be carried out by the reporting agency, who in this case were the PIRC. They submit a report or reports to the procurator fiscal along with associated statements, expert reports and productions. The procurator fiscal will then begin their investigation known as the precognition. That will involve seeing crucial witnesses and experts and compiling a report containing a narrative, analysis, recommendations and accompanying statements productions and reports for Crown Counsel.

264. Crown Counsel's role is to ultimately make a decision and issue instructions in relation to the case. In large and complex cases, an advocate depute is often allocated to a case at an early stage to help shape the inquiry. The appointment of Ashley Edwards KC to this case was in keeping with normal practice in a large sensitive and complex case like this.

Question 146

265. In my minute to the Law Officers dated 29 August 2016 (COP S-05199(b)) on page 2 under "Work Required" I stated:

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

266. Part of the purpose of this note was to consider timescales. I have set out the number of witnesses of fact that we required to see for precognition purposes. If we did not see those witnesses the case could be prepared more quickly. However, this case was complex and high profile so it was appropriate to see all of the potential eyewitnesses ourselves. That was usual practice. My comment about not relying on PIRC statements was not a comment about the quality of those statements, but rather to point out that for completeness and in accordance with standard practice we ought to see all of the eye witnesses.

Question 147

267. I have read my Notebook 7 COPFS-05237 at page 3:

268. The note reads;

"Les B Bayoh -> Met APCC with Al McLeod. 2 courses of action agreed. First she is concerned we'll get report where we say no pro & then subsequently someone breaks out. Attracted to..."

269. This note is incomplete suggesting that our conversation was not completed. The reference to someone breaking out is a reflection of the fact that some of the eye witnesses were reluctant to engage. APCC was keen that we capture all of the available evidence lest we decide to take no proceedings and then a witness who had not cooperated suddenly said something that might have been relevant to criminal proceedings. It does not to my recollection indicate that by that date she was minded to mark the case no proceedings, but rather was flagging a risk of making a decision without exhausting all possibilities to capture relevant evidence. The note above it appears to be dated 9 November 2017 so this conversation would have been about that time.

Question 148, 149 and 150

270. I was not involved in preparing the precognition nor did I decide what to include in it. I did not read it until the narrative and analysis was sent to me by the inquiry as by the time it was prepared I was no longer involved in the case. Having not seen the precognition I am not able to comment on what was in it.

Investigation into the purported leak to the Mail on Sunday of the decision not to prosecute

Question 151

271. I am asked "What is normal practice for COPFS in a situation where there is a possible unauthorised release of information about an investigation to the media by a COPFS official?"

272. I am not sure that there is a normal practice. Such a situation is rare and I can only think of 1 example other than this case. In that case a

police investigation was instructed. I have never been personally involved in instructing such an investigation or review.

273. At the time of the Mail on Sunday newspaper article dated 23 September 2018 reporting the decision of COPFS not to prosecute any of the officers, prior to Mr Bayoh's family being informed I was not involved in the case.

Question 152

274. I was not aware of this article prior to its publication.

Question 153

275. I had no role and involvement in the investigation within COPFS into the source of the information in the Mail on Sunday's article.

Learning from other investigations

Question 154 and 155

276. Prior to and during my involvement in the Investigation, I had no detailed awareness of investigations by the police and/or the CPS into race in England and Wales.

Question 156

277. I am referred to Please read my Notebook 4 COPFS-05233 at page 7 where I have made the following note:-

"LA 17/1

Dame Elish

Report in 6... on deaths in custody.

Recommendations. ? Read across ?

- 1. Police Federation & collaboration*
- 2. Families automatically get legal assistance"*

278. I do not specifically recall this meeting. The note indicates that relates to a discussion with the Lord Advocate on 17 January 2017, and given my role at the time do not expect that I was meeting with the Lord Advocate on my own about this matter. There was a discussion about the report that was being prepared by Lady Angiolini in respect of deaths in custody in England and Wales which was due in 6 weeks. We discussed whether there would be any read across from that report to our own investigation. Two areas are singled out. Firstly the question of post-incident management and whether officers involved should be separated or allowed to debrief the case together. That was an issue that had been raised in relation to the Bayoh case and Lady Angiolini was expected to make recommendations in relation to that. Secondly, it was expected that Lady Angiolini would make a recommendation that in respect of deaths in custody families would automatically get the benefit of legal

representation at public expense. In a Scottish context that was a policy question that was not within COPFS remit but we noted it nevertheless.

Race

Question 157

279. I am asked if I have any experience of racism being a factor to investigate in an investigation relating to:

- (i) a death in custody or death during or following police contact; or
- (ii) the actions of on-duty police officers.

280. I cannot recall being involved in any such case.

Question 158 and 159

281. Mr Bayoh's race and whether it was a factor in what the events of 3 May 2015 was a factor that was in our minds throughout my involvement in the case.

Training

Question 160

282. At the time of my involvement in the Investigation, I had no specific training that was relevant for my role in the Investigation. I had attended all of the foundation courses that explained and covered the role of a procurator fiscal such as the Depute Core Course, Precognition Core Course, ECHR training, and Deaths course.

Question 161

283. I have nothing further to add on role specific training

Question 162

284. I completed the mandatory training in respect of equality and diversity issues.

Question 163

285. I did not make reference to guidance materials during the investigation

Question 164

286. Leadership training in relation to racial matters is about to be rolled out to senior leaders in COPFS. I would have benefitted from that in general terms.

Records

Question 165

287. There is no requirement for me to take contemporaneous notes or any other record of your involvement in an investigation, beyond that which is needed for the purposes of the electronic file being up to date. That would amount to there being sufficient file notes, mostly these days in the form of emails, to allow the someone else to pick up the file and progress the case. The electronic file would have been held in CAAPD.

Question 166

288. I did not keep formal records in relation to the Investigation. I still have notes in notebooks that I used at the time in which I kept notes brief notes of matters that I might need to know in the near future. These were intended to be prompts to me, and were not/are not intended to be part of the file. The notes that I took and the material I still have is consistent with normal practice.

Miscellaneous

Question 167

289. In my experience, this investigation was lengthy. From a public and family perspective I am sure it would have been seen as being unduly lengthy. The timescale was consistent with the timescales for other large and complex deaths investigations at that time. It is objectively too long.

290. There were a number of reasons for the length of time the case took. It was a complex case, with conflicting accounts from eyewitnesses, uncertainty about the cause of death and a significant number of expert witnesses. All of these are factors that took time to work through and had to be properly analysed.

291. Generally speaking it could have been prepared more quickly were we able to put additional resources on the case. The reason that we did not do so was because of the general pressure on resources in COPFS at that time. I recall in 2016/17 when I was the PF High Court that due to the general increase in High Court level crime at that time, in particular sexual offences, I had to minute the Executive Board to say that I could not guarantee that a case would not timebar during the precognition process due to insufficient resources. These were the most serious cases and had a statutory time bar and as a result they were prioritised. Whilst Mr Bayoh's death was a priority and in consequence the staff involved were hand picked, at the end of the day there was no timebar attaching to the cases and therefore that impacted on resourcing when balanced with the timebarring cases. If we had more resources available then more resource would have been dedicated to the case which would have improved the timescales.

Question 168

292. I cannot recall when we first discussed the possibility of a Public Inquiry. This did not change our approach to matters and as I have noted before whether a Public Inquiry was held was not a matter for us. Until a decision was taken in relation to a Public Inquiry our position remained that there would be a Fatal Accident Inquiry.

Questions 169 and 170

293. There are no further issues to raise.

Question 171

294. I am asked "In what circumstances, if any, would COPFS share the findings of (i) a PIRC investigation including the PIRC Report and (ii) the Crown Precognition with Police Scotland?"

295. In other cases I am aware that we have authorised the sharing of information from the PIRC report where an issue has arisen that causes an immediate risk to the public or to the safety of police officers and police staff.

296. COPFS has no role in advising or suggesting if misconduct proceedings should be taken forward by Police Scotland following an investigation by COPFS. I do not think that the findings of a report for the purposes of assessing whether a crime has been committed or whether there should be a Fatal Accident Inquiry should be released to the Police for the purposes of deciding whether to take internal action against police officers.

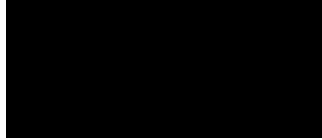
Question 172

297. I have read my email to Ms Fiona Carnan dated 12 February 2020 (COPFS-00336) relating to a request from the SPA for the redacted statements of the police officers who engaged Mr Bayoh. The statements that were referred to in the message are statements taken by PIRC for the purposes of an investigation instructed by COPFS in terms of section 33A of the 2006 Act. They were taken and held by COPFS for the purposes of the investigation of crime and the investigation of deaths. The material was held electronically. In order for the statements to be transmitted to SPA there would need to be a lawful basis to do so. There was no lawful basis on which to send the material in terms of the Data Protection Act 2018 in my view (the reference to GDPR is wrong; it should have read DPA). Furthermore, I did not believe that it was appropriate to hand over statements taken in what was a criminal inquiry to SPA for the purposes of consideration of potential disciplinary actions. They were taken for a different purpose, and it was not appropriate to hand them to SPA for their convenience. I have also commented in the email that handing the statement to SPA may amount to a review of the Lord Advocate's decision. In retrospect I do not believe that is a particularly strong point. I do not think that SPA consideration of statements for a different purpose

(i.e. disciplinary in terms of the relevant regulations) could be said to amount to a review of the Lord Advocate's decision on criminal proceedings.

297. My recollection is that the statements were not provided to SPA.

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



12 January 2024