

**Name:** John [REDACTED] Logue

**Date of Birth:** [REDACTED] 1971

**Address:** Crown Office, 25 Chambers Street, Edinburgh, EH1 1LA

## **Introduction**

I am the Crown Agent and Chief Executive of the Crown Office and Procurator Fiscal Service (COPFS). I was appointed to this role on an interim basis in September 2022 and on a permanent basis since December 2023. I have been employed by COPFS since September 1994. The paragraph numbers of my statement correspond to the questions which I have been asked in the Rule 8 Request of 28 November 2023.

## **Role and Experience**

1. I held the position of Director of Serious Casework in May 2015, having been appointed to the post in April 2014. This was a Senior Civil Service Pay Band 2 (Director) post in COPFS. In this post, I was responsible for the strategic oversight of all High Court prosecutions, the investigation of serious and complex criminal cases and the investigation of sudden, unexpected deaths. Between April and June 2016 I moved to a new post, Deputy Crown Agent for Operational Support. This was a level transfer to a newly created post in which I was responsible for the strategic leadership of the corporate functions and policy function in COPFS.

2. As part of my duties as Deputy Crown Agent for Operational Support, I was the COPFS Data Protection Officer between the end of 2018 and early 2021. My responsibilities included monitoring compliance with data protection laws, providing input at the COPFS Executive Board on all matters relating to data protection and co-operation with the Information Commissioner's Office. I led a small team of information assurance staff which was responsible for investigating and reporting suspected information breaches and developing and promoting information and records policies and practices.

3. My recollection is that I was made aware of the death of Sheku Bayoh by phone on Sunday 3 May 2015. I cannot remember who advised me of the death. In my role, I expected to be advised of significant new investigations out of hours. I was involved in oversight of the investigation between 3 and 7 May 2015. I was then on leave abroad from Friday 8 May (inclusive) to Friday 22 May 2015 and played no part in the investigation during that time. On my return from leave, my recollection is that I was made aware of developments in the investigation as one of a number of high profile and sensitive investigations then underway but was not involved in the investigation.

4. COPFS is responsible for carrying out the investigation of deaths on behalf of the Lord Advocate who is head of the system of investigation of deaths in Scotland. It is the duty and responsibility of COPFS to carry out a thorough and independent investigation of sudden, suspicious, accidental or unexpected deaths to determine whether a crime has been committed or to establish the facts in non-criminal deaths, ensuring that such deaths are accurately recorded and determining whether further inquiry is necessary e.g. a fatal accident inquiry. In carrying out its functions, COPFS must ensure that the investigation meets the requirements of Article 2 of the European Convention on Human Rights and meets the needs of the nearest relatives.

5. I have carried out death investigations and supervised deaths investigations since qualifying as a procurator fiscal depute in 1996. I cannot quantify the number of death investigations I was involved in over a 19-year period and cannot recall whether any of the investigations involved deaths in police custody, during or following police contact or whether race was a factor.

6. I had experience of family liaison in almost all death investigations in which I was involved and in many of the death investigations which I supervised. I do not recall whether race was a factor in any cases.

### **The Police and Investigations Review Commissioner (“PIRC”)**

7. I oversaw COPFS interaction with PIRC in my role as Director of Serious Casework after my appointment in April 2014. During this time, the day-to-day interactions with PIRC in ongoing investigations were led by the Deputy Director of Serious Casework, Stephen McGowan. Prior to my appointment as DSC, I had been responsible as Area Procurator Fiscal in Tayside in 2010-11 and Procurator Fiscal for the East of Scotland in 2011-14 for investigating complaints of criminal allegations against the police in those areas ahead of the establishment of Police Scotland in 2013. As a member of the COPFS Executive Board and a former Head of Policy between 2006-10, I was familiar with the work of the Police Complaints Commissioner for Scotland and the work of COPFS in investigating allegations of criminal conduct against police officers.

8. COPFS instructs PIRC to carry out the investigation in terms of the 2006 Act and therefore can direct PIRC in the investigation of criminality or deaths. COPFS takes the decision on whether there should be a prosecution. I regard the relationship as the same in so far as PIRC inherited the powers of police officers in 2013 with the creation of Police Scotland to allow for the independent investigation of almost all allegations of police criminality which had previously been investigated by local police forces. Section 41A of the 2006 Act makes clear that PIRC must comply with a lawful instruction given by the appropriate prosecutor.

9. I recall having discussions with PIRC on Monday 4 May in the absence of Stephen McGowan. I do not recall the details of those discussions but my general recollection was that they were about the scope of the PIRC investigation, the approval of any media statements and the initial findings such as the outcome of the post-mortem examination. I do not recall any engagement with PIRC about this investigation after those dates.

10. I do not recall being involved in such a decision on 3 May. It was not standard practice for prosecutors to attend the locus of a sudden death and this had been the case throughout my time with COPFS. Historically, it had been common for Procurators Fiscal to attend the locus of homicide investigations. Attendance at initial forensic strategy meetings and the post-mortem examination in all homicide investigations and complex death investigations was routine, reflecting the role of the Procurator Fiscal in the investigation. I cannot speculate on what "benefit" could have been gained by PIRC and Police Scotland if someone from COPFS had attended but there was clear communication between COPFS and both organisations on Sunday 3 May and on the following days. I am not aware of any criticism from PIRC or Police Scotland that no-one from COPFS attended Kirkcaldy on 3 May.

11. I recall that there was a second significant incident that day involving an aircraft crash. I do not recall being involved in a decision about attendance. Fatal aircraft crashes require two separate investigations, one led by the Procurator Fiscal into the circumstances of the death and one by the Air Accident Investigation Branch (AAIB) into the circumstances of the crash. There was only one investigation into the death of Mr Bayoh which was led by the Procurator Fiscal. It is more common for Procurators Fiscal to attend fatal aircraft crashes to ensure that there is co-ordination of the separate investigations in terms of the Memorandum of Understanding between AAIB, COPFS and Police Scotland.

12. As is explained in the email chain, the briefing document had been prepared in the early hours of the morning of 4 May by PIRC in respect of a "dynamic situation" and further briefing would be provided on 5 May. My email of 17:37 explains my initial view of where I thought additional clarity would assist in the investigation. My point about clarity was not a criticism of the document; it simply reflected my experience that further details become apparent as an investigation proceeds, especially in the very early stages of a complex investigation such as this. There is no connection between my comment about clarity and attendance by COPFS.

13. I do not recall the other issues to which Mr Green was referring. It seems likely that he was referring to the other significant investigation on the same day involving the plane crash. I do not think attendance at the plane crash prevented attendance by others at Kirkcaldy on 3 May or otherwise affected COPFS' ability to provide instructions. Had it been appropriate to do so then it would have been

possible for a Procurator Fiscal to attend Kirkcaldy. My recollection is that Mr Ablett attended the post-mortem and was sharing information with senior colleagues to assist the strategic direction of the investigation. My experience is that written confirmation of the terms of reference for a PIRC investigation was provided at a strategic level, sometimes one or two days after an incident and the initial instruction, not by those who might attend initial meetings as the investigation is unfolding in the initial stages.

14. I have not previously seen this document. I don't recall being involved in the formulation of the terms of reference for PIRC and so cannot say whether Mr MacLeod's summary is accurate but it appears to reflect the email discussion of 4 May referred to above and the PIRC instructions listed in the Annex, in particular COPFS-02539.

15. I have not previously seen this document. I was not aware of any detail in relation to the precise injuries suffered by Mr Bayoh or the sharing of information about them. I cannot comment on the view expressed by the precognoscers on page 7 of the minute.

16. My duty was to ensure that there was appropriate strategic co-ordination and support in COPFS for the investigation. I would not usually be involved in the detail of an investigation such as this and my recollection is that in the absence of Stephen McGowan on 4 May on leave I had direct contact with PIRC (Irene Scullion). I do not recall having direct contact with PIRC after that date. Race was not a factor in my becoming involved directly with PIRC on 4 May.

17. I was aware of the MOU at the time of its publication and during the investigation. I do not believe there were further duties incumbent on COPFS in light of the MOU. I do not know what instructions were given to PIRC in terms of paragraph 7.5.

18. I cannot recall if such meetings took place and I would not have expected to attend such meetings given that the MOU refers to representatives of CAAPD and SFIU attending the meetings. I would have expected to have been advised of any difficulties in the operation of the MOU or the need for amendment but do not recall such briefing. I believe the MOU was updated in 2021.

19. I do not recall being involved in such meetings.

20. I do not recall the circumstances described in this email chain. Section 41A of the 2006 Act (inserted by the Police and Fire (Reform) (Scotland) Act 2012) provides that the Commissioner must comply with any lawful instruction issued by the appropriate prosecutor who issued a direction under section 33A. This is similar in scope and effect to the authority of prosecutors to issue instructions to officers of Police Scotland. That authority is traditionally exercised by COPFS as

including the authorisation of any public statement by Police Scotland or PIRC when investigating a crime given the Lord Advocate's role as head of the systems of prosecution and death investigation. This ensures consistency of messaging and that information is only put into the public domain with the consent of the Crown. In my experience, such instructions are accepted and complied with and it would be unusual for a statement to be issued without first obtaining the approval of the Crown.

21. I do not recall any detail about this media line issued on 30 August 2015. I would not have expected to have had any direct engagement with PIRC in relation to this matter.

22. The costs of an initial investigation are borne by the investigating agency. Further investigations instructed by COPFS after a report has been received would be borne by COPFS. I do not recall the discussion with my PA described in her email of 9 October but it appears to relate to a request from the Scottish Government that COPFS should bear some of the cost of the initial investigation. This would not have been acceptable to COPFS which is not funded to carry out such investigations. It would be a matter for the investigating agency to resolve such budget issues with its funding authority, which in this case was the Scottish Government.

### **Lord Advocate**

23. The Lord Advocate is the head of the systems of prosecution and death investigation in Scotland. As a former Procurator Fiscal and Advocate Depute, the Lord Advocate was very experienced in the conduct of such investigations and able to take decisions as head of system effectively in so far as they required law officer involvement. Given the high profile and sensitive nature of the investigation, the Lord Advocate made clear that the investigation should be thorough, involve the deceased's family and prompt. My recollection is that my discussions with the Lord Advocate related to general overviews of the strategic direction of the investigation, media handling issues and direct approaches by the family's solicitor to the Lord Advocate which were appropriately shared with those involved in the investigation.

24. I do not think I was involved in such meetings and have no recollection of ever having met Mr Bayoh's family or their solicitor.

25. It has become more common since the early 2000s for law officers to meet bereaved families in death investigations, particularly if the family has concerns about the investigation. I was not involved in any meetings with Mr Bayoh's family and cannot comment on any difference in approach in 2016 when James Wolffe KC was appointed as Lord Advocate.

26. The involvement of both Lord Advocates was not unusual given the high profile and sensitive nature of the investigation.

27. My memory is that Ms Scullion emailed me the briefing because Stephen McGowan was on leave on 4 May. I would not have expected in my role to be directly involved with PIRC in the initial stages of the investigation. My role was to ensure that the Law Officers were kept up to date with high profile and sensitive investigations and this is why I sent the update on the morning of 5 May. It was a summary of the initial stages of the investigation. The email was a factual summary of information from the briefing and from colleagues (e.g. attendance at the post-mortem examination) and I may also have taken account of any phone calls with PIRC and Police Scotland. I do not recall whether I spoke to (then) DCC Livingstone on 4 May but the email chain indicates that I had placed a call to his office. The factual information was accurate to my understanding at the time. I would not have provided the Law Officers with information which was not accurate to my understanding. I believed the particular issues of the basis of the COPFS instruction to PIRC and the PIRC engagement with Mr Bayoh's family to be accurate. I cannot recall when PIRC was instructed in writing and my briefing does not indicate to the Law Officers that they had been instructed in writing. Initial instructions to PIRC are often given in person or by telephone in the immediate aftermath of an incident and then followed up in writing.

28. Your question is inaccurate. The email was not addressed to me. It was sent to Stephen McGowan and Les Brown and copied to my PA's mailbox. I have no recollection of this email and have searched my email records and cannot find a copy of it. I do not believe I was sent this email and have no recollection of the issue in the email that you have asked about. I am afraid I cannot assist with your questions about this email.

29. I do not recall the details of any conversation with Mr McGowan after this email was sent. His email to me of 15:41 on 6 May summarises the issue discussed in the email you highlighted in question 28. My recollection is that the Lord Advocate and senior prosecutors leading the investigative work were concerned that public confidence in the investigation, given the fact that Mr Bayoh had died during contact with police officers, should not be damaged by any unnecessary delays in the investigation or concerns on the part of Mr Bayoh's family. This was the meaning of the shorthand phrase "appearance is everything". To support this objective, the Lord Advocate asked for as much involvement and transparency as possible with Mr Bayoh's family, in so far as that was consistent with the integrity of the investigation, and for this to be done at pace, to maintain their confidence and that of the wider public that the investigation would be independent and thorough. My recollection, supported by this email, is that early contact with their solicitor, Mr Anwar, had raised the issue of the family being able to instruct their own experts to examine Mr Bayoh's body and the forensic evidence. Mr McGowan's email indicates that the Lord Advocate was concerned

that the report from the neuropathologist instructed by the Procurator Fiscal would not be available until he returned from leave.

30. Your question is inaccurate. David Harvie was not included in this email chain. It is a series of emails between me and the Lord Advocate's Private Office about the preparation and publication of a public document describing the legal and factual status of the PIRC investigation and the connection between PIRC and the Crown. I have a general recollection that the Lord Advocate had made this commitment to Mr Bayoh's family. By 2015, this was regarded as standard practice in all death investigations to ensure that families did not learn of developments in the media. The Lord Advocate was emphasising the point because in some cases mistakes had been made and he correctly wanted to ensure that no such mistakes were made in this case. I do not recall when the promise was made. I was not present at any meetings with Mr Bayoh's family. I cannot comment in whether the commitment was kept as I was not subsequently involved in any of the communications with Mr Bayoh's family. The question as to whether it was binding on James Wolffe KC as Lord Advocate misunderstands the nature of the commitment. As a matter of standard practice which continues to this day it would have been a continuing objective of COPFS throughout the time of James Wolffe KC's time as Lord Advocate.

31. These emails describe a decision to be taken as to whether to share individual witness statements with an expert instructed by Mr Bayoh's family. It is an example of the transparency objective which I have described above and the need to balance transparency with protecting the integrity of the investigation. I do not recall the discussion with the Lord Advocate and have no record of that discussion. I was not involved in discussions with Mr Wolffe KC about this case when he was appointed Lord Advocate and so cannot comment on whether he maintained this approach.

32. As the Lord Advocate's letter of 19 June to Mr Torrance makes clear, Mr Bayoh's family had already been told there would be a Fatal Accident Inquiry. The Lord Advocate made this decision based on the information available to him at the time without having prejudged the outcome of the PIRC investigation. There was no assumption or "reasonable expectation" of there also being a prosecution. I made the comment about the Lockerbie precedent because the journalist mistakenly thought that confirming there would be a Fatal Accident Investigation precluded a prosecution. My reference to Lockerbie as a precedent for a Fatal Accident Inquiry taking place before a criminal prosecution did not imply anything analogous in the investigation. I cannot think of other examples at this stage but would be surprised if there were no other examples.

33. I was not involved in the detail of the investigation and so cannot comment on any impact and do not know if Mr Wolffe KC maintained this position or not. I cannot see any reason why a commitment to a Fatal Accident Inquiry, either

because it would be mandatory or discretionary, would cause any issue for the investigation.

### **Family Liaison**

34. Communication with a deceased's family during an investigation is a critical part of the investigation. It allows the Crown to share information, keep the family updated on progress and ensure that they have an opportunity to contribute concerns or views on how the investigation should be conducted. These can then be considered by COPFS in reaching an independent view on the manner and extent of the investigation and its conclusions. The Crown's role in such communication must be carefully co-ordinated with any family liaison put in place by the investigating authority, be it Police Scotland or PIRC.

35. I do not know if there was a handover of family liaison from PIRC to COPFS. The duty of COPFS in any death investigation, whether involving PIRC or not, is as outlined in my answer to question 34. Engaging meaningfully and effectively with a deceased's family ensures that they have confidence in the investigation and its outcomes and allows satisfy the Crown's obligations in terms of Article 2 of the European Convention on Human Rights.

36. I do agree with the terms of the draft minute to Scottish Ministers in my email of 14:34 which invites the Lord Advocate to approve the draft. I would not have included something in the draft which I did not agree with. I was not involved in the family liaison in this case and cannot comment on what was done or whether it was successful.

37. My recollection is that I was not involved in the family liaison arrangements and played no part in deciding what was disclosed to Mr Bayoh's family.

38. The traditional Crown approach to engaging with families in death investigations has evolved since the incorporation of the European Convention on Human Rights. This has included engaging with families to ensure that the investigation is Article 2 compliant. The extent of the information provided in this case at an early stage, in so far as I was aware of it, was unusual and this was a reflection of the high profile and sensitive nature of the investigation and a judgement about what was needed to meet the family's needs. Although I was not involved in discussions with them or their solicitor, my understanding at the time was that they wanted to instruct their own experts. This in itself is unusual in death investigations and seemed to me to be a reason to justify a broader approach to the provision of information in a way which would not affect the integrity of the investigation. I agree with Mr McSparran to the extent that this made the co-ordination of family liaison between different organisations more important and potentially more challenging. Race was a factor in the investigation, in my view, only to the extent that it was known and understood that the



developing understanding of institutional racism and previous examples of failures to meet the needs of members of ethnic minority communities in investigations in Scotland and in the UK meant that it was an important objective of the investigation to maintain the confidence of Mr Bayoh's family in its thoroughness and independence. Meeting their needs as individuals was a justifiable basis of doing things differently.

39. COPFS provides information and advice to victims of crime and to bereaved relatives in death investigations through its VIA service. I do not know if a VIA service was provided or whether the information was provided by investigators directly but I would have expected a VIA service to be provided.

### **Police Officers' Status**

40. This is an operational decision for PIRC. The status of a person will determine the process to be followed by the investigating agency in carrying out the interview. It is not for COPFS to identify a suspect.

41. I had no involvement in this part of the investigation.

42. I had no involvement in this part of the investigation.

43. I had no involvement in this part of the investigation and to that extent such questions are hypothetical.

44. I had no involvement in this part of the investigation and to that extent such questions are hypothetical.

45. I have not been provided on Objective Connect with copies of the documents at footnotes 26 and 30. Notwithstanding this, I have considered the remaining documents, in particular my email in COPFS-06275. I describe on 11 June having had conversations with DCC Livingstone (at an unknown time) and DCC Richardson (on 10 June). I do not recall those conversations but it is clear from the email that I was familiar with the exchange of correspondence between the Lord Advocate and Chief Constable and the approach of Police Scotland as to whether the officers were under a duty to provide a witness statement to PIRC. The position of COPFS is set out in the correspondence, including the letters between Mr Brown and DCC Richardson such as have been made available to me, and I can infer from the email that I would have discussed the correspondence and that COPFS position in general terms with both officers. I would not have been in a position to discuss specifics or any evidential aspects of the case with them as I was not involved in the detail of the investigation.

46. I have no recollection of preparing this document. My email of 10 June 2015 at 21:59 explains why the document was prepared. There was a high level

of interest in the nature of an investigation carried out by PIRC. I can infer from my email that there may also have been confusion on the part of the media and politicians about the nature of a PIRC investigation. PIRC was a relatively new organisation in 2013 and there had not by 2015 been such a high-profile investigation, as far as I can recall, by PIRC of a death involving contact with police officers. The note sets out the relationship between COPFS and PIRC. I do not remember if the issue of compelling police officers to provide statements was part of the confusion which this note was intended to address. The note does not address this point. I do not know whether the note achieved its purpose because I cannot remember if there continued to be public confusion about the nature of a PIRC investigation. I do not understand the question about whether this was a normal approach. COPFS publishes a range of guidance and information for the public on its website to assist understanding of its work. That information can either be longstanding guidance which is updated over time or information specific to a matter of public concern. To that extent, I do not see anything unusual in the publication of this note.

47. To the extent that correspondence between PIRC and Mr Anwar has been shared with me, I do not recall this correspondence and was not involved in the detail of the investigation to allow me to comment on the issues which you have raised relating to section 14 of the 1995 Act or the reasonable suspicion of the PIRC officers carrying out the investigation. Section 33A(b)(i) of the 2006 Act sets out one of two bases on which the prosecutor may direct PIRC to investigate and section 14 (which is no longer in force) governs the procedure by which a constable may detain a person who is suspected of committing an offence punishable by imprisonment. My answer to question 40 addresses the question of the responsibility of determining the status of a person in an investigation.

48. I cannot remember the correspondence and do not seem to have been involved in drafting the letter or otherwise advising the Lord Advocate on this point. My answer to question 40 addresses the responsibility of PIRC to determine if a person is a suspect. I do not see any contradiction between the Lord Advocate's letter and the later letters from the Commissioner to Mr Anwar.

49. I was not involved in considering the PIRC report or completing the Crown precognition and so cannot comment on the matters you have raised. In light of the instruction by the Crown in terms of the 2006 Act that PIRC should investigate the matter it seems logical and appropriate to me that PIRC should provide a report to the Crown of the investigation regardless of their conclusion.

### **Ingathering of Evidence and Analysis**

50. My answer to question 4 sets out the role of COPFS in investigating sudden and unexplained deaths. This includes deaths in custody and deaths during or following contact with the police. COPFS performs this role on behalf of the Lord

Advocate and Police Scotland or PIRC carry out the investigation under the direction of the Procurator Fiscal.

51. I was given a general summary of the nature of the incident, in so far as it was known at the time, on Sunday 3 May 2015. I recall that this was done by phone. The purpose in notifying me was to make me aware of the incident in case I required to take any steps to support those involved in the investigation or notify the Crown Agent and Law Officers. I do not remember the details of what I was told other than a man had died early in the hours of Sunday morning following contact with police officers in Kirkcaldy. I was advised at that time that the deceased was a black man who lived in the local area and that PIRC had been instructed to investigate the circumstances of his death. I do not remember taking any additional steps after being advised of this incident.

52. I was only involved in the initial stages of the investigation until Thursday 7 May. I was abroad on leave for two weeks from Friday 8 May and my recollection is that when I returned from leave I was only involved to the extent of support for the law officers in dealing with correspondence. I was advised of progress with the investigation in general terms while I remained in post as DSC and then did not receive any updates after I moved to my new role in 2016. I cannot recall whether I formed any conclusion that my understanding of the circumstances as initially provided to me had changed.

53. I was not involved in consideration of this matter.

54. I do not seem to have been given access to this email on Objective Connect and have no recollection of being involved in this detailed aspect of the investigation or the issues described. It is possible this question should be directed to a different witness.

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### **Post-Mortem Examination and the Release of Mr Bayoh's Body**

56. COPFS attends post-mortem examination in a wide range of death investigations, including homicides. This is done because the post-mortem examination is instructed by the Procurator Fiscal. Attendance allows the Procurator Fiscal to understand the conclusions of the post-mortem examination and to instruct additional investigation by the police or PIRC if required. This principle applies to all death investigations in which the Procurator Fiscal attends the post-mortem examination.

57. I had no involvement, in so far as I can recall, in the post-mortem examination. I received an update from the Procurator Fiscal who attended. This was normal practice in high-profile and sensitive investigations of which I had already been notified.

58. I do not recall being involved in the discussion between the Lord Advocate and Mr Torrance nor the proposed visit. I do not know if the visit took place. I cannot say whether there was a request from Mr Bayoh's family or solicitor for this to happen. In my experience, the Lord Advocate led personally on efforts to build strong links between COPFS and local faith groups and would not have needed a request to make an offer such as this. He regarded it as an important part of his role to build those links and to listen to the concerns of different communities. I was copied into the email to Mr Brown and Mr McGowan, along with other copy recipients, by the Lord Advocate's Private Office for my awareness. I intervened to point out to the officials who were involved in this issue that the word "Iman" appeared to me to be a mistake, perhaps a spelling error on the part of the email's author. My understanding of the Islamic faith was and is limited but I understood an "Imam" to be a faith leader in a community and "Iman" to refer to an aspect of the Islamic faith. On that basis, I wanted to ensure that the error was acted upon by officials to ensure that the Lord Advocate was aware of it and that it did not feature in any subsequent communications.

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

59. I do not recall being involved in such discussions in this case. My view was at the time that the senior officials leading the investigation were all familiar with the Crown's obligations in terms of Articles 2 and 14 of the Convention.

60. I cannot recall any specific discussion about the application of Article 2 in my involvement in the investigation but I was confident that the senior officials leading the investigation were all familiar with the Crown's obligations in terms of Article 2 of the Convention.

### **Media Engagement**

61. COPFS takes the lead in investigations in communicating information to the public in order to ensure that the release of information does not compromise the investigation or future legal proceedings. Releases of information by Police Scotland or PIRC during an investigation are routinely cleared with COPFS in advance.

62. It was important to follow the media reporting of an investigation in order to ensure that there was no mis-reporting or misunderstanding of the investigation and to ensure that the investigation was not prejudiced by media reporting. It is also necessary to ensure that COPFS is able to answer questions posed by the

media. This is a standard feature of all investigations, particularly in high-profile and sensitive investigations which attract significant media interest. Investigative decisions are not influenced by media reporting. I have never been aware of this in my career of almost 30 years.

63. I have no specific recollection of being involved in consideration of COPFS media engagement but would have expected in my role to be sighted for awareness on significant media interest or issues and would frequently assist the media team in COPFS to respond to questions. I very rarely had direct contact with the media in any matter and do not recall such contact in this investigation. The detail of the investigation would have been provided by those involved in the investigation.

64. I do not recall being involved in any discussion about a proposed media release by Police Scotland on Sunday 3 May 2015. I do not recall having seen this proposed media release. It was common for COPFS to make amendments to proposed police media releases to ensure that they did not jeopardise the integrity of the investigation or any future legal proceedings. I do not know if this proposed release was shared with COPFS or considered for amendment.

65. I have no knowledge of the role of SPF in Police Scotland's media engagement. I have no knowledge of any such role by SPF in this case. I have no experience of such involvement in any other case and would not regard it as appropriate for COPFS to comment on proposed SPF media releases because SPF was not an investigating agency acting under the instruction of the Crown. It would be for Police Scotland to deal with the actions of SPF.

66. Your questions assume my involvement in consideration of the proposed press release. I do not believe I was involved in considering the proposed press release and so I cannot answer these questions.

67. I was not aware of this statement. I do not know if it was approved by COPFS. I do not know why this statement was made and whether any other statement was refused.

68. I do not recall a telephone call with DCC Livingstone on 4 May although the email chain indicates that I had placed a call to his office to speak to him. I have not made any reference to such a call in my subsequent email of 5 May. My priority in relation to public communications is always to preserve the integrity of the investigation and future legal proceedings. Were I asked about the scope for public release of information, this would have been the principle against which any release would be judged. The earlier email from Ms Davidson on 4 May highlights some of the risks of information being released by different organisations in an uncoordinated manner in the early stages of an investigation.

69. My email at 16:32 indicates that I wanted to discuss contact with Mr Bayoh's family. I do not recall that conversation or the issues which I wanted to discuss. My comment about Mr Anwar, to whom I have never spoken about this investigation, was my assessment that despite concerns from the family about the actions of the police at the time of Mr Bayoh's death he understood that our investigation would be thorough and independent and comply with the undertakings given to his clients.

70. I understood the Lord Advocate's comment to mean that the deleted text was unnecessary because it would provide too much public information about the status of the investigation. I understood the PIRC reference to a "heartening" response to mean that there had been a strong public response and that PIRC hoped to ensure that more information would be provided by the public.

71. I have no recollection of this and do not know if I was involved in this decision.

72. Your question is not accurate. I did not write in my email that referencing police custody would cause "confusion in the event that there is an FAI." I indicated that describing the circumstances at that very early stage of the incident "may confuse the position in future". I had in mind that a reference to Mr Bayoh being in police custody would suggest publicly that an FAI would be mandatory. The circumstances of the incident were still being investigated and it would have been wrong to give the impression that a conclusion on this point had been reached. I do not recall any specific conversations on this point. But I can infer from my comment "we think not" that initial views being discussed were that an FAI would be a discretionary one rather than a mandatory one. I do not believe that my comment refers in any way to the issue of whether or not police officers would be prosecuted. It was too early in the investigation to form even a preliminary assessment of that point.

73. I do not seem to have been given access to this document in Objective Connect and cannot therefore comment without seeing the document. I have no separate recollection of a media question from The Herald.

74. As explained in answer to previous questions, as DSC I was often required to give senior advice to media colleagues on all operational matters with which they were dealing.

75. [REDACTED]

[REDACTED]

**Parallel Investigation**

76. I was not aware of this investigation.

77. I was not aware of this investigation.

78. [REDACTED]

**Investigation into the Purported Lead to the Mail on Sunday of the Decision not to Prosecute**

79. A possible unauthorised release of information or documents is investigated by COPFS under the strategic direction of the Deputy Crown Agent for Operational Support who oversees all security related matters on behalf of the Crown Agent. This includes liaison with Police Scotland’s Anti-Corruption Unit. The nature of the investigation will depend on the circumstances of each incident but would involve the Departmental Security Officer and the Head of Cybersecurity. Unauthorised release of information may involve breaches of the civil service code, professional standards, breaches of data protection legislation and other possible criminal offences. If there are reasonable grounds to suspect that a member of staff has committed a criminal offence then the police will be instructed to investigate and report. There is no difference between an investigation into the unauthorised release of information and of documents; each investigation will reflect the individual circumstances of the incident.

80. I do not recall being aware of the article ahead of its publication. On many occasions the media will ask for comment ahead of publication but I cannot find any evidence of this having happened in this case. I review the media each weekend for reporting relating to COPFS and it is highly likely I was aware of the article on Sunday 23 September but have no recollection of that. From reviewing emails which you have asked me to consider, I can infer that the issue was first raised with me officially by Lindsey Miller on Monday 24 September in her capacity as Deputy Crown Agent Serious Casework following a conversation she had with the Lord Advocate. I do not recall being involved in this conversation and there is no indication in the emails I have reviewed that was involved. I do not recall any action being taken on the day of publication and I have no records to indicate that anything was done on 23 September.

81. I have explained my role as Deputy Crown Agent for Operational Support in answer to question 79. Following my discussions with Lindsey Miller on 24 September, I assumed strategic responsibility for carrying out the Lord Advocate's instruction to determine if confidential information about the death investigation had been provided to the media in an unauthorised manner. I concluded that there was no evidence of this from our case management and communications data, that there were no reasonable grounds to carry out interviews of members of staff or instruct a police investigation and that information about the decision and the timing of a meeting with Mr Bayoh's family was known to individuals outside COPFS for whom I had no departmental security responsibility. In all the circumstances, including the nature and content of the newspaper article, I determined that it could not be concluded that a leak, in the sense of an unauthorised release of information by a member of COPFS staff, had taken place. Lindsey Miller was Deputy Crown Agent for Serious Casework and as such had strategic responsibility for the investigation into the death of Sheku Bayoh at the time of the article. She drew the article to my attention in that capacity. [REDACTED] [REDACTED] is the Departmental Security Officer and carries out all security related investigations. [REDACTED] is the Head of Cybersecurity and responsible for all aspects of digital security, including analysing digital case related and communications information for evidence of security incidents.

82. I have no specific recollection of our discussion on 24 September. I have a general recollection of the investigation which followed, its scope and nature and the difficulties to which Ms Miller alludes in her emails. Those difficulties included an inability at the beginning to identify anything from the newspaper article which could identify any document or other source of an unauthorised release of information. Furthermore, the nature of the article, in which it was claimed that a source in the justice system knew of a decision in a case which had been highly publicised over three years, including reporting of the details of the incident involving Mr Bayoh's death, and by its nature could only be a decision either to prosecute or not left a question in my mind as to whether anyone involved in the investigation or with access to information about its conclusion had released information in an unauthorised manner. I also observed that a meeting between Mr Bayoh's family and the Lord Advocate had been fixed for the coming days and this was known to people outside COPFS. It was, as I recall, widely reported that the investigation was nearing its end. Knowledge of this meeting in itself, coming towards the end of the investigation, may have caused people in the justice system or journalists to speculate about the decision. I also anticipated that had anyone in COPFS released information in an unauthorised manner then it was extremely unlikely that this would have been done using COPFS case management and communication systems because it is widely known by staff that COPFS has the ability to review these systems. While these systems would, of course, be checked to make sure, I was of the opinion that these checks would be unlikely to reveal any basis to take further steps such as interviewing a member of staff or instructing the police to investigate. This turned out to be the case.



Journalists regularly claim to have unnamed sources who are reported to know confidential information. In my experience, in so far as this type of reporting relates to the work of COPFS, it is either inaccurate, speculative or simply opinion and guesswork on the part of journalists or those in the justice system with whom they engage. It is reported by the media as fact but in my experience working in COPFS I do not recall any example of a member of staff releasing confidential information to the media or any such media reporting demonstrating that a member of staff could be the only source of an unauthorised release. While I fully understood and sympathised with Mr Bayoh's family at the nature of the media reporting, the content of the article and its impact on their confidence in the investigation, I sought to give effect to the Lord Advocate's commitment that the matter would be investigated. The circumstances, however, in so far as they could be investigated internally within COPFS, did not allow me to conclude that a member of COPFS staff had been responsible for a release of unauthorised information or even that such a release of information had taken place. I subsequently reported this conclusion to the Lord Advocate and to the Bayoh family solicitor.

83. I had not reached any conclusions on 24 September and neither had [REDACTED] or Ms Miller. [REDACTED] is describing in this email in more detail the difficulties I have outlined in my answer to question 82. [REDACTED] was accurately describing the nature of the investigation which could be carried out given the circumstances known to us on 24 September. It was an accurate summary of the position. Had the investigation described by [REDACTED] revealed reasonable grounds to suspect that a member of staff had released confidential information to the media then further steps, including instructing the police to investigate criminal offences, would have been taken. I have no concerns about [REDACTED] comment about ticking boxes. It was not an indication that the investigation had been prejudged or would otherwise be perfunctory. It was a shorthand reflection on the limits which I have described in my answer to question 82. I do not know if the Lord Advocate was given an update on 24 September.

84. I do not recall the discussion with Ms Miller. The HR implications refer to the checks being carried out on COPFS communications systems in which members of staff, although operating work systems such as email and phone calls, have a reasonable expectation of privacy. As a result, checks on such data can only be carried out when authorised through HR as a result of an official investigation such as this. It would also be necessary to alert HR to the possibility of disciplinary and police investigations should there be reasonable grounds to suspect a member of staff of misconduct or criminal behaviour. [REDACTED]

[REDACTED]

[REDACTED]

85. I did not instruct interviews of the staff because there were no reasonable grounds to do so. This was consistent with the approach taken in relation to all such investigations. There was no indication of communication or unauthorised release of information and without such information there is no point in conducting an interview. In addition, the possibility of a criminal investigation meant that it was important that the internal investigation did not prejudice a future criminal investigation.

86. I was not sure, as you put it, that there had been no leak. I had reached no conclusion on the point on 24 September but had a real concern, as I have explained in my answer to question 82, that the article alone did not establish that confidential information had been released. My reference to a "leak inquiry" in this email was a shorthand reference to a full police investigation to identify that an offence had been committed. The purpose of my investigation was to establish if a basis for a police investigation or "leak enquiry" existed. I had no basis to determine if the journalist was lying but as I have explained in answer to question 82 there were other possible explanations for the newspaper article which needed to be taken account of in investigating the matter as the Lord Advocate had instructed. I do not understand your reference to "two possibilities".

87. LOB is a reference to an informal weekly briefing for law officers ("Law Officers Briefing") which took place each Tuesday and was attended one week by both Law Officers and the Crown Agent and then on the second week by the Deputy Crown Agents. The purpose of the briefing was to discuss informally that week's events and priorities. As such, it was highly likely that the newspaper article and the consequences for the investigation and communications with Mr Bayoh's family would be discussed at the briefing on 25 September. These briefings were informal and not minuted and I have no recollection if the matter was discussed. I have no records to indicate that I attended the briefing discussion on 25 September.

88. Document COPFS-03571 describes the investigation and the issues which I have outlined in my previous answers to questions 79 to 86. I do not agree with your interpretation of Ms Miller's email. I do not place any significance on the use of the terms "document" and "information". The investigation which I oversaw did not make such a distinction and was designed to find evidence of the unauthorised release of information in a document or other form.

89. [REDACTED]

90. I did not attend the meeting between the Lord Advocate and Mr Bayoh's family in October 2018 because I was not involved in the death investigation. I do not know who was present or what was discussed. I cannot comment, beyond my summary of what I understood the Lord Advocate to have said, on what exactly was stated by the Lord Advocate to Mr Bayoh's family. For the reasons I have given in answer to question 82, the investigation was proportionate and complete in so far as it was possible for COPFS to determine if an unauthorised release of information had taken place.

91. Your question does not accurately describe the basis for not completing a "formal leak inquiry". I have already explained that, in so far as this would relate to a formal police investigation, there were no reasonable grounds to instruct the police to investigate, either from the newspaper article itself or the enquiries carried out on my behalf. I have explained in my answer to question 82 why the approach taken was appropriate. I remain of the view that the newspaper article could either have been speculation on the part of the journalist or reporting of speculation by someone "in the justice system". Were it to be as a result of the unauthorised release of information, that information was known by others outside COPFS. My understanding at the time, supported by the Lord Advocate's email of 23 September in COPFS-03571 is that he was fully aware of the content of the article on the day of publication. His characterisation on the Sunday afternoon of the matter as "this leak" does not change my view at the time or now as to the newspaper article.

92. The enquiries carried out, including the review of communications data, did not reveal any contact between COPFS staff involved in the death investigation and the journalist or newspaper. To that extent, the result was consistent with my initial expectation when the parameters of the investigation were set on 24 September. It is not a question of whether the enquiries were sufficient; they were the limit of what was possible without reasonable grounds to take more formal steps in light of the nature of the newspaper article and the extent of knowledge of the information about the death investigation. To that extent, as described to the Lord Advocate, they were the extent of what was proportionate and possible. They were consistent with the Lord Advocate's commitment to investigate whether there had been an unauthorised release of information by COPFS staff. There was no evidence of this.

93. I have re-read my correspondence with the family solicitor. The letter of 13 December 2018 was sent while I was on leave in accordance with the Lord Advocate's instructions to Ms Miller that my draft response was approved subject to an amendment.

94. [REDACTED]

95. I have already explained in my answers to questions 79 to 94 that I took account of the nature and content of the newspaper article in setting the parameters of the investigation and my conclusion.

96. [REDACTED]

I do not agree with Mr Anwar's characterisation of this information as a "red herring". It was a matter for Mr Anwar to determine whether he regarded the holding of the information by another organisation as relevant to his client's concerns about the newspaper article. It was not my intention to deflect responsibility as I did not include it in my initial draft and it was sent without my knowledge. I had no basis to conclude that there had been an unauthorised release of information by the Scottish Government. I do not recall being asked by the Scottish Government to include this information. My draft letter referred to my capacity as Data Protection Officer. I can infer from the emails that my reference in the draft to my capacity and data protection legislation led Ms Miller to add my designation of "Data Protection Officer" to the final letter which was sent on my behalf, approved by the Lord Advocate, while I was on leave. I do not place any significance on the use of this term in the letter.

97. [REDACTED]

[REDACTED] I did not accept Mr Anwar's interpretation of my conclusion because I was restricting myself to a factual account of what had been established, namely that no evidence of an unauthorised release by a COPFS member of staff had been found. I regarded Mr Anwar's alternative conclusion as an attempt to stretch my conclusion in a way with which I was not comfortable. Anything beyond my conclusion, as I interpreted Mr Anwar's suggestion, would be an inappropriate characterisation of the factual position. I remain of that view.

98. I do not recall the conversation with [REDACTED]. The emails suggest that I was ensuring there was clarity between COPFS and the Scottish Government

about what had been established in each organisation and our communication with Mr Anwar.

99. [REDACTED]

100. I had every sympathy with the Bayoh family as regards the newspaper article and know from experience how distressing it is for families and victims to learn of information, whether it is accurate or not, from media reporting. I well understood their distress at the possibility of information being released in an unauthorised fashion and this was one factor in ensuring that the investigation was robust. I can infer from the Lord Advocate's email on 23 September (COPFS-03571) that he and others in the death investigation shared this view. Although I had not been involved in the death investigation apart from the first few days in May 2015, I was aware of the family concerns about fairness and impartiality on the part of the death investigation. This was, as I saw it, one factor in the length of the investigation: every effort was being made to ensure that their concerns were addressed. I do not recall discussing this particular issue with colleagues on 24 September but I am confident that the newspaper article investigation covered all possible and appropriate avenues which were open to COPFS. I believe the investigation of the newspaper article was robust but also proportionate and thorough in terms of the difficulties and issues I have outlined in previous answers. The failure to establish that there had been an unauthorised release of information does not mean that the investigation was not robust. I did not believe there was any concern that the COPFS relationship with the family would be adversely affected by the process adopted in the investigation. On reflection, I cannot identify any other steps which it would have been appropriate to take in an internal security investigation. The results were shared with the Lord Advocate and the family solicitor.

101. The internal security investigation and my involvement in it was consistent with normal practice and all other security investigations which I carried out during my time as Deputy Crown Agent Operational Support. Race was not a factor in my actions and the decisions which I took. There was no decision about prosecution and therefore your question incorrectly characterises the nature of my role. I was not acting as prosecutor. I was acting as a senior official with responsibility for security investigations. Had there been a basis for a police investigation and prosecution then a prosecution decision would have been taken by a prosecutor unconnected to the security investigation. I was not involved in any security investigations before my time as Deputy Crown Agent Operational

Support and so cannot comment on what was done in response to media reporting of other long-running high-profile investigations.

### **Learning from Other Investigations**

102. As a senior leader in COPFS I have a long-standing general interest and awareness in how all aspects of our work is carried out in other jurisdictions. I did not have particular experience or awareness of investigations by the police and/or the CPS into race in England and Wales beyond what was available to me in the public domain. My only involvement in the death investigation relating to Mr Bayoh was between 3 and 7 May 2015 and nothing in my approach changed during that time as a result of knowledge of the system in England and Wales.

103. I did not consider this issue because I was not involved in the death investigation beyond the initial response between 3 and 7 May 2015.

### **Race**

104. I have experience between 2010 and 2014 of dealing with complaints of criminal allegations against the police but cannot remember if racism was a factor in any of those investigations or in any death investigations for which I was responsible.

105. Mr Bayoh's race was a factor to the extent that COPFS had learned from its experience in the early 2000s of mistakes which were made in the investigation and prosecutions connected to the death of Surjit Singh Chhokar. Two reviews had been carried out and lessons had been learned which led to a strong corporate commitment to promoting equality, diversity and inclusion in all aspects of our work, including our operational activities. Speaking for my own personal decisions and actions, I was conscious that Black, Asian and ethnic minority individuals may not have had confidence in the criminal justice system because of previous mistakes such as in the Chhokar investigation. It was therefore important that our engagement with the Bayoh family should focus on building and maintaining their confidence in the independence and thoroughness of our investigation. I cannot recall a particular decision in which this was a factor which led me to a particular conclusion or action but I was aware of it throughout my involvement in the early stages of the investigation.

106. My view, as described in my previous answer, is that COPFS had made great progress since the early 2000s in learning and changing to reflect a better understanding of equality, diversity and inclusion. My experience was that any case in which the deceased was not white would involve consideration of the factors learned from the Chhokar inquiries.

### **Training**

107. I received operational training on death investigations, fatal accident inquiries, legal medicine, victims, communication, ECHR and homicide investigations in the early stages of my career (1995-99). These training courses provided the theoretical learning which underpinned my operational experience in all of these areas.

108. I attended Diversity Awareness Training in 2004, Senior Diversity training in 2010 and Valuing and Managing Difference e-learning in 2014. I have also completed online training through the Civil Service in relation Unconscious Bias. Equality, Diversity and Inclusion has also featured in almost every leadership and management training course I have attended since I became a manager in 1999. All aspects of this training were applicable to my role in so far as I oversaw the death investigation, advised the law officers and handled communications issues.

109. COPFS had and continues to have a range of guidance materials on equality, diversity and inclusion available on its staff intranet. I consult these materials as when issues arise on which I require guidance or when the guidance is changed. I do not remember consulting the material during the first few days in which I was involved with the investigation (3-7 May 2015).

110. I cannot identify any training which would have assisted in my involvement in the investigation.

## **Records**

111. Since the introduction of corporate email and digital file storage in 2000, I have used my corporate email and digital file storage as my personal record of my involvement in operational and corporate leadership. These records are maintained in terms of the COPFS Records Policy. There is no requirement on the format of a record but it is good practice to keep a record of key decisions and I rely on my digital email and files as my record of decisions and meetings I have attended.

112. All of my records in relation to the investigation are contained in my emails or my personal digital file storage and were shared with the COPFS inquiry support team in April 2021. I did not keep records in notebooks. Any handwritten notes relevant to an investigation were either scanned or recorded on email and the written record destroyed. This was consistent with my normal practice since 2000.

## **Miscellaneous**

113. The investigation was lengthy. I cannot say if it was unduly lengthy because I was not directly involved after 7 May. I am aware generally that it was complex and there was significant engagement with the family's solicitor throughout. The

investigation also started at a time when there was an unprecedented number of very complex investigations underway and at a time when resource was much less than it is now (approximately 1,500 staff compared to 2,400 in 2023). Beyond those general observations I cannot make any particular comment about the length of time taken or whether anything could have been done differently other than to observe that lengthy investigations are incredibly hard for families to bear and cause great damage to wider confidence in the system.

114. I was not involved in this decision and cannot remember when I first learned that there would be a public inquiry. I think I learned of the decision at the time it was made public. I cannot say anything about the decision in respect of an FAI.

115. I regard all of my involvement as consistent with normal practice.

116. I cannot identify any difficulties or challenges in the short time I was involved in the investigation.

117. I do not know if such documents were shared with Police Scotland, if such advice or suggestion was offered nor the circumstances in which these things were done. I am therefore not willing to speculate on the reasoning. I made no findings in the investigation and was not aware of the PIRC findings. I did not share any such information because I did not have access to the information and did not discuss it with those involved in the investigation. Nor was I asked for such information for any purpose.

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.



26<sup>th</sup> January 2024.