

Transcript of the Sheku Bayoh Inquiry

Tuesday, 23, April, 2024.

(10.03)

LORD BRACADALE: I shall allow Ms Mitchell to examine Mr Brown on the following issues. Issue number 1, whether there were any processes, practices or procedures in place to monitor the obtempering of the crown's duties and Articles 2 and 14. Issue number 3, the extent of consideration in the analysis of whether Mr Bayoh was suffering a mental health crisis. Issue number 5, whether when Mr Brown consulted with Deborah Coles of Inquest and the Lord Advocate, there was any discussion about racial links to excited delirium. And issue number 7, the issue of race in relation to the perception of threat and danger.

In relation to the other issues, I consider that I would not be assisted by examination of this witness in relation to these.

So can we have the witness back now, please.

Evidence of MR BROWN (continued)

Cross-examination by MS MITCHELL

LORD BRACADALE: Good morning, Mr Brown.

A. Good morning, my Lord.

LORD BRACADALE: Ms Mitchell senior counsel for the family of Sheku Bayoh has some questions for you. Ms Mitchell.

MS MITCHELL: Good morning. We've heard quite a lot about

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1 Article 2 and Article 14 and the Crown Office
2 responsibility in that regard.

3 A. Yes.

4 Q. And you've explained that you were, broadly speaking,
5 confident that everybody knew and everyone understood
6 their duties in that regard, but it might seem to the
7 outsider that perhaps Mr Anwar was having to remind
8 the crown of various duties under Article 2 and
9 Article 14. And what I would like to know is, was there
10 any processes or practices or procedures in place that
11 could monitor whether or not the crown was obtempering
12 its duty and whether or not there were any person who
13 was giving feedback on that or overseeing that duty
14 within Crown Office?

15 A. I don't think I could say that there was anybody
16 overseeing that in that sense. I do recollect that
17 there was repeated mention of the duties under ECHR and
18 in respect of law officers, I'm aware from
19 correspondence that the Lord Advocate's view, and I hope
20 I'm not misquoting him, was to the effect that
21 compliance with ECHR could only properly be assessed at
22 the end of the whole investigative process and the
23 investigative process was still ongoing, even after
24 Crown Counsel took their decision.

25 What I can say also is that in respect of the

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1 overall approach and in respect in particular of the
2 obligation under Article 2 of the right to life and the
3 obligation in respect of Article 14 as it affects all of
4 the rights under ECHR, the right or the obligation to
5 consider discrimination, that when one considers the
6 approach that is recommended to be taken in respect of
7 that and by that I mean the guidance issued to IPCC,
8 which I was directed to as part of my statement
9 questions, that that does set out how that should be
10 approached and in some respects it might be regarded as
11 best practice and in order to assess that, it -- that
12 guidance does say that at the centre of that there has
13 to be -- there has to be consideration of the position
14 of the officers of the police and that the structure of
15 that in broad terms, and I think I am quoting the
16 guidance, that one should assess what the actions of the
17 officers were, then one should assess from the officers
18 what assumptions they took into account and, thirdly,
19 once you have got to stage 2 of that process, you should
20 explore with the officers why they made those
21 assumptions.

22 Now, I would suggest that that requires an
23 investigative approach and an investigative approach
24 that wasn't open to the crown having regard to the stage
25 that the investigation had reached when the second PIRC

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1 report came in, because Crown Counsel was clear that
2 having regard to that stage that the crown could not
3 approach the officers and, as far as I can recollect,
4 Mr Anwar accepted that the crown could not precognosce
5 the officers --

6 Q. Well, can I ask you, sorry, to come back more to the
7 point that I was focusing on, which is, was there any
8 one in Crown Office when that work came to an end who
9 would look back and review and see whether or not there
10 had been compliance with Article 2 and Article 14.

11 Like public companies, there is a review process
12 carried out to ensure that they're tempering their
13 duties in regards to what the law places on them, be it
14 health and safety or whatever. What I'm asking
15 specifically is, was there somebody to carry out that
16 process and were there practices, procedures and
17 protocols put in place for that procedures?

18 A. As I said at the start, there wasn't a person who had
19 that overall oversight.

20 Q. Were there any practices or procedures put in place and
21 if there wasn't a person, was there anything that could
22 be done to -- at the end of an investigation where
23 you're assessing, did we do that right, have we done our
24 job, was there any practice or procedure in place for
25 that to be done?

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1 A. As I said, the investigation was not at an end even when
2 Crown Counsel took that decision. There was not a
3 person who had overall oversight in respect of that, but
4 my expectation would be that the kind of considerations
5 that would require compliance with ECHR would have been
6 a consideration as the investigation moved on once
7 Crown Counsel had reached that decision.

8 Q. And had that investigation moved on and had been
9 completed, was there practice or procedure or person to
10 do that?

11 A. I'm not aware of such a person. Quite what action would
12 have been taken if it had moved on to the Inquiry phase,
13 rather than moved on to the right to review and then the
14 public Inquiry phase, which is what obviously we are
15 engaged in just now, it is speculation on my part, but I
16 do say that the -- to get back to the stage that the
17 Inquiry had reached, it was for the specific and limited
18 purpose of assessing whether there was a basis to take
19 criminal proceedings and that was the end of that phase
20 of the Inquiry, but it was anticipated that it would
21 move on to another phase.

22 Q. I would like to move on to my next question. We covered
23 my learned friend with you in some detail with you on
24 Friday and indeed the proceeding days covered the crown
25 analysis that Ms Carnan had brought together. By the

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1 time that the crown analysis was brought together, had
2 you read the civilian and the police statements?

3 A. I'm trying to think back to at what point -- I had read
4 a number of statements up until that point. I don't
5 know that I can say what the statements were that I
6 read.

7 Q. Do you recall whether or not they were the police
8 statements or the civilians' or a mixture?

9 A. I suspect they were a mixture.

10 Q. In those police statements, because we've obviously been
11 through them, and then the civilian statements there was
12 a significant body of evidence, if it was chosen to be
13 accepted, that Mr Bayoh was suffering from a serious
14 mental health episode. Police officers themselves, even
15 before they got there, thought that might be a
16 possibility. On arrival his manner, his deportment
17 suggested such. Officers said it. Even civilians prior
18 to the police arriving reported in such a way that he
19 may be suffering from a mental health episode.

20 The crown analysis does not appear to consider
21 properly Mr Bayoh's mental health in the context of how
22 the officers dealt with him from the outset; would you
23 accept that?

24 A. What I would say in respect of the analysis and that
25 kind of information is that when Crown Counsel were

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1 making their decision, clearly there was a precognition,
2 there was that information, there was that analysis
3 prepared by Fiona Carnan, but there was also the
4 significant process in this case of Crown Counsel being
5 able to consult with experts themselves and, in
6 particular, the expert on restraint who was identified
7 hopefully for the purposes of being able to comment on
8 the overall approach of the officers from an independent
9 point of view.

10 And what I am confident of was that a key focus in
11 respect of that was whether the officers should have
12 recognised the signs that Mr Bayoh may have been
13 suffering from what I would generally term a mental
14 health episode and that that was part of the overall
15 assessment of the restraint expert and it was part of
16 the overall assessment of Crown Counsel as to whether
17 those aspects were of relevance to the consideration of
18 criminality.

19 Q. Should it have been included in the crown analysis?

20 A. It might with hindsight have been better, but what I can
21 say is that -- I don't want to speak particularly for
22 Crown Counsel, but Crown Counsel had a significant body
23 of information including information in respect of that
24 from their own consultations.

25 Q. Given that it wasn't in the crown analysis, would that

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1 limit what further inquiries might be made had it been
2 fully set out in the crown analysis?

3 A. I think my assessment of that is that all of the
4 relevant information in respect of the police officers'
5 approach and their actions was before Crown Counsel for
6 their consideration as to whether there was a basis for
7 taking criminal proceedings.

8 Q. But that might not have been included in the analysis?

9 A. I'm confident that Crown Counsel had that kind of
10 consideration in their mind and had information to
11 enable them to make a properly informed decision in that
12 regard.

13 Q. Is there a reason that it wouldn't be included in an
14 analysis?

15 A. Overall the purpose of the analysis is to assist
16 Crown Counsel in coming to a decision on the specific
17 and limited purpose of reaching a decision on
18 criminality.

19 Q. So is there a reason it wouldn't be included in the
20 analysis, the way Mr Bayoh was acting, what people had
21 said about his mental health, for example, whether or
22 not the police had ignored a direct order to pause and
23 report back before they engaged with him?

24 A. I -- overall, in respect of all the considerations of
25 Crown Counsel, I am confident that the question of

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1 whether the officers should have recognised and whether
2 their training in particular equipped them to recognise
3 identifying somebody who might be suffering from a
4 mental health episode.

5 Q. Forgive me, but my specific question isn't about what
6 Crown Counsel was considering or decided. My specific
7 question was whether or not that should have been or
8 would have been appropriate to have in the crown
9 analysis?

10 A. It would have been appropriate if it were relevant to
11 the consideration of criminality, but, as I say, it was
12 something that was, as far as I'm concerned, explored by
13 Crown Counsel who were of course the ultimate
14 decision-makers during the course of their own inquiries
15 and their own consultations.

16 Q. And following from that, do you accept that the question
17 of Mr Bayoh's mental health, whether or not he was
18 having an episode at that time, was relevant to the
19 issue of the criminality of the police officers?

20 A. I'm -- I'm not -- no, I don't want it to be taken that
21 that must have been relevant and was not properly
22 assessed by Crown Counsel. I am confident that
23 Crown Counsel did have sufficient information --

24 Q. I'm not asking about Crown Counsel. I'm asking about
25 the content of the analysis and whether or not that

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- 1 should have been included.
- 2 A. I will obviously try to answer your question. The
3 assessment of the actions of the police officers and in
4 particular whether their actions amount to criminality
5 or were wholly unreasonable in all the circumstances,
6 that was something that was assessed by the expert
7 witness who took into account whether they should have
8 recognised that. So to that extent it was something
9 that was addressed and was in the minds of those who
10 were making the decision.
- 11 Q. I'll just ask one last time. Should it have been in the
12 analysis?
- 13 A. Well, with hindsight, it might have been better if it
14 was in the analysis, but I suppose I'm not agreeing that
15 its absence would have affected the decision that
16 Crown Counsel had to make.
- 17 Q. Thank you. Moving on to my next question. In your
18 evidence you said that you weren't aware of the
19 connection between the term "excited delirium" and a
20 link to racial cases. You said that earlier in your
21 evidence, do you recall that?
- 22 A. I --
- 23 Q. It was three days of evidence, I appreciate that.
- 24 A. Sorry.
- 25 Q. May be I'll just go back. The bit of evidence was when

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1 you were discussing with my learned friend the issue of
2 race and excited delirium and it was put to you that at
3 the actual -- the idea of excited delirium in and of
4 itself had issues of race and racial connotations and I
5 think you accepted that you weren't aware of that; is
6 that correct?

7 A. That may well have been the case, the specific link. I
8 knew that it was a -- I knew that it was a -- it was a
9 condition that had attracted some controversy.

10 Q. I see. And that controversy was related with race, or
11 not?

12 A. I don't recollect knowing that it specifically was
13 connected with race. I didn't have familiarity with it
14 prior to my involvement in this case and I suppose
15 trying to look back and it is difficult to separate what
16 I knew when in respect of it. I certainly later on knew
17 that it was something that was controversial and that
18 perhaps it had -- it had particular resonance
19 internationally and in particular in America. So I
20 suppose to that extent if one were looking at cause of
21 death and deaths following restraint and in custody, it
22 would be reasonable to assume it might have a racial
23 element, but I don't remember knowing that at the start,
24 although it might be that Mr Anwar did make that as part
25 of the criticisms that he made in respect of --

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1 Q. Well, I'm just wondering, and sometimes things jog your
2 memory and sometimes they don't, but I'm just wondering
3 if you recall when you met with Mr Anwar and
4 Deborah Coles of Inquest the issue of excited delirium
5 having a link with race was discussed then? Would that
6 trigger any memory with you. Do you remember speaking,
7 first of all, about excited delirium?

8 A. With Deborah Coles?

9 Q. Yes, or restraint in police custody?

10 A. I did reflect on my meeting with Lindsey Miller and
11 Deborah Coles and Mr Anwar at his offices. The
12 recollection that I referred to in my statement was very
13 much directed towards the investigation had to be -- had
14 to be rigorous and that criticisms had been made of the
15 IPCC in respect of investigations, in particular
16 Sean Rigg, and that their -- I can't recollect if this
17 was the specific reference that he used, but it was
18 along the lines of that one shouldn't -- the
19 investigation should not seek to blame the deceased
20 person, in this case obviously Mr Bayoh, for their --
21 for the incident. That's -- that is what I took from
22 the -- from the meeting.

23 Q. Nothing might turn on it. It's just the Inquiry may
24 come to hear that such a discussion was had, but you
25 don't recollect that at the time?

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1 A. I'm sorry. I don't recollect -- that was my main
2 take-away, if I can use that cliché, in respect of that,
3 and as I have said in my Inquiry statement, I did use
4 that to inform some of the analysis that I presented to
5 the Lord Advocate following that meeting.

6 I have said in my statement that I did find the
7 meeting to be valuable and that is still my position in
8 respect of, it does provide a valuable perspective and
9 it did.

10 Q. Thank you. I'll move on to my final issue, which is
11 about something that you said in evidence on Friday to
12 my learned friend. And if I can just refresh my memory,
13 obviously it was many days giving evidence, that's at
14 page 134 and 135. So at page 134 line 16 -- no, I don't
15 need it up on the screen. I'll read it out to you. I
16 was just providing you with the context. You said:

17 "I considered the way that it was approached in this
18 case [it will become clear what we're talking about in a
19 second] which the team and Crown Counsel were content
20 with was looking at the actions of the officers and
21 assessing whether their actions and behaviour fell
22 outwith the range of reasonable options that were open
23 to officers taking account of all the relevant
24 circumstances, including in particular the apparent
25 threat or danger that could be posed by someone who

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1 might have been still in possession of a knife."

2 And you go on to say then at line 135:

3 "I recollect it was the restraint expert considered
4 that he was unable to separate out some of the elements
5 that would have a potential racial motivation, such as
6 terrorist threat, but that the most important factor
7 that was under consideration was the degree of threat
8 posed by someone who could have been in possession of a
9 knife."

10 Now, what I would like to ask you about is whether
11 or not in the crown analysis the degree of threat and
12 the mens rea of the police officers was properly
13 analysed. This Inquiry has repeatedly asked questions
14 of people: would you have dealt with someone in this way
15 if they had not been white, just to see whether or not
16 the answer would be "yes" to that. We hear that
17 attending a knife crime was unfortunately a very common
18 thing for police officers to have to do and indeed, on
19 many occasions when they attended, we have heard stories
20 of the person being armed with a knife. Of course we
21 know as a matter of fact Mr Bayoh was not.

22 So the question -- the question surrounding what was
23 in the minds of the police officers when they arrived
24 that day, they came to this knife incident, was
25 obviously crucially important. What was their mens rea?

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1 And what I would like to ask you was whether or not you
2 think their perception, the perception that we hear
3 about from things they have said, their perception of
4 threat and their perception of danger may have been
5 specifically related to the colour of Mr Bayoh's skin.

6 Do you understand the question that I'm asking?

7 A. I think so.

8 Q. Okay. Do you think that that was properly analysed by
9 the crown?

10 A. I consider that that kind of important consideration was
11 a factor in relation to the focus of the crown
12 investigation and in relation to, in particular, whether
13 the standard of criminality could be -- could be
14 established. I do recollect obviously with you reading
15 it out that that passage that I was going back to what I
16 recollect the assessment of the restraint expert being
17 and as I recollect it, there was a particular focus upon
18 the initial approach of the officers, taking into
19 account a number of factors, but that the main factor
20 according to the restraint expert that had to be
21 assessed and taken account of in relation to the initial
22 approach to Mr Bayoh, which I think could be reasonably
23 described as assertive, that that was a course of action
24 which was open to the officers and therefore that
25 assessment could inform, it would not be determinative

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1 of the issue of criminality, but it could inform and I
2 suppose assist Crown Counsel in reaching an assessment
3 as to whether the standard of criminality had been
4 established.

5 Q. Again I'm really looking more at the moment at the
6 analysis that the crown did. So I'm not asking what the
7 expert witness, what Mr Graves said or what Mr Graves
8 discussed, what I was wondering was, did the crown
9 analyse the mens rea of the police officers in relation
10 to race? Did they look at the statements and note that
11 there were terms used that would have a racial nature,
12 the word "coloured", et cetera? Did they note
13 stereotyping that might be common in the idea of a black
14 man being more aggressive or super human strength or all
15 those sorts of phrases that we've covered in the earlier
16 part of the hearing? Was an assessment done in that
17 regard by the crown?

18 A. I'm confident the team were aware of those kind of
19 considerations as they related to specifically the mens
20 rea of the crime that could potentially have been
21 committed. I do come back to the point that I made at
22 the start of this morning's session, that considerations
23 of the approach of the officers could only in my view be
24 properly assessed when one had the opportunity of asking
25 why the officers took that approach and it would

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1 require, I think, careful, skilled, and experienced
2 questioning within a framework in order to assess those
3 kind of considerations.

4 Q. And that inquiry hadn't been carried out?

5 A. That inquiry could only be carried out, in my view, when
6 one had the opportunity to embark on the inquiry that
7 was envisaged by the IPCC guidelines where there was a
8 three-stage process where one looked not only at the
9 actions but looked at the assumptions that were made
10 and, importantly, why those assumptions were made and
11 all of those would require an approach to the officers.

12 Q. When considering the issue of mens rea, did anyone as
13 far as you're aware in crown office sit down and think,
14 we have to consider the issue of race and relation to
15 all matters of this inquiry? Is it possible that the
16 way the police officers acted and the way that they
17 produced a hard-stop on arrival, that Mr Bayoh was
18 sprayed quickly, that he was on the ground very quickly,
19 could the way the officers have acted have been
20 influenced by race and analysed that race through what
21 they said and what they did in the statements that you
22 had?

23 A. I consider that to embark upon that process when one was
24 precluded from approaching the officers did risk coming
25 to an assessment that could be either described as

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- 1 partial or incomplete or potentially wrong.
- 2 Q. Well, you weren't --
- 3 A. But that was an essential part --
- 4 Q. I'm sorry. You weren't precluded from looking at the
5 language that was used by the police officers?
- 6 A. Yes.
- 7 Q. You weren't precluded from looking at various tropes
8 that were displayed within the course of that and that
9 might have -- that provided -- that might have provided
10 you with a basis for doing that. Did anyone look at
11 those things and say "I think we have an issue here.
12 I think race might be part of why they reacted in this
13 way to this particular man"?
- 14 A. I do consider that that would be relevant to an inquiry
15 phase, but only once the assessment of criminality had
16 been taken and that the approach, the overall approach
17 of the officers and their actions was assessed and was
18 part of the assessment of the crown team as it related
19 to at the issue of criminality.
- 20 Q. But doesn't the issue of the mindset, the mens rea of
21 the officers intrinsically linked with identifying
22 whether or not there had been a criminal offence?
- 23 A. I am not going to assess that because I appreciate that
24 this is a core issue for this Inquiry to assess whether
25 there was discrimination and that does involve, I would

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1 suggest, quite a different approach. But the approach
2 that was taken by the crown was at that stage to exclude
3 criminality and I'm satisfied that the crown team
4 were -- were able to present to Crown Counsel an
5 assessment of the relevant issues and also that
6 Crown Counsel being part of the team, because I do
7 consider that it's important consideration, this wasn't
8 all going one way to a Crown Counsel who was opening up
9 the precognition at page 1 and starting to read their
10 way into it. By that stage, Crown Counsel had been
11 embedded in the whole process, had directed some
12 inquiries themselves, had conducted consultations with
13 key witnesses and that they considered they were in a
14 position to make a decision on that, but that the
15 Inquiry was not concluded at that point.

16 Q. If it wouldn't have been right to make a decision on the
17 issue of what the police were thinking without
18 statements, how were you able to assess whether or not
19 the actions were criminal or not without those
20 statements?

21 A. Because the overall information, the assessment of the
22 broadcasts, what information had been given to the
23 officers, that was all an important and a very rigorous
24 part of the crown assessment. Also a specific inquiry
25 as to the actions of the officers after the incident and

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1 trying to ascertain whether any comment had been made,
2 either on the way back to the police station or back at
3 the police station, all of those were a key focus of the
4 Inquiry at that stage in assessing what information was
5 available to the officers and what their reaction was.
6 So that was the focus of the Inquiry --

7 Q. So -- if I can just interrupt you there. Those are
8 relevant issues as to what the thinking of the officers
9 were, what they were saying at the time, what they said
10 after it.

11 A. Yes.

12 Q. What I'm saying was did somebody actually do that? Did
13 anybody at Crown Office say, "look, there's language
14 that's being used here that is of a racial nature and
15 there are stereotypes or tropes we may see coming
16 through those statements"? Did anyone in particular
17 flag that up?

18 A. The focus of the assessment in respect of the
19 possibility of criminality was in relation to assessing
20 whether there was evidence that the officers' actions
21 was grossly disproportionate and that involves
22 considerations of trying to assess at what stage
23 Mr Bayoh was under control and whether after that gross
24 and disproportionate violence was inflicted upon him
25 when the officers either knew or should have known that

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1 he was getting into difficulties and whether there was
2 any evidence of a loss of control or a loss of temper of
3 the officers. And those were all relevant
4 considerations, I would suggest, in relation to the
5 overall question of could a crime, namely in relation to
6 the incident itself, a crime of assault or culpable
7 homicide be established to a criminal standard?

8 Q. Are you suggesting that if hypothetically police
9 officers dealt with someone in a way different and
10 performed a hard-stop when that wasn't necessary, for
11 example, it would not -- the issue of criminality
12 wouldn't focus on the minds of the police officers when
13 they did that, but rather whether or not the stop could
14 be justified?

15 A. I consider that that key question of whether the stop
16 could be justified was a key consideration of the
17 restraint expert who did comment specifically on that in
18 the light of all of the information that the officers
19 had at the time.

20 Q. Yes, but you didn't comment on the language used by the
21 officers or the fact that tropes were identified.

22 A. No.

23 Q. That doesn't appear to have been dealt with by him. So
24 it's that particular bit that I'm asking you about.

25 A. No, he made his assessment for the assistance of

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1 Crown Counsel on the basis of key considerations
2 including in particular the potential threat that the
3 officers might have considered at the time of their
4 attendance.

5 Q. Did anyone pose the question in Crown Office, given what
6 we know about the statements and given what we know
7 about the evidence of what the police did when they
8 approached and they met Mr Bayoh, given those factors,
9 do we think that this would have happened if the police
10 officers had encountered a white man or a white woman?

11 A. I do consider that those questions were for the
12 subsequent phase of the Inquiry, but I do consider that
13 relevant information that related to criminality was
14 accurately assessed as part of that decision-making
15 process.

16 Q. So even if --

17 LORD BRACADALE: Ms Mitchell, I think I really have the
18 point now. I think we can perhaps stop now.

19 MS MITCHELL: I'm obliged.

20 LORD BRACADALE: Thank you. Mr Brown, thank you very much
21 for coming to give evidence to the Inquiry. You have
22 given a lot of time to the Inquiry and I'm very grateful
23 for that. I'm going to adjourn for arrangements to be
24 made for the next witness and you'll be free to go.

25 THE WITNESS: Thank you.

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1 (10.41 am)

2 (A short break)

3 (10.49 am)

4 LORD BRACADALE: Good morning, Mr Logue, will you take the
5 oath.

6 Evidence of JOHN LOGUE (sworn)

7 Examination-in-chief by MS GRAHAME

8 LORD BRACADALE: Ms Grahame.

9 MS GRAHAME: Thank you. Good morning, Mr Logue. You are
10 John Logue.

11 A. Yes.

12 Q. What age are you?

13 A. I am 52.

14 Q. You are now the crown agent and chief executive of
15 Crown Office?

16 A. That's correct.

17 Q. And as I understand it, that is the most senior member
18 of staff in crown office?

19 A. Yes, that's the position that the senior permanent
20 prosecutor civil servant within the organisation.

21 Q. Thank you. And you were appointed to that role
22 initially on an interim basis in September 2020 and then
23 on a permanent basis since December last year.

24 A. That's correct.

25 Q. But you have been in Crown Office itself since 1994?

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- 1 A. That's correct.
- 2 Q. You've also held the roles of area procurator fiscal in
3 Tayside between 2010 and 2011?
- 4 A. Correct.
- 5 Q. And between 2011 and 2014 you were the procurator fiscal
6 for the East of Scotland?
- 7 A. Yes.
- 8 Q. And I understand from your statement that essentially
9 during that role you were investigating complaints in
10 relation to criminal allegations against police in those
11 areas and that was even before Police Scotland itself
12 was established?
- 13 A. Yes. In those roles I had responsibility as the senior
14 procurator fiscal for a geographic area for a number of
15 responsibilities, one of which was consideration of any
16 complaints of criminal conduct by police officers.
- 17 Q. And that would have included the area of Fife, Fife
18 police, before they became part of Police Scotland on
19 1 April 2013?
- 20 A. That's correct.
- 21 Q. In April 2014 you specifically became the director of
22 serious case work?
- 23 A. Yes.
- 24 Q. And as I understand your statement, you said you were
25 responsible for the strategic oversight of all

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1 High Court prosecutions, the investigation of serious
2 and complex criminal cases, and the investigation of
3 sudden and unexpected deaths?

4 A. That's correct.

5 Q. And you remained in that role as at May 2015?

6 A. Yes.

7 Q. And our main interest obviously is in relation to the
8 events in 2015 in May and I wonder if you could -- just
9 before we move on to the particulars, could you tell us
10 a little bit more about your job in around 2015?

11 A. So it's a post which at that time, as you have
12 described, was called the director of serious case work.
13 The Crown Office and Procurator Fiscal Service had
14 restructured in a number of ways over a period of about
15 ten years and it was a post which traditionally would
16 have been known as the depute crown agent role in
17 Crown Office before it was called the director of
18 serious case work. At that stage when it was known as
19 the depute crown agent role, the work of the Procurator
20 Fiscal Service was distributed across the country in a
21 number of offices and every office carried out the same
22 type of work and, therefore, if an incident occurred in
23 Aberdeen, it was the responsibility of the procurator
24 fiscal in Aberdeen. If it occurred in Dumfries, it was
25 the responsibility of the local procurator fiscal.

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1 So the organisation was structured at the point when
2 I joined up until about early -- the late 2000, early --
3 early into the next decade on the basis that the
4 Crown Office operated at the headquarters, but a lot of
5 the details of investigative work was done in local
6 procurator fiscal's office. By the time I held the post
7 of director of serious case work that had begun to
8 change and we were moving to a model where complex work
9 in particular was carried out by dedicated units who
10 could operate across the country and therefore the role
11 within Crown Office had begun to change and so I still
12 retained responsibility in May of 2015 for all
13 High Court prosecution, the preparation of those cases,
14 all complex case work, and the investigation of sudden
15 deaths and also any significant mass fatality incidents
16 which might occur, then would fall to me in the first
17 instance.

18 Q. And were those specialist units based in Crown Office
19 although dealing with work from all over Scotland?

20 A. Some were based in Crown Office, but some were based
21 elsewhere in the country, depending on where it was the
22 most convenient to have them and there could be a number
23 of reasons for that, but they weren't all necessarily
24 within the building of Crown Office at
25 25 Chamber Street.

Transcript of the Sheku Bayoh Inquiry

1 Q. Right. Thank you. Have you had the opportunity to
2 watch any of the evidence in the Inquiry?

3 A. No.

4 Q. No. Well, let me tell you, there is a blue folder
5 sitting in front of you and that should contain a hard
6 copy of the -- well, the Rule 8 request and the response
7 from you, which is effectively your statement to the
8 Inquiry; do you see that?

9 A. Yes, I have that.

10 Q. That is for your use. Some people prefer a hard copy
11 version and if you're one of those people then please
12 feel free to use that.

13 Now, when I ask you to look at a document, for the
14 benefit of everyone who is in the room, we'll have
15 things put on the screen in front of you, but it will
16 only show maybe a paragraph or a couple of paragraphs.
17 So if there's anything around that area that you think
18 I -- should be drawn to my attention or you need as part
19 of your answer, please just let me know and we'll have
20 that put on the screen as well?

21 A. Thank you.

22 Q. And I should say that there may be other documents that
23 you think would be of assistance and if so, if we don't
24 have them available on the screen, please let us know
25 what they are and we'll try and get them either over the

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1 next break or overnight.

2 A. Thank you.

3 Q. Thank you. Could we look first of all at the request
4 for a Rule 8 statement and this is SBPI 00441.

5 Now, you'll see that this is -- and if we can move
6 down, we'll say a series of questions. There we are,
7 "role and experience" -- a series of questions which
8 were sent to you by the Inquiry team with a request that
9 you answer those in writing and send them back to
10 the Inquiry?

11 A. That's correct.

12 Q. And this is the process that was followed for your
13 statement so it wasn't a face-to-face or anything like
14 that.

15 A. That's correct.

16 Q. And can we look at your response to this which is
17 SBPI 00454. You'll see your name is at the top. It's
18 from Crown Office. And if we look at the final page,
19 you'll see that it's dated 16 January, 2024.

20 A. 26, sorry, that's my handwriting.

21 Q. Oh, sorry. No, it's my mistake. 26 January, 2024. And
22 it's a number of pages and you'll see that although our
23 version is redacted, it's blacked out, I think on the
24 copy you have you'll be able to see that your signature
25 was applied there?

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1 A. The paper copy I have is also redacted, but I'm happy
2 that -- that's my handwriting and I remember preparing
3 the statement.

4 Q. Thank you. And if we look at the final paragraph, we
5 see:

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

10 And you understood that to be the case when you
11 signed?

12 A. I did.

13 Q. Thank you. And is it fair to say that you did your best
14 when you were answering these questions to give a true
15 and accurate record of your involvement in this matter
16 that we're investigating today?

17 A. I did.

18 Q. Thank you. Let's look at paragraph 4 first of all.
19 That will be towards the top. Now, I think here in this
20 paragraph you explain the role of Crown Office
21 essentially. You mention the Lord Advocate, and I
22 wonder if we can look at the final sentence. It say:

23 "In carrying out its functions..."

24 Do you have that?

25 A. Yes.

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1 Q. "... Crown Office must ensure that the investigation
2 meets the requirements of Article 2 of the European
3 Convention on Human Rights and meets the needs of the
4 nearest relatives."

5 And so we've heard a number of witnesses talking
6 about Article 2 and we've heard that there are five
7 procedural obligations which should be observed to make
8 an investigation Article 2 compliant and they are:
9 Independence, effectiveness or adequacy, it should be
10 reasonably prompt, so there shouldn't be delay,
11 sufficient public scrutiny should be available and also
12 the next of kin or the victim should be involved. And
13 is that your understanding of the obligations in terms
14 of Article 2?

15 A. Yes.

16 Q. And then we've also heard about Article 14. Could we
17 perhaps look at paragraph 59 of your statement. I think
18 you mention this there. There we are:

19 "My view was at that time that the senior officials
20 leading the investigation were all familiar with
21 the crown's obligations in terms of Articles 2 and 14 of
22 the Convention."

23 And again, we've heard a number of witnesses
24 speaking about Article 14 and it will be a matter for
25 submission ultimately, but a number of witnesses have

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1 agreed that Article 14 requires that all of the rights
2 in the Human Rights Act have to be protected and applied
3 without discrimination; is that your understanding?

4 A. It is.

5 Q. Thank you. And then we've also spoken to witnesses
6 about a case called Nachova, where it was held that:

7 "The authority's duty to investigate the existence
8 of a possible link between racist attitudes and an act
9 of violence is an aspect of their procedural obligations
10 under Article 2, but may also be seen as implicit in
11 their responsibilities under Article 14 taken in
12 conjunction with Article 2 to secure the enjoyment of
13 the right to life without discrimination."

14 Do you disagree with anything I have just said?

15 A. I don't.

16 Q. And we've also asked witnesses who have agreed that:

17 "In terms of Article 14, where there is a suspicion
18 that racial attitudes induced a violent act, it is
19 particularly important that the official investigation
20 is pursued with vigour and when investigating violent
21 incidents at the hands of the state authority agents,
22 state authorities have the additional duty to take all
23 reasonable steps to unmask any racist motive and to
24 establish whether or not ethnic hatred or prejudice may
25 have played a role in the events."

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1 Anything then that you would disagree with?

2 A. No.

3 Q. And then finally we've also asked witnesses to consider
4 the phrase:

5 "Failing to do so [to carry out those reasonable
6 steps and investigate with vigour] would be to turn a
7 blind eye to the specific nature of acts that are
8 particularly destructive of fundamental rights."

9 Would you agree with that?

10 A. Yes.

11 Q. Thank you. So if we look at paragraph 60, again you
12 mention:

13 "I cannot recall any specific discussion about the
14 application of Article 2 in my involvement in the
15 investigation, but I was confident that the senior
16 officials leading the investigation were all familiar
17 with the crown's obligations in terms of Article 2 of
18 the Convention."

19 And would that also include Article 14 of
20 the Convention?

21 A. Yes.

22 Q. Yes. And who are these senior officials that -- to whom
23 you're referring?

24 A. Those were the individuals who were more directly
25 involved in the investigation than I was in May of 2015.

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- 1 Q. And who would they be?
- 2 A. So, for example, I had two direct reports, members of --
- 3 colleagues who reported directly to me. One was
- 4 Stephen McGowan and one was Lindsey Miller and I also
- 5 worked very closely with Les Brown who, if I remember
- 6 correctly, was the head of our Complaints Against the
- 7 Police Division, so we had centralised that work, as I
- 8 spoke about earlier, into a dedicated team, and also
- 9 David Green who was the head, if I remember correctly,
- 10 at the time of our Scottish Fatalities Investigation
- 11 Unit. So we had, as I described earlier, in relation to
- 12 deaths investigation brought that work together into a
- 13 dedicated team instead of the traditional model of local
- 14 procurator fiscal investigating deaths within their
- 15 jurisdiction.
- 16 Q. We've heard that Les Brown was the head of CAAPD?
- 17 A. Yes.
- 18 Q. And David -- we've heard from David Green also. He was
- 19 head of SFIU?
- 20 A. Yes.
- 21 Q. We've heard that SFIU was actually a more senior
- 22 position than head of CAAPD, is that correct, in 2015?
- 23 A. I can't -- that could be correct. I can't remember the
- 24 precise grading of the roles at the time.
- 25 Q. All right. And then above that level, Stephen McGowan

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1 and Lindsey Miller?

2 A. Yes.

3 Q. And they both reported to you?

4 A. Yes.

5 Q. Thank you. Could I ask you some questions in relation
6 to training. Could we look at I think page 23, which is
7 paragraphs 107 to 110, but I'm interested primarily in
8 page 23. Some of your answers span more than one page
9 so where I have it, I'll give the page number as well.
10 So this is 107 and it moves on to 110 and this is areas
11 where you've been asked about your training in relation
12 to training within Crown Office within your career.

13 And if we could look at 107, you've talked about
14 operational training in death investigations, FAIs, you
15 include ECHR, homicide investigations. That was in the
16 early stages of your career you've mentioned and they
17 gave theoretical training.

18 108 you talk about attending diversity awareness
19 training, senior diversity training, valuing and
20 managing difference E-learning and you also talk about
21 completing online training through the civil service in
22 relation to unconscious bias, equality, diversity and
23 inclusion and that's also featured in almost every
24 leadership and management training course you attended
25 since you became a manager 1999.

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1 And then at 109 you said:

2 "Crown Office had and continues to have a range of
3 guidance materials on equality, diversity and inclusion
4 available on its staff intranet."

5 We've heard evidence that there's a knowledge bank
6 which is available to staff in Crown Office which
7 contains documents that can give guidance or advice to
8 members of staff in the roles that they're performing in
9 Crown Office; is that correct?

10 A. That's correct.

11 Q. And when you talk about a range of guidance materials
12 being available, is it available on that knowledge bank?
13 Is that what you were referring to?

14 A. It was, yes.

15 Q. Thank you. And we've heard that at one time that might
16 have been hard copies, but nowadays it's all on the
17 intranet?

18 A. Yes, for quite some time. We moved away from
19 distributing hard copy for a number of reasons many
20 years ago.

21 Q. All right. Thank you. I would like to ask you about
22 your -- sorry, excuse me. I would like to ask you about
23 these training courses if I may. Can we begin with the
24 diversity awareness training in 2004 that you mention in
25 paragraph 108. Tell us a little bit about that course,

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1 please.

2 A. My recollection is that that was -- that was a training
3 course that was established by the organisation and was
4 mandatory for all staff. If I'm remembering correctly,
5 it was part of the service's response to the failings in
6 the Chhokar prosecutions and the two reviews which had
7 followed that and it was important that every member of
8 staff in the organisation understood the findings of
9 those reviews, understood what needed to change in the
10 organisation and also that staff were given what I might
11 describe as the fundamental training on the issues of
12 equality and diversity in terms of dealing with the
13 public in performing our duties, as well as aspects of
14 how that also would impact on equality within the
15 workplace. So it was a broad range of issues, but it
16 came out of, I think I'm right in saying, given the
17 timing, it came out of those reviews.

18 Q. Thank you. How long was that course, do you remember
19 thousand?

20 A. I don't. There may be records to confirm it. My
21 recollection is it was either a day or more than one day
22 or then may have been more than one element to it.

23 Q. Right. And did it contain content regarding Article 2
24 and Article 14, as far as you remember?

25 A. I really don't remember. I'm sorry.

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1 Q. Right. And do you remember if there were any aspects of
2 that course that were of particular assistance when it
3 came to dealing with the Sheku Bayoh investigation?

4 A. I don't remember during my involvement in the
5 Sheku Bayoh investigation specifically recalling or
6 relying on any particular aspect of that training,
7 I think by 2015 I think my understanding of the issues
8 was informed by what I might describe as that
9 fundamental level of training in 2004 and then
10 experience built up since then in other matters.

11 Q. Thank you. You then mention senior diversity training
12 in 2010 and, again, can you tell us a little bit about
13 that course?

14 A. My recollection of that is -- is not very detailed I'm
15 afraid. It's simply that this was a more developed
16 course directed towards senior members of staff in the
17 organisation by that stage which sought to update on
18 issues, learning and it was not like the training in
19 2004 directed at all staff, but I don't -- I'm afraid
20 I don't remember the detail of the content of that
21 training.

22 Q. Did it include training on Article 2, Article 14 or do
23 you not remember?

24 A. I simply don't remember.

25 Q. Okay. Were there any other particular lessons that you

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- 1 learned during that training which assisted you in
2 relation to the Sheku Bayoh investigation?
- 3 A. I can't say whether it was that training or whether it
4 was litigation around that time, but a large part of our
5 learning, which I think I drew on in relation to the
6 Sheku Bayoh investigation and in particular Article 2,
7 came from litigation which had drawn out in more detail
8 and more understanding the consequences of Article 2,
9 particularly for death investigations, and so by 2015
10 I think that was the main point that I was focusing on
11 in terms of the Sheku Bayoh investigation and in
12 particular how that should lead the service to engage
13 with Mr Bayoh's family at what must have been an
14 incredibly difficult time for them.
- 15 Q. Thank you. You then mention in 2014 you went on valuing
16 and managing difference E-learning course, was that an
17 online course?
- 18 A. Yes, it was.
- 19 Q. So this was a year prior to the Mr Bayoh's death and I
20 wonder if you can help us understand a little about this
21 course.
- 22 A. Yes, my recollection of that is that it was more
23 focusing on workplace aspects of equality and inclusion.
- 24 Q. Right. So did it include learning in relation to
25 Article 2 or Article 14 regarding investigations?

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1 A. I don't think so, I don't think so, I don't think it was
2 directed to our operational work. I think it was about
3 workplace implications.

4 Q. So was that course of any assistance in relation to the
5 investigation into Mr Bayoh's death?

6 A. Only in the general sense that it was a continuation
7 of -- it was an opportunity to continue and build up a
8 general understanding of issues in relation to equality
9 and diversity and inclusion.

10 Q. Can we look at paragraph 109. You've talked about
11 having a range of materials on equality, diversity and
12 inculusion available. You say:

13 "I consult these materials as when issues arise on
14 which I require guidance or when the guidance has
15 changed. I do not remember consulting the material
16 during the first few days in which I was involved with
17 the investigation."

18 That's into Mr Bayoh's death. Did you have any
19 cause to refer to any guidance that was available or
20 seek it out in any way?

21 A. During that specific time?

22 Q. During that time.

23 A. I don't think so, no. I don't recall, but I don't think
24 I needed to.

25 Q. Did you have any cause to seek it out?

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1 A. Not in relation to this investigation, no.

2 Q. And then at paragraph 10 you say:

3 "I cannot identify any training which would have
4 assisted in my involvement in the investigation."

5 Do you think further training would have been of
6 assistance to you when you became involved in relation
7 to Mr Bayoh's investigation?

8 A. In terms of my own direct involvement, I can't think of
9 anything in retrospect, if I reflect on it, where I felt
10 there was a training -- a personal training need.
11 That's not to say that there isn't value in continuous
12 training in this area, but I can't say that that linked
13 specifically to anything to do with my own involvement
14 in the investigation.

15 Q. In your role as director of serious case work, was there
16 anything which -- any training need that you either
17 identified at the time or subsequently that you would
18 like to share with us?

19 A. I think in general terms one of the priorities in that
20 role was to ensure that I was aware of, for example,
21 developments in any judicial consideration of our work,
22 whether that be in the civil courts or any criminal
23 courts, and so there is -- particularly at a senior
24 level in the organisation there's a particular
25 responsibility on you as an individual to maintain you

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1 are own professional understanding and legal skills and
2 maintain an awareness as -- particularly as case law
3 develops or legislation is introduced which changes
4 matter. That was the other significant area where I
5 would require to spend time keeping myself up to date.

6 Q. You have explained to us how the head of CAAPD and the
7 head of SFIU were actually below Lindsey Miller and
8 Stephen McGowan. In terms of -- who both reported to
9 you -- in terms of identifying training needs within
10 their departments or their units that they were head of,
11 how would that be shared with you or would it be shared
12 with you?

13 A. So that -- I would expect in my role at the time to have
14 known if there were any significant gaps in training
15 needs within either of these units. So for example
16 if -- I can't remember when the units were established,
17 but I would have expected the people responsible for
18 setting up those units to identify the skills and
19 experience of the people joining the units, the
20 requirements of the role that they were moving into, and
21 then, at an individual level, identify what training
22 needs. I wouldn't have expected to be advised of the
23 training needs of each of the individuals in the team,
24 but if that had identified, for example, that there was
25 a significant gap across the entire team that could not

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1 be met from within the organisation, then I would have
2 expected at that stage to know about it because that
3 would have been part of my responsibility to try and
4 make sure that we were taking the steps to plug those
5 gaps.

6 Q. Would you only have expected to be made aware of that if
7 there was a need to go externally for that sort of
8 training or would you have expected to have been -- had
9 that brought to your attention if there was training
10 required, full stop?

11 A. I would have expected if -- to know about it if there
12 was a need for the training full stop. Just to be
13 absolutely clear, I'm not talking about the needs of
14 individuals. I'm talking about a more substantive wider
15 issue within any of these teams then I would have
16 expected to know about that, not necessarily because we
17 had to go externally, but because I would have wanted to
18 know that that had been identified and was being
19 addressed.

20 Q. So in the period up to May 2015 had any issues been
21 brought to your attention where a training need had been
22 identified regarding equality, diversity, inculsion or
23 Article 2 or Article 14?

24 A. I don't remember being advised of any issue like that.

25 Q. All right. Thank you. Can I ask you now about

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1 resources?

2 A. Yes.

3 Q. I think you touch on this in paragraph 113 in your
4 Inquiry statement and you say here:

5 "The investigation was lengthy. I cannot say if it
6 was unduly lengthy because I was not directly involved
7 after 7 May. I am aware generally that it was complex
8 and there was significant engagement with the family's
9 solicitor throughout. The investigation also started at
10 a time when there was an unprecedented number of very
11 complex investigations underway and at a time when
12 resource was much less than it is now (approximately
13 1,500 staff compared to 2,400 in 2023).

14 "Beyond those general observations I cannot make any
15 particular comment about the length of time taken or
16 whether anything could have been done differently, other
17 than to observe that lengthy investigations are
18 incredibly hard for families to bear and cause great
19 damage to wider confidence in the system."

20 I'm interested in the issue of resourcing. We have
21 that heard in around July of the same year, after
22 Mr Bayoh had died, there was also a crash -- M9 fatal
23 crash involving Mr -- Yuill and Bell. We've heard from
24 PIRC witnesses and we've heard from other witnesses that
25 that put considerable pressure on their resources

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1 because that was obviously a very high profile
2 investigation around at about the same time.

3 You've talked here about there being an
4 unprecedented number of very complex investigations
5 underway and I'm interested in your views on resourcing
6 at the time round around about, first of all, May 2015.

7 A. So perhaps if I can explain -- before I talk about the
8 unprecedented number of complex investigations, I could
9 perhaps explain a little background about the resourcing
10 position.

11 Q. Please do?

12 A. So the service by 2015 I think on refectation was coming
13 to the end of a period of about five years where, based
14 on my recollection, the resource available to the
15 organisation had been essentially flat over a number of
16 years and that was because public sector financing after
17 the crash and approximately 2009 or 2010 did not
18 increase in the way that it had been increasing before
19 that and so there was a need for the organisation to
20 essentially operate within a what's described as a flat
21 budget. So the budget was not increasing, but costs
22 would continue to increase so the consequence of that
23 over a period of time is that the resource available to
24 the organisation, the staff available to do the work,
25 decreases. That was not something that I recall was

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1 particular to the Procurator Fiscal Service. It was
2 something which applied across the public sector at that
3 time. Therefore, it was a constraint on a number of
4 different public services.

5 What proved particularly difficult for the
6 Procurator Fiscal Service at that time was the number of
7 very complex investigations which happened to coincide
8 with that period of time. So I could be wrong with some
9 of these dates, but my recollection is that the Clutha
10 helicopter crash happened I think perhaps in
11 November 2013. The incident in George Square involving
12 the bin lorry happened in December 2014. I think, which
13 would be just six months before Mr Bayoh's death.
14 You've referenced the M9 incident. There were -- I
15 can't remember the specifics, but I think there were at
16 the time two ongoing fatal helicopter crash
17 investigations involving the helicopter industry in the
18 North Sea I think. So there were a number of ongoing
19 investigations arising out of unusual incidents which
20 cannot be -- clearly the service has to respond to and
21 cannot be predicted or factored into budget planning and
22 for those to coincide at a time when the resource
23 available to the organisation was not increasing year on
24 year proved a very significant challenge.

25 The response of the organisation to that, which was

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1 led by the Lord Advocate at the time, was to seek
2 additional funding where available from the government
3 for specific large complex pieces of work and I have
4 described up until now some of the death investigations
5 which we were carrying out. There were also a number of
6 complex criminal investigations which were being carried
7 out at the same time. So the organisation, led by the
8 Lord Advocate, did seek additional funding and my memory
9 is additional funding was granted, but that was for
10 specific pieces work and therefore it would be expected
11 to be time limited and it's always very challenging in
12 those circumstances to accurately identify at the
13 beginning of a large complex piece of work what level of
14 resource you're going to need. It's much preferable for
15 the organisation as a whole to be properly resourced to
16 be able to deal with the full range of the work that it
17 faces at any one time.

18 From 2016 onwards that began to change and that is
19 the period of time that leads to the difference that I
20 have referred to in paragraph 113 where the organisation
21 grew from having approximately 1,500 staff to now being
22 somewhere between 2,300 and 2,400 staff and that was a
23 recognition of -- that there was a need for us to meet
24 public expectations, particularly around the speed of
25 investigations, and also to be able to engage with

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1 victims and bereaved families in the way that we would
2 have liked to have done, but that with a lack of
3 adequate resource that becomes a very challenging part
4 of the job.

5 Q. And so those -- that increased resourcing began in 2016,
6 you've said?

7 A. Yes, I can't remember the precise year but,
8 approximately in the period we are talking about the
9 annual resource budget for the Procurator Fiscal Service
10 was £108 million. That began to increase and its
11 current resource budget this year is approximately
12 £220 million. Now, a significant part of that has to
13 take account of the consequences of the Covid pandemic.
14 Specific funding has been made available to the service
15 to deal with, broadly speaking, the consequences for the
16 court backlog, the criminal backlog arising from the
17 court shutdowns and also the death investigation work
18 which has followed from the Covid pandemic. So there is
19 funding built into that figure that I am describing to
20 you of the current budget which will come to an end when
21 our work-related to the Covid pandemic comes to an end,
22 but even bearing that in mind, that puts the
23 organisation now in a very different position from the
24 one it was in in 2015.

25 Q. Thank you. Can I ask you about -- in terms of your role

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1 as director of serious case work, what diversity was
2 there in terms of the staff that you were -- that were
3 under you. So we've heard about Stephen McGowan,
4 Lindsey Miller, and we've heard about the two units,
5 SFIU and CAAPD. Can you help us understand what the
6 position was in relation to diversity of staff?

7 A. I can't recall specifically in the two units that you've
8 described. My recollection is that at that point the
9 areas of responsibility that I had totalled perhaps --
10 I think approximately 6 to 700 staff, but I would need
11 to check, and I can't give you any personal recollection
12 from that time of those units, those two units or that
13 broader area of responsibility.

14 What I can say is that I'm aware generally that this
15 was a period of time where and for some time before 2015
16 the organisation, in response to the reviews that I
17 spoke about earlier, had put a lot of effort into
18 attracting and recruiting staff for all jobs from a
19 diverse range of communities across Scotland and had
20 succeeded in doing that and had, I think, comparatively
21 good data available to the organisation about diversity
22 across the workforce as a whole.

23 By 2015 though that was really reflected in the
24 entry grades to the organisation and the challenge for
25 the organisation, which remains a challenge, is to do

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1 all that we can to ensure that that diversity feeds
2 through into the leadership roles in the organisation.

3 Q. Right. Thank you. Can we look at paragraph 5, please.
4 I would like to move on to your own experience. And you
5 say here:

6 "I have carried out death investigations and
7 supervised deaths investigations since qualifying as a
8 procurator fiscal depute in '96. I cannot quantify the
9 number of death investigations I was involved in over a
10 19-year period and cannot recall whether any of the
11 investigations involved deaths in police custody during
12 or following police contact or whether race was a
13 factor."

14 Given your experience, is it fair to say you have
15 been involved in a large number of deaths investigations
16 over your career in Crown Office?

17 A. Yes, I think I have either directly been involved in or
18 supervised a large number of investigations. I have
19 also in roles where I have not been directly
20 operational, so for example for a period of time, about
21 four to five years, I was the head of policy in the
22 Crown Office. So although I was not directly
23 operationally responsible for any investigations,
24 I would have been closely aware of investigative issues
25 that were being dealt with, progress of investigations,

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1 other developments that affected the work of services.

2 So I think my experience of death investigations
3 goes beyond the operational ones to broader
4 considerations to, for example, that was the period of
5 time when the organisation considered whether it was
6 right to leave death investigations to be the
7 responsibility of individual procurator fiscal or
8 whether there was a better way of doing it. And my
9 memory of it is that Lindsey Miller led a particular
10 piece of work, perhaps about 2010, 2011, and it was her
11 recommendation that the organisation should move away
12 from that model and establish a dedicated team which
13 would build up expertise in deaths investigations.

14 Q. Thank you. You don't recall whether any of them
15 involved deaths in police custody or during or following
16 police contact? Can you reflect on that now? Do you
17 remember if any of them involved deaths in police
18 custody?

19 A. I genuinely can't. I genuinely can't recall, I'm
20 afraid.

21 Q. Does -- if you had been involved in a death in police
22 custody would you have probably recalled or does it not
23 have any indication one way or the other?

24 A. I can't say one way or the other.

25 Q. And you also say you don't recall whether any of the

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1 investigations involving deaths in police custody or
2 contact or whether race was a factor. Do you remember
3 any deaths investigations at all where race was a
4 factor?

5 A. I don't, and in fact on reflecting on that coming here
6 today, I think this is the only death investigation
7 I can recall involving the death of a black man in
8 circumstances like this. I cannot recall any other
9 death investigation which the organisation has dealt
10 with.

11 Q. And that's -- and you have been in Crown Office
12 presumably you started your traineeship in '94?

13 A. That's correct.

14 Q. Qualified in '96?

15 A. Yes.

16 Q. And you're now crown agent?

17 A. Yes.

18 Q. Right. Thank you. Were there other people working
19 beneath you who had experience in deaths in custody
20 where race was a factor, as far as you remember now?

21 A. I would certainly have expected within the death
22 investigation team that in the two to three years that I
23 think it had been established by that stage that there
24 would absolutely have been experience in within that
25 team of dealing with deaths in custody. I can't say

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1 whether any of those would have involved race as a
2 factor or not.

3 Q. Would that have been CAAPD?

4 A. I was thinking of SFIU.

5 Q. SFIU.

6 A. Yes, so for example if a prisoner had died in prison.

7 Q. And we've heard that, at least to some extent, you
8 expected that experience, that knowledge to be centred
9 around SFIU?

10 A. Yes.

11 Q. Now, I am going to move on now to your involvement,
12 which I understand was concentrated between 3 and
13 7 May 2015. But I'm also conscious of the time and I
14 wonder if you could give me a moment to address
15 the Chair. Would that be an appropriate time?

16 LORD BRACADALE: Take a break for 20 minutes.

17 (11.31 am)

18 (A short break)

19 (11.55 am)

20 LORD BRACADALE: Ms Grahame.

21 MS MITCHELL: Thank you. I wonder if we could go back to
22 your statement SBPI 00454 and look at paragraph 3 first
23 of all. You say -- and this relates to your involvement
24 with the investigation. You say:

25 "My recollection is that I was made aware of the

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1 death of Mr Bayoh by phone on Sunday, 3 May [so that was
2 the day he died]. I cannot remember who advised me of
3 the death. In my role I expected to be advised of
4 significant new investigations out of hours. I was
5 involved in oversight of the investigation between 3 and
6 7 May 2015. I was then on leave abroad from Friday,
7 8 May to Friday, 22 May and played no part in the
8 investigation during that time. On my return from
9 leave, my recollection is that I was made aware of
10 developments in the investigation as one of a number of
11 high profile and sensitive investigations then underway,
12 but was not involved in the investigation."

13 Is it fair for me to say that from that paragraph
14 really your primary involvement in the investigation
15 regarding Mr Bayoh's death was between 3 and 7 May 2015?

16 A. That's correct.

17 Q. And beyond that, although matters may have been brought
18 to your attention, you didn't really have any direct
19 involvement in the investigation?

20 A. That's correct.

21 Q. Now, you've also told us that one of the members of
22 staff beneath you is Stephen McGowan, and we've heard
23 his name mentioned and you say at paragraph 16 that in
24 his absence on 4 May, so if we look at paragraph 16:

25 "My duty was to ensure that there was appropriate

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1 strategic coordination and support in Crown Office for
2 the investigation. I would not usually be involved in
3 the detail of an investigation such as this. My
4 recollection is that in the absence of Stephen McGowan
5 on 4 May on leave, I had direct contact with PIRC,
6 (Irene Scullion). I do not recall having direct contact
7 with PIRC after that date. Race was not a factor in my
8 becoming involved directly with PIRC on 4 May."

9 So just to recap, we have heard that the events took
10 place on 3 May, the Monday was a Bank Holiday so that
11 was a Bank Holiday weekend. We understand, we've not
12 heard yet from Mr McGowan, but you're also saying he was
13 off on Monday, 4 May. He may be -- when he comes to
14 give evidence, he may say he was back on 5th.

15 I am wondering if you can help the Chair understand
16 your involvement between 3 and 7 May. Obviously,
17 initially Mr McGowan wasn't present, but then he did
18 become -- he came back from about 5th. I just wonder if
19 you can help us understand your involvement and how that
20 changed when Mr McGowan came back?

21 A. So I had forgotten that Monday, 4th was a public
22 holiday. My recollection is that Mr McGowan was
23 involved on the Sunday, 3 May. I; believe Mr McGowan
24 sent emails confirming the position during the course of
25 that day. I can't remember who it was who called me on

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1 Sunday, 3 May, so it may well have been Mr McGowan that
2 called me on 3rd. But my reference there to him not
3 being available on 4th, is I have, as best as my
4 recollection allows, a recollection that he and I had
5 discussed, perhaps on the Sunday, that he wouldn't be
6 available on Monday and I would therefore in a sense
7 step in and perform some of the functions that he may
8 well have ordinarily performed had he been available.

9 The fact that it was a public holiday for an
10 incident like this would have made no difference to us.
11 We would have carried out the work that was required as
12 we were doing on the Sunday and on the Monday and his
13 role on the Monday would have been to have a more direct
14 involvement than mine, to provide me with updates and
15 to -- he would have been assisting with conversations
16 with PIRC, for example, on the course of the Monday.

17 If the Monday was the public holiday, then we would
18 have all been back in the office on the Tuesday and that
19 would have been the first day we would have had any
20 meetings together, including with the Lord Advocate.

21 Q. So your recollection Mr McGowan was involved on the
22 Sunday, he may have contacted you to tell you about the
23 events, but wasn't available on the Monday?

24 A. Yes.

25 Q. So you were stepping into his shoes on that day. In

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1 terms of your involvement from 5 May then, because
2 you've said that you were involved between 5 and 7 May
3 when Mr McGowan was obviously back at work during those
4 days, can you explain the nature of your relationship
5 during those days?

6 A. With Mr McGowan?

7 Q. Yes.

8 A. Specifically.

9 Q. In terms of your professional -- the work that you were
10 doing?

11 A. So when an incident like this occurs, there are a
12 relatively small number of senior people within the
13 organisation who become involved and so over those days
14 Mr McGowan and I would have been in regular contact
15 everyday. His office in Crown Office was beside my
16 office. We, for an incident like this, would have been
17 talking throughout the day. If we had been in separate
18 locations, we would have been keeping each other updated
19 with emails or phone calls.

20 I don't specifically remember when the first meeting
21 with the Lord Advocate would have been, but that would
22 have been a very important meeting. Very early on that
23 week the Lord Advocate would have required to know the
24 latest position and my memory was that he was at work
25 and available that week and therefore, although I don't

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1 remember when it happened or specifically anything about
2 the meeting, I do remember in a general sense that over
3 the course of those days there were a number of
4 discussions between Mr McGowan and myself, both of us
5 and the Lord Advocate, and our role was to build up a
6 picture of what this investigation would involve, what
7 it would require, and to make sure that critical issues
8 that were arising at that stage were being dealt with.
9 The actual work to do those things would then be done by
10 others.

11 Q. Right. Thank you. You've talked about having direct
12 contact with PIRC on 4 May when Mr McGowan wasn't
13 present. Can you tell us about that contact you had
14 with Irene Scullion?

15 A. I have a very general recollection that I spoke to
16 Irene Scullion on that day. She wasn't someone I had a
17 lot of regular contact with and I'm basing this not just
18 on my recollection, but also I think some of the
19 documents I have seen. I think I've referred to having
20 spoken to her. But my understanding was that -- my
21 recollection is that she was providing me with an update
22 on what PIRC had been able to establish by that stage on
23 the Monday and, if I remember correctly, the postmortem
24 was taking place that day and so the conversation may
25 well have included an update in relation to the

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1 postmortem.

2 But what I was really trying to do was get from my
3 point of view a clear understanding of what PIRC had
4 established and where the investigation was likely to go
5 and to identify if there were any issues that needed to
6 be resolved and then I would have shared that with other
7 people, such as the Lord Advocate or Mr McGowan.

8 Q. Thank you. Focusing on 5 May, so Mr McGowan is present.
9 We've heard that he had a meeting with Les Brown, head
10 of CAAPD, round about 5th or perhaps 6 May and at that
11 meeting, as I understand it, Les Brown was -- he
12 travelled through to Edinburgh to have the meeting in
13 Crown Office and he was advised that he would be taking
14 oversight of the investigation into Mr Bayoh's death.

15 I'm interested to what extent you had involvement in
16 the decision to appoint Les Brown as head of CAAPD to
17 look at the investigation, have oversight of the
18 investigation, as opposed to SFIU who we have heard
19 evidence from David Green that he was involved on the
20 Sunday and he was the one who actually appointed PIRC to
21 investigate on the Sunday, 3 May.

22 Were you party to that discussion or the decision to
23 appoint CAAPD to cover the matter?

24 A. I don't remember the specific discussion you're
25 referring to, but I would have expected to have known

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1 and been involved in discussions at the very least
2 around that meeting, if not actually to be part of that
3 meeting. So it's possible I was there and I don't
4 remember any consideration as to Mr Brown taking the
5 lead on that, but that in my experience would have been
6 the -- would have not been an unusual response to an
7 incident of this nature where Mr Bayoh had died after
8 being in contact with police officers.

9 Q. You've talked about the level of experience that those
10 working in SBPI had in relation to deaths, sudden
11 deaths. I'm interested in if you can help us understand
12 why matters did not remain with the SFIU but were moved
13 to CAAPD?

14 A. My recollection is it was because of the nature of this
15 incident and because it involved Mr Bayoh's contact with
16 the police officers in the morning of 3 May that it was
17 felt appropriate that the investigation should sit
18 there. That doesn't prevent the team investigating it
19 within CAAPD having access to colleagues or expertise
20 who work elsewhere in the organisation, such as SFIU,
21 and both of those elements of work therefore come
22 together at a more senior level involving Mr McGowan and
23 myself and therefore part of our role would be to ensure
24 that there was appropriate coordination in working
25 together between these units. So allocating Mr Brown at

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1 that early stage would not in any way have put any of
2 barriers in place in terms of access to people who
3 worked in SFIU.

4 Q. We've heard that this was the first PIRC report that
5 ultimately CAAPD had received, the first case of this
6 type that they had dealt with. Was that taken into
7 account when a decision was to appoint CAAPD to the
8 investigation into Mr Bayoh's death?

9 A. I don't remember that specific point, but my
10 recollection, as I say, is that it was felt appropriate
11 for CAAPD to lead on this and Mr Brown to lead on it
12 because of the issue of Mr Bayoh's contact with the
13 police on the Sunday morning.

14 Q. Right. And was it your expectation that they would look
15 to any guidance or assistance that SFIU could provide
16 them?

17 A. Yes, plus the individuals in that team, I can't remember
18 who they were now, but I would have expected them to
19 have had, as many of us had, experience of investigating
20 deaths under the previous model as well, so some of them
21 may have had their own individual experience of
22 investigating deaths.

23 Q. We've heard that initially Alisdair McLeod and
24 Erin Campbell were appointed to CAAPD and they prepared
25 work and began to work on the investigation largely to

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1 focus on creating the narrative of the crown
2 precognition. Are you aware of their experience and
3 background at that time?

4 A. Other than they were experienced procurators fiscal
5 deputes, I don't have any detailed knowledge of their
6 background at the point. I'm not sure even what point
7 they were appointed to the team.

8 Q. They were appointed at a later stage after the final
9 PIRC report had been received by Crown Office.

10 A. I see. At that stage, I wasn't involved and I'm not
11 even sure I was aware that they had been appointed.

12 Q. All right. And were you aware that Fiona Carnan had
13 been appointed to prepare the analysis of the crown
14 precognition?

15 A. No, I wasn't.

16 Q. Can I ask you to look at -- first of all, perhaps can we
17 look at the question, question 27 in SBPI 00441. This
18 was the request for your witness statement, your
19 response. It may be easier to begin with the question.
20 And you were sent a document, a PIRC briefing document,
21 and referred to a number of matters.

22 You were asked, if you can look through the body of
23 that:

24 "To what extent was the factual information accurate
25 to your understanding at that point in the

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1 investigation?"

2 That was particularly directed towards the briefing
3 note that was sent to the Lord Advocate.

4 "In particular, was it the case that Crown Office
5 had instructed PIRC in writing under section 33A(b) (i)
6 of the 2006 Act and did you understand that PIRC FLOs
7 had engaged with Mr Bayoh's family the night before and
8 PIRC were confident that a relationship could be
9 established?"

10 There's three different elements in that question.
11 So the first is the briefing note that was sent to the
12 Lord Advocate. The second relates to section 33A(b) (i),
13 and the third relates to FLOs, and the relationship.

14 Can I ask you some questions about this. First of
15 all, could I ask you about the instruction to
16 Crown Office. It may be of assistance if we look at a
17 document called the memorandum of understanding between
18 PIRC and Crown Office, which is PIRC 04453, and it sets
19 out the different sections of the Act that's referred to
20 there. It might be easier to have that on the screen
21 when we go through this.

22 We can come back to that. But in the meantime,
23 let's look at email COPFS 02685, and I'm interested in
24 page 1. This is an email dated 5 May 2015 at
25 8.35 hours, and it's from you to a number of people, the

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1 private secretary of the Lord Advocate and then a number
2 of people are cc'd into that. Do you see that?

3 A. Yes.

4 Q. And if we can move, let's look at that. You enclose a
5 briefing received from PIRC last night on the
6 circumstances of the incident. And it says:

7 "The key issue here is that Crown Office has
8 instructed PIRC to investigate the incident in terms of
9 section 33A(b) (i) of the 2006 Act as [and this is in
10 quotation marks] 'circumstances in which there is an
11 indication a person serving with the police may have
12 committed an offence'."

13 Now, we've heard evidence from other witnesses that
14 section 33A(b) has two paragraphs, 1 and 2, and 1 is
15 where they think a criminal offence has been committed
16 and the second relates to investigating the
17 circumstances.

18 Now, we've heard evidence from PIRC investigators
19 who were under the impression that they had been
20 instructed by the crown to investigate the circumstances
21 of Mr Bayoh's death, but in this email you seem to be
22 sending an email to the private secretary of the
23 Lord Advocate saying actually it was an investigation
24 into circumstances in which there was an indication that
25 the police may have committed an offence, ie a criminal

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1 offence.

2 A. Yes.

3 Q. Can you think back now to your recollection on 5 May and
4 whether you did, as you have said there, think that this
5 had potentially been a criminal offence that was being
6 investigated?

7 A. Yes. So just if I can perhaps clarify the purpose of
8 this update, which was sent just after half past 8 in
9 the morning. I think I have seen elsewhere, and it may
10 be further down in this email chain, I think this was
11 being sent in response to a request from the privacy
12 office.

13 Q. Let's -- we can look at the bottom if that would help.
14 If we look at the bottom of this. If we go to the
15 bottom and work our way up.

16 A. Yes, sorry.

17 Q. Sometimes email threads are quite --

18 A. It's immediately just before my own email so if you
19 continue going up, continue, there. So this is a
20 request to me which if you just go a little higher might
21 show the time. Yes, that's as I remember it. So just
22 early that morning.

23 Q. This is 5 May at 9 minutes past 8 in the morning.

24 A. Yes, so the Lord Advocate's private office was
25 requesting an update because, as you can see from the

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1 email there, the Lord Advocate was attending Cabinet and
2 so it was important. In those circumstances, I would
3 not have had a chance to meet the Lord Advocate that
4 morning, but it was important before he attended Cabinet
5 that he was fully aware of everything that we had been
6 able to establish up until that point in terms of the
7 nature and scope of the incident and the investigation
8 and so that was the purpose of my email, which I think
9 was just typed in response to that.

10 Q. Keep going up. This is the one that -- this is your
11 briefing.

12 A. Yes.

13 Q. So:

14 "I enclose a briefing received from PIRC last
15 night."

16 We've heard that there was a briefing dated 3 May
17 that had been prepared. We can look at that in a
18 moment, and then this is where you say it's a 33A(b) (i)
19 investigation.

20 A. Yes. Now, what I can't remember is when the formal
21 written instruction was given to PIRC. That wasn't
22 something that I had been involved in, but what I was
23 trying to convey here in that paragraph for the benefit
24 of the Lord Advocate was I think my recollection is that
25 from the very beginning, given the report of the

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1 circumstances in which Mr Bayoh had died, it was
2 apparent to us that our death investigation would have
3 to consider the question of whether or not there was any
4 criminal offence on the part of the police officers who
5 had restrained him.

6 And I think that's what I was trying to convey here
7 at that point on the Tuesday morning was that we were
8 alive to that issue and focused on that and, therefore,
9 as is common in a number of -- it's not unusual in death
10 investigators that the procurator fiscal carries out for
11 it not to be clear at the beginning whether or not the
12 circumstances of the death involve the commission of a
13 crime and, therefore, the role of the procurator fiscal
14 is to consider at all times and be aware of that
15 possibility and, if necessary, to take the appropriate
16 steps, if it becomes apparent that a crime has been
17 committed.

18 And so although the legislation is divided into two
19 parts, that doesn't reflect the nature, I think, of many
20 of the investigations that the procurator fiscal carries
21 out, because it's not always possible to say at the
22 beginning definitively that it's one way or the other.
23 There may be circumstances, as I understand there were
24 in this case, where ultimately a full criminal
25 investigation is carried out.

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1 Q. Okay. So was it your expectation that PIRC were
2 essentially carrying out what you've described as a full
3 criminal investigation into the events?

4 A. It was my view at that stage that it was inevitable that
5 PIRC would have to in investigating this matter consider
6 whether any of the officers had committed any criminal
7 offence. That was part of our investigation, the
8 crown's investigation, and we would require PIRC to
9 investigate that matter on our behalf and provide us
10 with whatever evidence they could find on that matter.

11 Q. And was it your view that that was the appropriate
12 section from the Act which PIRC should be instructed
13 under?

14 A. I think my reference to it then on the Tuesday morning
15 was an indication that I did not -- so for example if I
16 had defined it by reference to the subsection (2), that
17 to me would have seen -- I would have viewed that as
18 being too narrow an investigation. It was important to
19 convey to the Lord Advocate and to others that we
20 regarded this as being one of potential criminality.

21 Q. And when you say "others", are those persons in the
22 Cabinet?

23 A. This is not necessarily information provided for the
24 Lord Advocate for him to share at Cabinet, but it's
25 important. It clearly was by the Tuesday morning a high

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1 profile event and it was important for him to be aware
2 not so that he could share any information with Cabinet,
3 but if the issue was being discussed it was important
4 for him to be able either to intervene and make it clear
5 what the appropriate role of Scottish ministers would be
6 and, therefore, in order to do that he has to be fully
7 briefed on what we knew at that stage.

8 So it's very common in an investigation of this
9 nature that's going to be large and complex, that's very
10 high profile from the very beginning, that we seek to
11 give the law officer as much information as we have so
12 that if they are -- so for example in attending Cabinet,
13 I can't remember which -- who the members of Cabinet
14 were at the time, but it's possible, for example, he may
15 meet an MSP who has a constituency interest in the
16 matter or there are a number of things that may happen
17 during the course of the Lord Advocate's day and it's
18 simply at the start of the day giving him a full
19 picture.

20 Q. We have heard evidence that the first written letter of
21 instruction was sent to PIRC on that same day, 5 May but
22 at that stage the instruction did not specify between
23 (b) (i) and (b) (ii). Was there a particular reason for
24 that?

25 A. I'm not aware of any particular reason. I don't think

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1 I was involved in the preparing of the letter or sending
2 it so I can't -- I'm afraid I can't help with that.

3 Q. We've also heard evidence from PIRC witnesses who said
4 their understanding was that they were being asked to
5 investigate the circumstances, effectively a (b) (ii)
6 investigation, rather than (1), which was under (b) (i).
7 Can you explain it why that would -- that impression
8 would have been given to PIRC witnesses?

9 A. I can't explain why they would have that impression. As
10 I say, if I had had the conversation at the time,
11 I would have -- I would have tried to explain it to PIRC
12 myself in the way that I have tried to explain it to
13 the Inquiry this morning that, yes, this is a -- at this
14 stage this is an investigation into the death of
15 Mr Bayoh, but it is important as that investigation
16 proceeds that the investigators consider the potential
17 for any evidence of any criminality.

18 Q. So we've heard from you that you think Mr McGowan was
19 involved on third when PIRC were instructed over the
20 telephone to investigate the death of Mr Bayoh. We've
21 heard it was you who was in position on 4 May.

22 If it appears that there was some confusion on the
23 part of PIRC as to the basis upon which they were being
24 instructed by the crown in the period between --
25 until -- up until 5 May, can you explain how that

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1 miscommunication or misunderstanding could have arisen?

2 A. I'm afraid I can't. My recollection is that this email,
3 as you can see, is sent to people within the
4 Crown Office and Procurator Fiscal Service. I'm not
5 aware -- I don't recall receiving an email for example
6 from anyone that it was circulated to saying that's
7 wrong or that's incorrect. My view of that was that
8 what I was sharing there was something that was
9 apparent. There were a number of things that were
10 apparent to us from the very beginning of this
11 investigation and I was formally recording there that
12 one of those things would be the need for us to very
13 carefully consider the question of criminality.

14 Q. Thank you. In relation to the -- there's mention of the
15 briefing document there was in the question. Can we
16 look, please, at PIRC 03694. And you'll see this is
17 dated 3 May, 2015, "Briefing note for director of
18 investigations. Death of Mr Bayoh", and then there's a
19 document giving background information. Do you
20 recognise that document?

21 A. Yes.

22 Q. Is this a briefing note that was attached to your
23 previous email to the private secretary of the
24 Lord Advocate?

25 A. Yes, I believe it is.

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1 Q. And this was for sharing with the Lord Advocate?

2 A. Yes.

3 Q. And can we look at page 2, paragraph 4 and you will see
4 there -- we have heard evidence about this. It says:

5 "It was reported that as the officers drove into the
6 Hayfield Road they saw the now deceased coming towards
7 them as the vehicles came to a halt. They could clearly
8 see he was in possession of a knife and was making his
9 way towards them. Some of the officers, unknown how
10 many at this stage, drew their police-issue batons. At
11 least one of the officers also drew their PAVA spray and
12 issued a warning to the now deceased who continued to
13 come forward."

14 So this appears to have been information that was
15 reported in relation to the events at Hayfield Road,
16 namely that Mr Bayoh could be clearly seen by the
17 officers in possession of a knife and after a warning
18 was issued, he continued to come forward.

19 In terms of that information, did you have an
20 impression about the circumstances at Hayfield Road
21 based on what was contained in the briefing note?

22 A. Other than the information that is described to me
23 there, that was the extent of my understanding of what
24 PIRC were conveying in that note which was dated on 3rd,
25 the Sunday, but I think it's important to say that my

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1 experience in complex death investigations and major
2 incidents, and this investigation shares many features
3 of a major incident perhaps, something that might
4 involve the death of many people at the same time, is
5 that the position is rarely clear at the beginning,
6 rarely clear, and so I --

7 My own personal approach to these matters is that
8 from the very beginning you have to work with the
9 information you're provided, but you do not at any stage
10 at that point in an investigation begin to narrow the
11 investigation or reach any conclusions. You simply,
12 particularly at the beginning, are concerned to properly
13 identify the scope of the investigation and make sure
14 that nothing is missed. And so to the extent I was able
15 to form a view, it was simply no more than this was what
16 was available to us at the time and I didn't form any
17 view beyond that, because, in my experience, it was far
18 too early in the investigation to begin to form any
19 particular view.

20 Q. So in terms of your impression of this briefing note, I
21 have asked other witnesses about whether they formed the
22 impression that the police were acting in self-defence,
23 were you not forming any real impressions about the
24 matter at this stage?

25 A. Well, it's difficult to -- it's difficult to recall the

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1 precise detail, but for example it wasn't -- I don't
2 think it was necessarily clear to me. I could be wrong
3 and it could be clear elsewhere in this note. I don't
4 think I have seen this note recently. But my
5 understanding was that the PIRC assessment was based not
6 only on information from the police, but information
7 perhaps from other members of the public who may have
8 seen what happened and, therefore, I assessed this as I
9 was reading a summary of all of that, but the paragraph
10 does say at points "where they could clearly see" in the
11 reference to the police officers.

12 So what I take from this is that the police officers
13 were providing an account that was consistent with this
14 and that they -- they describe Mr Bayoh at that time as
15 acting in this way. Whether or not that is actually
16 what happened would have to be established during the
17 investigation.

18 Q. Did this information have any impact on your role and
19 the approach you took at the outset?

20 A. No, I don't think it did.

21 Q. Right. Now, when I looked at question 27, I said there
22 were three points and one was the section 33A point, the
23 other was the briefing note and the final one related to
24 the PIRC FLOs and you were asked if you understood that
25 PIRC FLOs had engaged Mr Bayoh's family the night before

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1 and PIRC were confident that a relationship could be
2 established.

3 Was that your understanding as at this date, 5 May,
4 or had you been advised that there were some issues
5 emerging in relation to PIRC's engagement with the
6 email?

7 A. My email isn't on the screen, but I think in my email
8 I'm describing for the benefit of the Lord Advocate that
9 there had been some difficulties that Mr Bayoh's family
10 had. I think without me really understanding the
11 details of what had caused this that they were
12 understandably, as any family would be, concerned about
13 how Mr Bayoh had died in circumstances where there were
14 a number of police officers involved and so I'm not sure
15 that I was more -- I was aware of anything more specific
16 than that, that just that it was proving difficult in
17 those early stages for the family liaison officers to
18 establish a trusting relationship in the way that I
19 would want it to be at the very early stages.

20 Q. I don't want you to be at a disadvantage. Let's put the
21 email back on the screen.

22 A. Yes, sorry. I think I said something about that.

23 Q. COPFS 02685 I think. There we are. And there's mention
24 of FLOs in the fourth paragraph:

25 "We understand the transition of the investigation

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1 to PIRC was completed yesterday [so that would have been
2 4 May] and that PIRC FLOs have established contact with
3 the deceased's family. After an initial difficult
4 meeting, indications last night were that the family
5 were beginning to engage with the FLOs and PIRC is
6 confident that a relationship can be established."

7 So that would appear to refer to the previous
8 evening, which would be 4 May, and that PIRC were
9 confident that a relationship between the PIRC FLOs and
10 the family could be established; is that what you're
11 remembering?

12 A. Yes. Now that I see that that is slightly more specific
13 than I could remember but, yes, I'm clearly relaying to
14 the Lord Advocate either information I gained from any
15 of the phone calls I'd made or any of the briefing
16 documents that I read.

17 Q. And does that -- now that you see the email, does that
18 accord with your recollection of the information you had
19 on 5 May?

20 A. Yes, I see in particular in the next paragraph I go on
21 to specify that Mr Bayoh's family had concern that what
22 they had been told at the beginning to them just didn't
23 seem right and, therefore, that that alone
24 understandably would make it very difficult for them to
25 be I suppose willing to trust any official organisation

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1 at that stage that was trying to establish a
2 relationship with them.

3 Q. All right, Thank you very much. I would like to ask you
4 some questions. We've talked about the -- we can take
5 that off the screen. We've talked about Article 2 and
6 the five procedural obligations and one of them is
7 independence.

8 We've heard evidence that and you've mentioned that
9 the postmortem was conducted on 4 May. That was the
10 Monday. And we've also heard evidence from Mr Little,
11 who was then the lead investigator for PIRC, that he
12 sought information about whether blunt force trauma
13 caused the death of Mr Bayoh and he sought that at the
14 end of the postmortem from Dr Shearer who was one of the
15 pathologists who was carrying out the postmortem. And
16 the preliminary views at that stage, certainly by
17 Dr Shearer, were that blunt force trauma had not caused
18 the death.

19 We've heard evidence that that information from the
20 postmortem was later shared with the officers who had
21 attended at Hayfield Road and I wondered if you have any
22 thoughts or comments you would like to share about PIRC
23 sharing information from the postmortem with police
24 officers who had attended at Hayfield Road?

25 A. So without knowing the precise circumstances in which

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1 that happened, my starting point would be to assume
2 that -- well, my guiding principle would be that the
3 police were not carrying out this investigation. PIRC
4 was carrying out this investigation on the instruction
5 of that crown. This was an investigation which was led
6 by the crown and being carried out by PIRC. I would
7 therefore not expect, as a general principle, PIRC to be
8 sharing any information with any party without having
9 discussed it with the crown first.

10 Now, whether it was then shared for any specific
11 purpose in order to advance the investigation, I don't
12 know, but I can't imagine beyond that that there would
13 be any basis for a discussion between PIRC and the crown
14 as to whether it would be appropriate to share
15 information from the postmortem.

16 Q. We have heard evidence from Mr Little that he shared --
17 he authorised the sharing of that information in the
18 hope that officers who had attended Hayfield Road would
19 then provide statements which they'd not been willing to
20 do up to that point.

21 Is that something that you think crown permission
22 should have been sought before that was done?

23 A. I would have expected the sharing of any investigative
24 material by the investigating agency which has been
25 instructed by the crown to discuss that with the crown

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1 before doing that.

2 Q. And you have explained to us that Mr McGowan wasn't
3 present on the 4th, that Les Brown, we've heard, hadn't
4 been appointed until the 5th, but you were present.

5 If you had been approached by PIRC and asked for
6 permission to share information from the postmortem with
7 police officers who had attended Hayfield Road and who
8 had not yet given statements, is that something that you
9 would have been willing to give?

10 A. I think in the absence of there being a clear need in
11 order to advance the investigation, I don't think
12 I would have agreed to that. I would have wanted to
13 protect the integrity of the investigation by ensuring
14 that information was shared only at the right time and
15 in the right way with correct people.

16 Q. When you say "a clear need", can you give us an example
17 of what you mean by a clear need?

18 A. It's very difficult to provide a specific example in the
19 circumstances of this case, but if in a postmortem the
20 investigating agency thought it was appropriate to share
21 information from the postmortem in order to then find
22 out something else, and I appreciate this is very
23 general, it's difficult on the spot to be specific with
24 an example, but if for example there was a need to test
25 eyewitness evidence by reference to something at the

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1 postmortem which was inconsistent with that eyewitness
2 evidence, then that would appear to me to be a valid
3 reason for the investigator to then, in inappropriate
4 circumstances in the right way, share with that
5 eyewitness that to test whether or not their evidence
6 stood up to scrutiny.

7 Q. And if it was shared to try to get the police officers
8 to give statements, would you consider that to be a
9 clear need?

10 A. Without knowing the full detail of what happened, on the
11 face of it, no, that doesn't appear to me to be
12 something that I would have agreed to just simply in
13 order to encourage police officers to give a statement.

14 Q. And if we've heard evidence that the information about
15 the postmortem was shared with the police officers who
16 attended at Hayfield Road prior to the family being
17 advised, do you have any thoughts or views on that?

18 A. I think that is especially problematic, because I think
19 we recognise from the very beginning that it was
20 important in this case to have good clear channels of
21 communication with Mr Bayoh's family and to ensure that
22 they were provided with information as quickly and as
23 accurately as possible. In a case like this where you
24 have an understandable concern on the part of the family
25 as to how Mr Bayoh had died and the potential

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1 involvement of others in that death, then it's very
2 clear to me I think that a family would be very
3 concerned to hear that information was being shared with
4 others who may be, at the very least, critical witnesses
5 as to how Mr Bayoh had died.

6 Q. Thank you. I would like to ask you some questions about
7 rib fracture and I would like for this purpose to get
8 you to look at a document which was a briefing note that
9 was prepared in 2020, so sometime after the concerns and
10 is in relation to this particular issue of the rib
11 fracture.

12 Could we look at COPFS 02126A, please. And it's
13 quite a lengthy document. I'm interested in the section
14 on rib fracture, but first of all you'll see it was
15 prepared by Alisdair McLeod, who was the senior
16 procurator fiscal depute at CAAPD, on 28 February, 2020
17 and it was sent to the then head of CAAPD, and copied to
18 Fiona Carnan, who was the precognoscer, and it talks
19 about -- it's to:

20 "Detail and timeline the work carried out by CAAPD
21 between 3 May 2015, the date of Mr Bayoh's death, and
22 11 November 2019."

23 And if we can move down -- sorry, I have not got a
24 note of the actual page. There is a paragraph that's
25 headed up "in relation to rib fracture". If we can just

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1 go down, we'll say it. There we are. I will just read
2 this out:

3 "During the analysis of the statements it was noted
4 that three of the officers involved in the restraint had
5 made reference to hearing the deceased fracturing a rib
6 during the administration of CPR."

7 Were you aware of the issue regarding the rib
8 fracture in your involvement?

9 A. No, I wasn't, no.

10 Q. "The deceased's ribs appeared to be impact at the
11 postmortem on 4 May. However, a fracture to his left
12 first rib was discovered following a further examination
13 by the pathologists on 29 May 2015. That same day
14 Mr Brown advised [that's Les Brown head of CAAPD at the
15 time] Anwar & Company and PIRC about the deceased's rib
16 fracture.

17 "In his statement dated 4 June PC Walker told PIRC
18 he heard the sound of a rib cracking when he was
19 carrying out CPR. At this time PC Walker handed over an
20 undated pre-prepared statement to PIRC. Notably in this
21 statement PC Walker made no reference to hearing a rib
22 crack during CPR."

23 So just to recap there before we move on to the next
24 page, postmortem is on 4th, they discover the rib
25 fracture on 29 May, on 4 June, a few days later, the

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1 police officers give statements to PIRC and PC Walker
2 was one of those officers and he had prepared a
3 statement himself, it was undated, and he handed that
4 over to PIRC on 4 June. And in that statement, which
5 related to a period prior to 4 June, there was no
6 reference to hearing a rib crack during CPR.

7 If we can move on:

8 "Two other officers, PCs Paton and Tomlinson, also
9 made reference in their PIRC statements dated
10 4 June 2015 to the deceased's rib fracturing during CPR.
11 Within the PIRC report medical experts instructed by
12 PIRC put forward various scenarios as to how it could
13 have occurred. The crown carried out extensive further
14 independent inquiries in relation to the deceased's rib
15 fracture. Although the rib fracture did not lead to
16 Mr Bayoh's death, the precognoscers recognised that it's
17 very existence may have illustrated the force and
18 mechanism of restraint used by the officers."

19 And then there was reference to a Professor Freemont
20 who was an osteoarticular pathologist and a specialist
21 in bones. And then at the bottom of the page we see
22 there it says:

23 "The precognoscers found it of interest that the
24 information about the rib fracture, which was only being
25 made known to PIRC on 29 May, was somehow potentially

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1 being explained away by three of the officers when they
2 provided statements on 4 June. After careful
3 consideration of all the evidence, there was
4 insufficient evidence to make any more of it, other than
5 to say it was suspicious and potentially called into
6 question the integrity of the PIRC investigation at that
7 point."

8 I'm interested in this matter, partly against that
9 background of independence and the independence of PIRC
10 from the police service and we've look at this
11 disclosure of the postmortem -- some information from
12 the postmortem on 4 May and I'm interested in this
13 briefing note prepared on behalf of Mr MacLeod for the
14 head of CAAPD. Were you aware that there were these
15 concerns about the integrity of the PIRC investigation
16 at this time?

17 A. No, no.

18 Q. Had you been aware of these concerns about the integrity
19 of the PIRC investigation, are there any steps you
20 particularly would have taken in this regard?

21 A. Just to clarify you mean at the time in May of 2015?

22 Q. Yes.

23 A. Yes, I think if I had had concerns of that nature,
24 I would have insisted on, at the very least, a meeting
25 with the Commissioner to understand. I would want to

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1 understand, firstly, what had happened, why it had been
2 done, and I would then work with colleagues to determine
3 what the consequences of that were and what should be
4 done and that would focus on giving advice to the
5 Lord Advocate.

6 Q. And when you say what had happened and what had been
7 done, was that both in relation to the postmortem and in
8 relation to these concerns about the rib fracture being
9 mentioned?

10 A. I think I'm just offering a general comment on --
11 I think your question was what would I have done if I
12 had had any concerns and I'm really just able to answer
13 that in a very general sense that if I had had any
14 concerns, if I'd seen anything which indicated to me
15 that I had concerns about the independence of the
16 investigation, then I would have wanted to address that
17 directly with the PIRC, not necessarily myself, but
18 I would have wanted to ensured that it was being
19 addressed with the Commissioner themselves.

20 Q. And you would have wanted to ensured presumably it was
21 independent of the police?

22 A. Absolutely. It was one of the features that I remember
23 from the very beginning of this investigation, and we
24 you may come one to ask questions about my later
25 involvement later in the summer, but I think there was

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1 another aspect of it then was that PIRC was a new --
2 relatively new organisation in the same way that
3 Police Scotland was a relatively new organisation and it
4 seemed to me that there was a general lack of public
5 understanding and I would include in that understanding
6 in the media or amongst people who would have an obvious
7 interest, such as politicians, there was a general lack
8 of understanding about the role of PIRC and its
9 independence.

10 And I think part of my involvement later in the
11 summer was to provide the Lord Advocate with information
12 or briefing that would help publicly to try and make
13 clear the distinction that PIRC were operating
14 independently of the police under the instruction of the
15 crown. This was not a police investigation and I can't
16 remember any specific details, but I have a general
17 recollection that there was a sense in the early days
18 that Mr Bayoh's death was being investigated by
19 Police Scotland and it was important for us to be clear,
20 not least with Mr Bayoh's family, that that was not the
21 case.

22 Q. Right. Can we move on to another topic. If we go back
23 to your Inquiry statement, this covers paragraphs from
24 61 to 75. There we are. And I'm interested -- I
25 suppose this relates to public scrutiny, media

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1 engagement, and I think this is where you talk about
2 media engagement. At paragraph 61, you say:

3 "Crown Office takes the lead in investigations in
4 communicating information to the public in order to
5 ensure that the release of information does not
6 compromise the investigation or future legal
7 proceedings. Releases of information by Police Scotland
8 or PIRC during an investigation are routinely cleared
9 with Crown Office in advance."

10 So is that your expectation that really the crown
11 will be charge which and take the lead many
12 communicating any information to the public?

13 A. Yes. In an investigation like this, the investigating
14 agency is acting on behalf of and under the instruction
15 of the crown and it's the crown's ultimate
16 responsibility to make sure that the release of
17 information, as I say there, doesn't compromise the
18 investigation.

19 Q. Do the crown also keep control of the extent to which
20 PIRC are permitted to release information?

21 A. That is my view. My view is that having been instructed
22 by the crown to carry out this investigation, PIRC was
23 in no different position from the police would routinely
24 carry out an investigation and, therefore, I would have
25 expected PIRC to discuss and clear any communication --

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1 public communication with us.

2 Q. And you've mentioned the police, does that situation
3 differ regarding the police when it is members of the
4 police service that are being investigated or do you
5 still expect the crown to have control and the authority
6 to decide what information is released by the police?

7 A. I don't think it makes any difference who is being
8 investigated, whether it's members -- whether it's
9 police officers or others. If there is an investigation
10 underway, it is the crown's investigation and it's the
11 crown's responsibility to ensure that the release of
12 information is coordinated and appropriate and in the
13 right circumstances also that the information -- for
14 example that the family should not read about
15 developments in the media. That's another
16 consideration.

17 So there are a number of factors that go into close
18 coordination of the release of information. I should
19 say though my experience is that it is often one of the
20 most problematic areas in investigations which are
21 complex, moving at speed and a number of different
22 people and agencies are involved. I have experience in
23 other investigations where information is released
24 without having been cleared with the crown or experience
25 of it working in the way that I would expect. I have

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1 experience of it working that way where the information
2 is discussed and the crown gives its approval to the
3 release of the information. In some cases, depending on
4 the circumstances, that could extend up to and include
5 the Lord Advocate approving the release.

6 Q. And you've said that that release of information can be
7 problematic. What sort of problems can occur when
8 information is released without getting the approval or
9 the say so of the crown?

10 A. Well, I've already -- I've already mentioned the problem
11 that can cause for bereaved families. If it's not
12 properly coordinated with information that's been given
13 to the families, then you can end up in a situation
14 where the families learn things through the media. That
15 is in my experience I have seen that happen and it's
16 very distressing for families.

17 Beyond the interests of the bereaved relatives, our
18 overwhelming priority is to ensure the integrity of the
19 investigation in any subsequent legal proceedings. So
20 we in general sense -- in a general sense we will always
21 priorities that over the release of information. If
22 there's any concern, we will seek to ensure the
23 integrity of the investigation.

24 Q. You've talked about the investigating bodies. You've
25 mentioned PIRC, you've mentioned Police Scotland. Can I

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1 ask you, do the crown have any authority to have some
2 input or to take the lead on communicating information
3 that is coming from other bodies such as SPF?

4 A. By SPF you mean the Police Federation.

5 Q. The Scottish Police Federation.

6 A. No, the Scottish Police Federation would not be part of
7 any investigation and therefore the crown would take no
8 responsibility for that matter. The SPF to my mind is
9 essentially a trade union and therefore it's a matter
10 for them to decide what they do and say in relation to
11 any matter involving their members.

12 Q. So there's no involvement of crown in approving press
13 releases or anything of that sort?

14 A. I've never known us to be involved in discussing, never
15 mind approving, anything that the
16 Scottish Police Federation would issue. I'm not sure
17 the Scottish Police Federation would regard it as
18 appropriate either.

19 Q. Perhaps not.

20 Can I ask you to look at paragraph 62. We can see
21 the beginning of it on the page:

22 "It was important following the media reporting of
23 an investigation in order to ensure that there was no
24 misreporting or misunderstanding of the investigation
25 and to ensure that the investigation was not prejudiced

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1 by media reporting. It's also necessary to ensure that
2 Crown Office is able to answer questions posed by the
3 media. This is a standard feature of all
4 investigations, particularly in high profile and
5 sensitive investigations which attract significant media
6 interest. Investigative decisions are not influenced by
7 media reporting. I have never been aware of this in my
8 career of almost 30 years."

9 I'm interested in your thoughts on what you say at
10 the beginning of that paragraph, you follow the media
11 reporting of an investigation in order to assure there
12 was no misreporting or misunderstanding of the
13 investigation. Can you tell us a little bit more about
14 your concerns in relation to that, misreporting and
15 misunderstanding?

16 A. Yes, I think what I have in mind there is that any
17 misreporting or misunderstanding would almost
18 immediately damage the confidence of the bereaved
19 relatives in any investigation and then more widely, as
20 the investigation proceeds, I have experience that
21 misreporting or misunderstanding of an investigation can
22 cause lasting damage to wider public confidence in an
23 investigation, because inaccurate information simply
24 becomes accepted as truth, just simply because it has
25 been reported on a previous occasion.

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1 And therefore it's vital that, particularly in the
2 early stages of an investigation where the facts are
3 still being established and there may not be clarity and
4 in fact sometimes the understanding can change over a
5 relatively short period of time, it's very important to
6 understand what is being reported in relation to an
7 investigation and, if necessary, try to deal with the
8 consequences of that.

9 Q. Can you help us understand if there is misreporting, a
10 misunderstanding could arise or misinformation generally
11 being shared in the media, what steps can the crown take
12 in relation to that?

13 A. There are a variety of steps depending on the context.
14 If it was felt that that had arisen just simply because
15 the media organisation had misunderstood something, then
16 we would informally contact the organisation and try to
17 have it corrected. If we felt there was something more
18 substantive behind it, then we would really need to look
19 at the precise circumstances and try to address that.
20 That might mean engaging with people directly and more
21 formally, asking them to refrain from continuing to
22 misreport. If it was -- if it came from an aspect of
23 the investigation, then it would require us to take
24 steps to make sure that that aspect of the investigation
25 was no longer causing the misunderstanding.

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1 It is a feature now of our investigations that that
2 task that I'm trying to describe has become much more
3 difficult simply because of social media and the nature
4 of modern reporting makes that much more difficult thing
5 to do. So at the very outer edges of what we are
6 focusing on, it is unfortunately a feature of modern
7 investigations that there will always be very -- in some
8 circumstances very widespread inaccurate comment by
9 people who know nothing about an investigation or are
10 proceeding on a false basis.

11 There's a very limited amount that the crown can do
12 about that type of reporting, but much closer to the
13 heart of the investigation, if it's possible to do
14 something to correct it, we would do that and that would
15 include trying to address any misunderstanding or
16 concerns on the part of the bereaved relatives.

17 Q. Thank you. Looking at the paragraph 65. I think you
18 say you've no knowledge of SPF's role, you have no
19 experience of involvement in any other case and would
20 not regard it as appropriate for Crown Office to comment
21 on proposed SPF media releases, because SPF was not an
22 investigating agency acting under the instruction of the
23 crown. It would be for Police Scotland to deal with the
24 actions of SPF.

25 A. Yes.

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1 Q. And so do you consider that to be something that
2 Police Scotland would have some influence or authority
3 in relation to but not crown?

4 A. Yes, from the perspective that Police Scotland operates
5 as the employer and the SPF operates as the trade union
6 then I would have expected any actions by the trade
7 union which were causing difficulties to be dealt with
8 by the relative employer.

9 I have to say in making those comments in paragraph
10 65, I have no specific recollection of anything that the
11 SPF did or said in relation to the investigation and I
12 could be wrong, but I don't think I was directed to any
13 particular communication that they issued, so these are
14 very general comments.

15 Q. Okay. I would like you to look at something for me,
16 PS04984. We have heard evidence about this. This is an
17 email thread, and if we can go to the bottom, I think.
18 And we can see the sort of first email that comes.

19 This is from William Little who was the -- his role
20 in PIRC was deputy senior investigator and if we can
21 look at the email he sent. So this is an email sent on
22 14 May, 2015, to Keith Hardie, who we have heard was a
23 police officer, as was Stuart Wilson and the subject is
24 "Family press conference. Importance high":

25 "Morning Keith Stuart, the PIRC was made aware of

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1 this late yesterday afternoon, John McSporrان [he was
2 the lead investigator by this time] spoke to Mr Anwar
3 late last night and it would appear that the thrust of
4 this conference will be to criticise the police
5 officer's decision not to provide statements regarding
6 their involvement."

7 The police officers had declined to provide
8 statements at this point. And then the press release is
9 copied and given here, Wednesday, 13 May 2015, from
10 Aamar Anwar & company, relates to Mr Bayoh and a press
11 conference by the family on Thursday, 14 May. So the
12 press conference was due to take place on the same day
13 that this email was sent.

14 And if we can go through to the bottom, you'll see
15 that press release talks about the investigation into
16 Mr Bayoh's death.

17 And can we look at the next email, please, next one
18 further up the page. And this -- if we can keep going
19 up, there's an email from Gary McEwan. We have heard
20 evidence from Gary McEwan. Sent on the same day at 8.08
21 to -- in relation to the family press conference and
22 this is to someone called Lucy Adamson:

23 "Lucy, please see below. I think we need to be in a
24 position to respond to this. I think the best avenue is
25 most likely Federation. We need to be quick with this.

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1 Will you link with exec and feds around this? Gary.

2 "Alisdair, please ensure all is sighted on this
3 development."

4 So this has been forwarded by Gary McEwan having
5 received that from Mr Little so it comes from PIRC to
6 Police Scotland to Gary McEwan and then is forwarded
7 again and if we can go up to the top of that page just
8 for completeness, you'll see then it's dealt from DCC
9 Local Policing to ACC Local Policing East.

10 I'm interested in the -- this situation where
11 obviously the crown have control over PIRC, press
12 releases, matters, communications about the
13 investigation, but what appears to have happened here is
14 that Mr Little, investigator with PIRC, has forwarded
15 something to Police Scotland, primarily Gary McEwan, and
16 that has then by Gary McEwan been said "the best avenue
17 is most likely Federation," but you have told that the
18 crown have no control over Scottish Police Federation.

19 I'm interested in this engagement here between PIRC
20 and the police being forwarded to the Federation in
21 relation to comments which could be made publicly to
22 respond to Mr Anwar's press statement on behalf of the
23 family.

24 Do you have any concerns about this? Obviously, if
25 crown have control of PIRC, they have control to some

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1 extent to the police, but this has been factored out to
2 the refrigeration of whom you have no control, do you
3 have any thoughts about this?

4 A. If I have read the document correctly, then what's been
5 shared is a press release that was either public at the
6 time it was being shared or about to become public.

7 Q. Yes.

8 A. That's what it appears to be, and it's being shared from
9 PIRC to the police. That in itself I would have
10 expected -- there obviously had to be a degree of
11 coordination between the organisations so PIRC in order
12 to do its job would need to have a relationship, it
13 would seem to me, with senior officers in the police in
14 order to be able to progress the investigation and what
15 that email appears to be suggesting is that
16 Police Scotland have -- the nature of the relationship
17 between Police Scotland and the Federation was such that
18 Police Scotland could -- I can't remember the precise
19 words, I don't see them on the screen at the moment --
20 at least draw the Federation's attention to it and
21 perhaps in the expectation that the Federation would
22 then say something publicly. That's simply my
23 interpretation of what I have been shown.

24 Q. I'm interested as well about the relationship with PIRC,
25 that they receive a press conference from the -- that's

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1 due to go out for the family, information about that and
2 what's to be said but then share that with
3 Police Scotland. Are you comfortable as -- in your role
4 with information being shared by PIRC with the police
5 and then being forwarded to the Federation?

6 A. So it would depend on the timing. That looked to me as
7 if it was being shared in the morning and the press
8 release was dated 13th so I don't know when that
9 information -- I don't know whether the information was
10 public at the point this was shared or not. If it
11 wasn't, then by the date on the press release it would
12 become public, it wouldn't therefore appear to me to be
13 investigative material that was being sent from PIRC, it
14 was media communication information that was being
15 shared, something that was about to be -- if it hadn't
16 been made public already was about to be made public
17 about the views of the family.

18 Q. So if the information does not relate to the
19 investigation by PIRC, do crown have no concerns about
20 that being shared with the police?

21 A. I think -- I think it would be wrong to say "no
22 concerns". I would be interested on the basis of this
23 one example of knowing more. I think if I had known
24 about this at the time, I would have wanted to know more
25 about what was being shared and the extent of any

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1 information, so I think it would be wrong to say I have
2 no concerns but my concerns are moderated somewhat by
3 the fact that this is not investigative material that's
4 being shared and therefore from the crown's
5 responsibility, it isn't material that is relevant to
6 the crown's own investigation.

7 Q. We'll maybe come back to this. I am conscious I have
8 gone over the time.

9 LORD BRACADALE: We'll stop for lunch and sit at 2 o'clock.

10 (1.04 pm)

11 (Luncheon adjournment)

12 (2.03 pm)

13 LORD BRACADALE: Ms Grahame.

14 MS GRAHAME: Thank you. I wonder if we can have on the
15 screen again PS04984. And we were look at this just
16 before lunch and there are four pages. I'm interested
17 in page 2 of 4 and we look at this earlier. So this is
18 the email from Billy Little at PIRC on 14 May 2015 at
19 7.55 to Keith Hardie, Stuart Wilson, regarding the
20 family press conference and we looked earlier. The
21 press release you can see at the bottom of the screen at
22 the moment dated Wednesday, 13 May and the email from
23 Mr Little says:

24 "Morning Keith or Stuart. The PIRC was made aware
25 of this late yesterday afternoon."

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1 So this would be made aware on the 13 May.

2 "John McSporran [then lead investigator for PIRC]
3 spoke to Mr Anwar late last night and it would appear
4 that the thrust of this conference will be to criticise
5 the police officers' decision not to provide statements
6 regarding their involvement."

7 So it's being sent to the police, first of all to
8 Keith Hardie and Stuart Wilson, not because of the press
9 release or the content of the press release itself, but
10 because it would appear that John McSporran spoke to
11 Mr Anwar and The thrust of this conference will be to
12 criticise the police officers, criticise their decision
13 not to provide statements regarding their involvement.
14 So it's an email from PIRC to the police which appears
15 to be concerned that the thrust of the conference from
16 the family will be to criticise the officers.

17 And then moving on. If we can move up the screen.
18 Let's move on to page 1, and at the bottom of page 1,
19 you can see -- can we go -- I would like to see further
20 down, please. Yes, okay. Thank you. Move back up,
21 please.

22 So the original message there, I think which is
23 being forwarded is from Stuart Wilson to a number of
24 people who are named, including Nicola Shepherd,
25 Gary McEwan and it was cc'd to Keith Hardie, they're all

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1 police officers, and sent on 14 May at 7.59:

2 "You will likely already be aware but for
3 information."

4 So Stuart Wilson appears to have forwarded that on
5 to a number of officers. Then if we can move up to the
6 email from Gary McEwan to Lucy Adamson. We heard
7 evidence from Gary McEwan on 30 August 2023, Day 64 of
8 the Inquiry, that Lucy Adamson is with the
9 communications department or unit:

10 "Lucy please see below. I think we need to be in a
11 position to respond to this. I think the best avenue is
12 most likely to be Federation. We need to be quick with
13 this. Will you link in with exec and feds around this."

14 So the concern appears to have come from
15 Mr McSporran at PIRC to the police with a concern that
16 the police were going to be criticised and Gary McEwan
17 has then passed that on to Lucy Adamson with
18 communications, saying "I think we need to be in a
19 position to respond to this, we need to be quick with
20 this", and then also to suggest that the best avenue is
21 most likely Federation. I'm particularly interested in
22 your views and thoughts on the fact that PIRC's lead
23 investigator seems to be -- appears on the face of it to
24 be concerned about the potential criticism of the police
25 and he's sending information about that to

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1 Police Scotland, who then pass it on to the Federation.
2 You said before lunch you wouldn't say you had no
3 concerns. I wonder if you can tell me what concerns you
4 do have.

5 A. I hadn't seen this document before today and I thought a
6 little bit about it over lunch and I think the situation
7 I -- where I would have had less concern if not any
8 concern would have been something that I think I see in
9 many investigations, which is each organisation has
10 people who are focused on media roles, and that would
11 appear to be who Lucy Adamson here is. And I think the
12 sharing of press release statements ahead of them being
13 public, I would have expected to be done through those
14 roles for that purpose so that the organisations are to
15 be aware of what is likely to be said.

16 Having thought about it more over lunch and your
17 explanation of it just there, it does on the face of it
18 appear to me to be concerning that an investigator
19 working with PIRC is sharing a concern the police
20 officers will be criticised. Had I known about this at
21 the time, I would have wanted to understand exactly why
22 this would -- had been done and to consider that before
23 taking any next steps, but it's not the sort of
24 communication I would have expected to see between PIRC
25 and the police.

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1 Q. And when you talk about it being concerning, can you
2 help us understand what your concerns are in relation to
3 that?

4 A. PIRC is charged with carrying out an investigation into
5 what the individuals -- the individual police officers
6 did as part of their restraint of Mr Bayoh that morning.
7 It appears to me that it is not appropriate for PIRC to
8 be sharing with Police Scotland any planned or intended
9 communication which seeks to criticise officers in any
10 way. That's not what I would regard as part of PIRC's
11 job, which is to carry out an investigation as to what
12 happened that morning.

13 If there is to be any criticism, by anyone of what
14 the police did, then it's for the police to deal with
15 that, either because it's brought to them directly or
16 made public. It's not part of PIRC's remit I would have
17 thought to be sharing such information as part of their
18 investigation and working with the police.

19 I spoke I think before lunch about how I imagined
20 there would need to be contact at an appropriate level
21 between PIRC and Police Scotland as the investigation is
22 carried out, but I had in mind that that would very much
23 be around the coordination of the investigation and
24 steps that needed to be taken, not necessarily sharing
25 information of this nature.

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1 Q. And against the background of a number of questions I
2 have been asking about Article 2 and one of the
3 obligations being independence, do you have any concerns
4 in relation to independence in light of this
5 communication between PIRC and the police?

6 A. Well, it's -- it's difficult to draw a conclusion based
7 on one email exchange, but it would certainly, as I said
8 I think, prompt me to ask more questions and understand
9 what exactly was going on here and why this was -- this
10 information was being shared in this way and why
11 concerns were being shared.

12 I would have wanted to either assure myself that
13 there were no concerns that would cause any Article 2
14 difficulties or that further steps needed to be taken to
15 protect those procedural principles.

16 Q. Thank you. And I think you say in your statement that
17 it was important to the crown that the investigation be
18 independent and the PIRC investigation be independent?

19 A. Yes.

20 Q. Thank you. Thank you very much. Could we move on then
21 please to another document, this is COPFS 02682, and is
22 a seven-page document. It's an email thread again,
23 COPFS 02682. Here we are. So there's seven pages. I'm
24 interested in starting in the earlier stages of these
25 emails, which is page 5 of 7.

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1 Now, I think you were included as you were cc'd into
2 these emails at the time, but I'll go through them just
3 so we can get some context. So you'll see that this
4 is -- the first email I'm interested in is from
5 Iain Campbell at Crown Office communications and that
6 was sent to the Lord Advocate's private secretary, the
7 Solicitor General's private secretary and you were cc'd
8 you'll see, John Logue, as well as Les Brown and
9 Stephen McGowan:

10 "David, PIRC line against enquiry. I have been
11 contacted this afternoon by PIRC, who have asked for
12 your views on a proposed line against enquiry."

13 Now, do you understand what that means, "proposed
14 line against enquiry"?

15 A. Yes, that means that PIRC anticipates at some point they
16 might be asked about some aspect of their investigation
17 and so they want to be ready for that by having worked
18 in advance what -- essentially what the public answer to
19 that question would be.

20 Q. They hope to issue this if they're asked about recent
21 crown instructions to investigate other matters in
22 relation to the Sheku Bayoh death.

23 And to put some context to that, this is
24 28 August 2015, so it's the period after the first PIRC
25 report has been received from PIRC by the Crown Office

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1 and we've heard from Les Brown in evidence that he was
2 then in the process of going to issue further more
3 detailed instructions to PIRC, which were sent on
4 2 September. So that's what was happening behind the
5 scenes there.

6 A spokesman for the PIRC said and this is the line
7 that PIRC wished to release to the media if an inquiry
8 was received:

9 "The Commissioner recently received further
10 direction from the Crown Office in relation to matters
11 surrounding the death of Sheku Bayoh. Those
12 investigations are now ongoing. Our view is that
13 if ..."

14 This is then the response in the email:

15 "Our view is that if they issue the above, it will
16 set an expectation of a blow-by-blow account of our
17 individual instructions and correspondence as the
18 investigation progresses. On discussion with Les Brown,
19 who is content, we intend suggesting to that they do not
20 issue the response above, but hold instead to the latter
21 section of their previous line, as below:

22 "'On 7 August the Commissioner delivered an interim
23 report of the investigation's findings which are now
24 being considered by the Lord Advocate. The Commissioner
25 continues to work closely with the Lord Advocate,

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1 including gathering further expert opinion in relation
2 to the cause of death. It would be inappropriate to
3 comment further at this time'."

4 "And I would be grateful if this could be drawn to
5 the attention of the Lord Advocate."

6 So it's a request from PIRC to issue a line if they
7 receive an inquiry and an alternative is proposed by
8 Les Brown and that's brought to the attention of the
9 Lord Advocate.

10 Then if we could look at page 4 of the PDF and if we
11 can see at the very bottom of page 4 there's a letter --
12 an email from the private secretary of the Lord Advocate
13 on the same date at 15.15 to Iain Campbell in response
14 and it says:

15 "The Lord Advocate has confirmed he agrees with line
16 suggested by Les [Les Brown]."

17 So the alternative was agreed by the Lord Advocate.
18 Then if we can move up towards the top of page 4, which
19 is the third email and this is an email sent on same
20 day, 28 August at 16.23, and it's from Iain Campbell to
21 the private secretary of the Lord Advocate:

22 "PIRC have come back to suggest the slight addition
23 in bold below. This seems fine to me, but just wanted
24 to confirm for the record."

25 Then there is essentially what was Les Brown's

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1 alternative comment, there's no bold there, but from my
2 reading and comparison, I think the additional words are
3 in the second-last paragraph "to investigate complex
4 lines of inquiry". So they were not in the original
5 Les Brown version, but they had been added, so although
6 they're not involved I think that's the only difference
7 I can see.

8 And then if we can look at page 3 of 7, towards the
9 bottom, we see a response from private secretary of the
10 Lord Advocate on the same date at 17.11 and it says:

11 "As discussed, I can confirm that the Lord Advocate
12 is content with the amended response below."

13 And then looking up to if we start at page 2,
14 please, you'll see an email from Iain Campbell. This
15 one is on the Saturday, so August 29, so the next day at
16 4.29 in the morning to the private secretary of the
17 Lord Advocate:

18 "PIRC have today come back on about this, having now
19 received an inquiry from the Sunday Mail. They're
20 looking for guidance by 6.00 pm. They state that the
21 Sunday Mail have the names of two experts looking into
22 cause of death and are being briefed by Amar Anwar that
23 they have only been chosen by the PIRC due to the fact
24 that they will come up with the conclusion of excited
25 delirium. As well as the statement that was agreed

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1 yesterday, PIRC wished to provide them a few additional
2 lines as background, not as a direct quote or source, to
3 give a better context. Their suggested wording is as
4 below:

5 "'The Sunday Mail understands that PIRC were asked
6 to combine a list of experts in relation to carry out
7 further investigations into the cause of death of
8 Sheku Bayoh. They were then presented to the
9 Crown Office for consideration. The PIRC was then
10 instructed on who they should appoint as the appropriate
11 experts to go and carry out those investigations'".

12 "On discussion with Liam Murphy and Steve McGowan we
13 consider that PIRC should issue only the line agreed
14 yesterday to the effect that this is an ongoing
15 investigation and that it would be inappropriate to
16 comment and nothing further. And I would be grateful if
17 this can be brought to the Lord Advocate's attention."

18 And then we he can move on to the next email, which
19 is page 2 and this is Saturday, August 29 at 5 o'clock:

20 "Iain, further to your email below, the
21 Lord Advocate has indicated that he would be content for
22 PIRC to respond along the following line."

23 And then there's a remark in quotation:

24 "PIRC take direction from the crown on who should be
25 instructed to carry out further expert work on

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1 establishing the cause of death. The crown are
2 considering the points made by the family's lawyer on
3 the instruction of [I assume that's best experts] to do
4 this work and will issue direction to PIRC in due
5 course."

6 Then if we can move on to page 1, and you will see
7 that this is an email from Iain Campbell on Sunday, 30
8 August to the Lord Advocate and private secretary:

9 "For the information of the Lord Advocate, I have
10 just been informed by PIRC comms that they have been
11 instructed to issue the following by Kate Frame.
12 [Kate Frame was the Commissioner at the time.] It
13 issued this afternoon just before they informed us about
14 it."

15 And then if we can move down:

16 "PIRC has issued a statement in relation to the
17 ongoing investigation into the death of Sheku Bayoh on
18 3 May 2015. It comes ahead of a meeting between
19 the Commissioner and the Bayoh family on Thursday.
20 Responding to claims reported today about the experts
21 asked to further investigate the cause of death
22 Kate Frame said:

23 "'It is unfortunate that the family lawyer
24 Aamar Anwar appears to have interpreted the fact that
25 forensic pathology experts from outwith Scotland have

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1 been instructed as a sign that the PIRC has focused its
2 investigation on a particular cause of death for
3 Sheku Bayoh. The Commissioner can reassure the family
4 that in fact the opposite is true. As they and
5 Aamar Anwar know, the postmortem conducted in Scotland
6 did not reveal a conclusive cause of death. In order to
7 assist the family in understanding what caused
8 Mr Bayoh's death, the PIRC identified a number of expert
9 forensic pathologists to the Crown Office. The
10 Lord Advocate then selected and instructed
11 the Commissioner to approach the chosen experts and seek
12 their opinion on the cause of death. Both are entirely
13 independent and Dr Payne-James has already said 'an
14 expert's duty is to be completely independent,
15 irrespective of who is instructing them'. Once the
16 experts' opinions are available, they will be passed to
17 the Crown Office and the PIRC would anticipate that in
18 accordance with standard practice in a serious case such
19 as this, they will take the opportunity to precognosce
20 them as witnesses along with other significant witnesses
21 identified in the PIRC report. The Commissioner will
22 reassure the deceased's family at her meeting with them
23 on Thursday that further lines of inquiry continue to be
24 explored. She will be happy to receive any additional
25 information they might have that would assist the

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1 investigation."

2 So it would appear in relation to this that
3 Kate Frame, the Commissioner, then issued her own
4 statement that was not forwarded to crown for comment
5 before it was released to the media.

6 And do you remember these events?

7 A. I'm afraid I don't remember the specifics, no.

8 Q. Right. It would appear from what we see in this email
9 thread that the quotes and the comments by Kate Frame,
10 the Commissioner, go far beyond what the Lord Advocate
11 had approved?

12 A. That's correct.

13 Q. Now, I think in your Inquiry statement you were asked
14 about this. If we could look at question 20 in
15 SBPI 00441, and if we look at the email chain 28 to
16 30 August relating to the PIRC's media release and in
17 light of what we've just looked at and it says -- sorry,
18 do you have that?

19 A. Yes, I have that.

20 Q. It is on the screen as well.

21 A. Yes, thank you.

22 Q. "The Commissioner, Ms Kate Frame, appears to have
23 departed from the direction she was given by the
24 Lord Advocate and released her own statement to the
25 media to directly respond to Mr Anwar's comments in the

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1 media.

2 "Please provide your comment on this matter and
3 include your view on whether this is a breach of PIRC's
4 duties to follow the Lord Advocate's direction. Do you
5 consider this a breach of PIRC's duties under the 2006
6 Act. Please explain your reasoning."

7 And I would like to go through that question. I'm
8 not entirely sure your answer fully responds, but we can
9 look at your answer at this stage, so this is answer 20
10 in the statement:

11 "I do not recall the circumstances described in this
12 email chain. Section 41A of the 2006 Act
13 provides the Commissioner must comply with any lawful
14 instruction issued by the appropriate prosecutor who
15 issued a direction under section 33A. This is similar
16 in scope and effect to the authority of prosecutors to
17 issue instructions to officers of Police Scotland."

18 So can I be clear, do you consider the
19 correspondence in the emails to have been a lawful
20 instruction by or on behalf of the Lord Advocate to PIRC
21 in relation to the media statement that was to be
22 released by PIRC?

23 A. It's not an example of what is commonly understood to be
24 a lawful instruction, because a lawful instruction in my
25 experience is commonly understood to refer to

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1 investigative steps to be taken by the investigative
2 agency and what I was trying to explain in the answer is
3 that having said that, in my experience instructions
4 given by the crown in relation to communications are
5 treated as if they were an instruction which had had
6 lawful effect, so the end result is the same but I
7 think, on the finer detail, I'm not sure that everyone
8 involved necessarily would see it as being a lawful
9 instruction. Some people might. Some people might see
10 it as being simply a media matter, but in my experience
11 they've always been treated as if they were a lawful
12 instruction.

13 On one view they are a lawful instruction, because
14 they handle it -- the crown's interest in handling the
15 media's inquiries is directed to the conduct of the
16 investigation and that is the only interest that the
17 crown has in ensuring that public communications are
18 appropriate. So if I have been less than clear in the
19 answer, I have been trying to explain the background and
20 the complexity to it.

21 My personal view is that I would regard it as a
22 lawful instruction both in terms of the substance of it
23 and its effect.

24 Q. Thank you. I just wanted to be clear about that. But
25 even if you're wrong in your personal view, in terms of

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1 the practice that's been adopted, between PIRC and the
2 crown, since PIRC existed, are you -- are you aware of
3 any examples where PIRC simply have declined to comply
4 with these requests or comments or instructions,
5 whatever you may wish to call them, by the
6 Lord Advocate?

7 A. No, I'm not aware of this happening in any other case
8 that I've ever been involved in where the crown has been
9 consulted on a public statement. The problems that I
10 spoke about earlier which make it difficult in terms of
11 coordinating and managing communications tend to be
12 around either people simply forgetting in the immediate
13 aftermath of an incident that this needs to be done and
14 it's simply in good faith missed out or it's done at the
15 very last minute where there's no real time to consider
16 it. Those are the issues that tend to make it
17 problematic. This is the only example I can think of
18 where the crown was asked for a view, gave it and then
19 something else different to that happened.

20 Q. Thank you. Can I ask you for your comment on part of
21 the media statement that was released by PIRC where
22 the Commissioner has said -- she comments that:

23 "It's unfortunate the family lawyer appears to have
24 interpreted the fact that forensic pathology experts
25 from outwith Scotland have been instructed as a sign

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1 that the PIRC has focused its investigation on a
2 particular cause of death for Mr Bayoh.

3 The Commissioner can reassure the family that in fact
4 the opposite is true."

5 Can I ask you about that approach by PIRC, have you
6 any concerns about that?

7 A. When you say "that approach", do you mean the reference
8 to the criticism that is being made.

9 Q. The criticism in relation to Mr Anwar and saying the
10 opposite is true.

11 A. So I have a number of concerns. I think I have a
12 general concern that it is unwise through the media to
13 engage in a debate about what is happening in an
14 investigation, principally because, I could be wrong
15 here, but I'm making an assumption that the Commissioner
16 had no more information than was available to the crown
17 as shown in the email. In other words, we were simply
18 being advised by the media of something that Mr Anwar
19 had said. Now, that's not the same thing as knowing
20 that that's exactly what Mr Anwar said. So I think for
21 that a reason alone it's unwise to engage in a debate as
22 to what was said and whether it's unwise or not.

23 I think it goes too far in saying that something is
24 true in relation to an investigation, because I think
25 that is potentially confusing for people who are not yet

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1 aware of the full detail of the investigation and I
2 think it's therefore unwise and premature to be going
3 into that level of detail in a public statement.

4 Q. Thank you. Then just to complete or look at your answer
5 20, if we can just move that up slightly:

6 "That authority is traditionally exercised by
7 Crown Office as including the authorisation of any
8 public statement by Police Scotland or PIRC when
9 investigating a crime given the Lord Advocate's role as
10 head of the systems of prosecution and death
11 investigation. This ensures consistency of messaging
12 and that information is only put into the public domain
13 with the consent of the crown. In my experience, such
14 instructions are accepted and complied with and it would
15 be unusual for a statement to be issued without first
16 obtaining the approval of the crown."

17 Can you elaborate slightly on the importance of
18 ensuring consistency of messaging and information that
19 is put out into the public domain from the perspective
20 of the crown?

21 A. Yes. If there is inconsistency, if information appears
22 to people to be different or confusing because of a lack
23 of consistency, then that creates -- it could
24 potentially create a difficulty in the investigation
25 itself, the investigation was still ongoing at this

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1 stage, and therefore if people form a mistaken view that
2 there is a lack of consistency or that there is a
3 confusion in the position of the investigation, that
4 could hinder the investigation itself.

5 It also damages, in my experience, the confidence of
6 the bereaved relatives if they see public statements
7 being made by different parties to the investigation
8 which may appear to be inconsistent and then that begins
9 to damage wider public confidence in the validity of the
10 investigation and its objectives.

11 Q. And thinking of Article 2 and the obligations on the
12 crown in terms of the investigation, are these all
13 factors that cause you concern if they do have an impact
14 or hinder the investigation as you've said?

15 A. Yes. If you look at it from the perspective of
16 Article 2, then inconsistent messaging would be
17 something that would be problematic in terms of
18 Article -- the procedural requirements of Article 2.

19 Q. Thank you. Can I ask you to look at something else now
20 for me, please, which is COPFS 02922, and this is a
21 letter from October 2015, so COPFS 02922. Do you see
22 it's a letter to Amar Anwar dated 22 October 2015, and
23 if we can look at the bottom of the page, you'll see
24 it's from Les Brown, head of CAAPD, and then we can see
25 "Dear Mr Anwar" at the top, and it refers to

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1 communications that have been taking place between
2 Mr Anwar and Crown Office.

3 I'm interested in paragraph 3 of this letter:

4 "In respect of your communication of 20 October 2015
5 regarding the concerns expressed by the Bayoh family in
6 relation to media coverage, the Lord Advocate has taken
7 the exceptional step of issuing a statement calling for
8 restraint from all parties in the provision and
9 publication of information in respect of the death of
10 Mr Bayoh.

11 "I attach for your information a copy of the text
12 and it is hoped that this will be of assistance in
13 preventing distressing and speculative media coverage.
14 I would also be grateful... "

15 And he goes on to mention something else. Then if
16 we turn over to the next page, you'll see a document
17 that has been attached:

18 "The Lord Advocate today called for restraint from
19 all parties in the provision and publication of
20 information in respect of the death of Sheku Bayoh.
21 The Lord Advocate, Frank Mulholland QC, said the
22 investigation into the death of Sheku Bayoh is being
23 conducted by PIRC under the direction of the crown and
24 both are well aware of all the evidence, the lines of
25 inquiry and the issues surrounding this case. The crown

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1 and PIRC are not influenced by comments made in the
2 media and that is how it should be. However,
3 speculation and a running commentary on the
4 investigation can be upsetting to the family of
5 Sheku Bayoh, as well as the families of the officers
6 involved.

7 "A decision will be taken at the end of this
8 extremely complex investigation as to whether or not
9 criminal proceedings should be raised. An inquiry will
10 also be held at which all the relevant evidence will be
11 heard, open to the public and the media, and it is right
12 that it is this forum where the evidence will be
13 rigorously tested and judicially assessed. PIRC and the
14 crown should be allowed to get on with their job."

15 Do you remember the background to this statement by
16 the Lord Advocate?

17 A. I'm afraid I don't, no.

18 Q. You don't. It says in the covering letter on page 1 of
19 this PDF that the Lord Advocate had taken the
20 exceptional step of issuing a statement calling for
21 restraint. We've heard a number of witnesses have
22 spoken about at the Lord Advocate taking this step. Did
23 you have any involvement in the statement or deciding
24 whether to take this step?

25 A. I don't think -- I don't think I did. I don't remember

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1 the statement in particular.

2 Q. You don't remember being aware of it at the time?

3 A. No.

4 Q. All right. From your own experience, was this an
5 exceptional step for the Lord Advocate to take to call
6 for restraint?

7 A. Yes, because of my reference earlier to the fact that
8 I -- I'm unaware of this happening in any other
9 investigation. Although we spoke earlier about the
10 lawful instructions, the reality is that in working
11 together with an investigating agency on any complex
12 investigation there's very rarely the need for the crown
13 to in a sense fall back on the formality of a lawful
14 instruction. The reality of the investigations is that
15 they are professional, the people from each organisation
16 understand the role and are able to carry that out, and
17 so for this to reach the stage --

18 I'm assuming that this letter and the release by the
19 Lord Advocate is prompted by the document we've just
20 been looking at. I think it is exceptional in the sense
21 of I'm not aware of that ever having happened before
22 that the crown's instruction in relation to a media
23 inquiry was not followed.

24 Q. I'll be corrected if I'm wrong, but my understanding is
25 that there were a number of tensions in -- being

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1 expressed arising as a result of media commentary,
2 public commentary, by a number of bodies persons
3 involved and it wasn't just specifically one statement
4 from PIRC which was the issue.

5 A. I see.

6 Q. I'll be corrected if I'm wrong on that though.

7 Can I move on then please and ask you to look at
8 another media matter, PS18106. Now, this is from,
9 you'll see at the top, Scottish Mail On Sunday, first
10 edition, 23 September 2018. So it's a period some time
11 after the matters we were just looking at. It says:

12 "Exclusive. Officers who restrained tragic father
13 in street did not break law. Sheku death police
14 cleared."

15 And it's an article by Catherine Sutherland on the
16 front page of the Mail on Sunday. And you'll see:

17 "The police officers who forcibly restrained a
18 suspect in one of the most controversial cases in recent
19 Scottish history will not face prosecution over his
20 death. He'd lived in Scotland since childhood ...
21 pinned to the ground ... carrying a knife. His death
22 sparked complaints of police brutality and racism and
23 also prompted an official investigation into whether
24 undue force was used to restrain the 31-year-old.

25 "Now, according to a well-placed source within the

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1 justice system, the country's chief prosecutor has
2 decided the officers should not face any criminal
3 charges. The Scottish Mail On Sunday understands the
4 Lord Advocate believes that evidence does not support a
5 prosecution against the officers who restrained
6 Mr Bayoh. His decision is said to be based on two
7 main... "

8 And then if we can turn to page 6:

9 "... two main factors: firstly, the statements of
10 multiple witnesses who confirmed the police acted
11 proportionately and, secondly, forensic evidence that
12 Mr Bayoh's death was caused by the high levels of
13 illegal drugs found in his system. The move will be
14 welcomed by the police who will see it as a massive
15 vindication of their actions as Mr Bayoh's death is one
16 of a number of high profile cases where the force has
17 faced criticism, but the decision not to prosecute the
18 officers involved is certain to spark a furious reaction
19 from Mr Bayoh's family.

20 "The source said [and in quotation marks] 'The
21 decision has not yet been formalised but the
22 Lord Advocate is now confident there will be no criminal
23 proceedings against the police officers involved.' The
24 Crown Office yesterday refused to confirm the decision
25 not to prosecute, but officials said they would soon be

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1 giving an update on the case to Mr Bayoh's relatives. A
2 Crown Office spokesman said 'We are meeting the family
3 in the near future to update them and it would not be
4 appropriate to comment further at this time'."

5 Can we look at -- you have been asked about this in
6 your Inquiry statement.

7 A. Yes.

8 Q. Can we look at that, please, which is 454, and it's
9 paragraph 79. It's headed "investigation into the
10 purported lead [I think that should be 'leak'] to the
11 Mail On Sunday of the decision not to prosecute."

12 A. Yes.

13 Q. 79:

14 "A possible unauthorised release of information or
15 documents is investigated by COPFS under the strategic
16 direction of the deputy crown agent for operational
17 support."

18 And who was that?

19 A. At that time that was me.

20 Q. That was you.

21 "... who oversees all security related matters on
22 behalf of the crown agent. This includes liaison with
23 Police Scotland's Anticorruption Unit."

24 So this is a unit within Police Scotland itself?

25 A. Yes.

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1 Q. "The nature of the investigation will depend on the
2 circumstances of each incident, but would involve the
3 departmental security officer and the head of cyber
4 security."

5 And is that two roles within Crown Office or is it
6 two roles within Police Scotland?

7 A. Those are two roles within Crown Office.

8 Q. "Unauthorised release of information may involve
9 breaches of the Civil Service Code."

10 Would that apply to members of staff in
11 Crown Office?

12 A. Yes.

13 Q. Professional standards? We've heard that a number of
14 them are legally qualified. They will be obliged to
15 comply with the professional standards applicable to
16 solicitors?

17 A. That's correct.

18 Q. "Breaches of data protection legislation, which requires
19 Crown Office to keep personal data secure and other
20 possible criminal offences. If there are reasonable
21 grounds to suspect that a member of staff has committed
22 a criminal offence, then the police will be instructed
23 to investigate and report. There is no difference
24 between an investigation into the unauthorised release
25 of information and of documents. Each investigation

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1 will reflect the individual circumstances of the
2 incident."

3 So if it's a possible criminal offence, the police
4 would be involved. If it's a breach of professional
5 standards, that would be a matter for the Law Society of
6 Scotland rather than the police?

7 A. It would also be treated as an internal disciplinary
8 matter.

9 Q. So there may be other aspects which may not be
10 potentially criminal, but which Crown Office would look
11 at internally in any event?

12 A. Yes.

13 Q. Thank you. Paragraph 80.

14 Sorry, there's one other thing I wanted to ask you
15 about that paragraph, if we can go back. I think there
16 was a reference to reasonable grounds. Sorry I don't
17 have a note of the -- there they are. It's just below
18 halfway. "If there are reasonable grounds to suspect
19 that a member of staff has committed a criminal
20 offence"; do you see that line?

21 A. Yes.

22 Q. What would reasonable grounds amount to?

23 A. Reasonable grounds could be, for example, preliminary
24 indications that a member of staff had access to case
25 that they had no entitlement to access or it could be

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1 information from another member of staff who thought
2 that they had seen a colleague do or speak -- do
3 something or speak to someone or it could be information
4 from outside the organisation. So it would be a broad
5 range of possible circumstances that would give you
6 reasonable grounds to suspect that a member of staff had
7 done something and therefore there was something to
8 investigate, a line of investigation which could be
9 followed.

10 Q. Thank you.

11 Looking at answer 80:

12 "I do not recall being aware of the article ahead of
13 its publication. On many occasions the media will ask
14 for comment ahead of the publication, but I cannot find
15 any evidence of this having happened in this case. I
16 review the media each weekend for reporting related to
17 Crown Office and it is highly likely I was aware of the
18 article on Sunday, 23 September, but I have no
19 recollection of that."

20 I'm interested in the -- you have said "on many
21 occasions the media will ask for comment ahead of
22 publication". How would you normally go about finding
23 out if somebody has provided comment from Crown Office?

24 A. Sorry. That reference is to just simply the routine
25 requests that media will send us to say -- they will

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1 often say that they are planning to public a news
2 article about our work and they will give us the
3 opportunity to offer a comment to be included in that so
4 we regularly would see -- it's rare to see a published
5 statutory which we did not know was going to be -- to be
6 in the media. That's what I meant in that sentence.

7 Q. Right. But you don't recall being aware of it ahead of
8 the publication?

9 A. Not in this specific example, no.

10 Q. And when we look at the article itself, it did appear to
11 provide quotations from someone in Crown Office who
12 refused to confirm the decision not to prosecute but
13 said they would soon be giving an update on the case to
14 Mr Bayoh's relatives and we're meeting with the family
15 in the near future to update them.

16 Did you find out if those comments had come from
17 someone in Crown Office?

18 A. I would need to look at the article again just to be
19 sure, but I think what you're referring to would be the
20 official response that the Crown Office provided to the
21 article in the way that I've described. So on the
22 Friday the Mail On Sunday would contact us and say this
23 is an outline what we're planning to say. They don't
24 share the entire article, but they would provide an
25 outline and any specific part that related to our work

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1 and they would invite us to offer a comment and we would
2 provide that in the expectation that they would then
3 publish that. So I think what you're referring to is
4 the response that we provided for inclusion in the
5 article.

6 Q. So let's look at the article again, PS18106, and if we
7 can look on page 6, you'll remember I read out the
8 section where -- this is on the left-hand side:

9 "The Crown Office yesterday refused to confirm the
10 decision not to prosecute, but officials said they would
11 soon be giving an update on the case to Mr Bayoh's
12 relatives. A Crown Office spokesman said 'we are
13 meeting the family in the near future to update them and
14 it would not be appropriate to comment further at this
15 time'."

16 So those comments appear to have come from
17 Crown Office. Would that indicate that the paper had
18 been in touch with Crown Office for comment in advance
19 of publishing the article?

20 A. Yes, and I would distinguish that comment from --
21 there's a paragraph above with quotes in it, but that's
22 not to be confused with the Crown Office's response.

23 Q. I think it says "the source said" for those comments?

24 A. Yes.

25 Q. But these are -- it says:

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1 "The Crown Office yesterday refused to confirm but
2 then gave an update on the case."

3 A. Yes, I mean the reference to yesterday suggests they may
4 have asked on the Saturday rather than the media team in
5 Crown Office provide an out-of-hour service.

6 Q. And did you look into who the person -- who the
7 Crown Office spokesman was on a Saturday to comment --
8 to provide those comments to the newspaper?

9 A. No, that wasn't something I was concerned about.

10 Q. Right. We were on answer 80 I think on your statement
11 and then line 5:

12 "From reviewing emails which you have asked me to
13 consider, I can infer that the issue was first raised
14 with me officially by Lindsey Miller on Monday,
15 24 September."

16 So that would be the Monday after the article has
17 appeared?

18 A. Yes.

19 Q. "... in her capacity as deputy crown agent serious case
20 work following a conversation she had with the
21 Lord Advocate. I do not recall being involved in this
22 conversation and there is no indication in the emails I
23 have reviewed that [you were involved]. I do not recall
24 any action being taken on the day of publication and I
25 have no records to indicate that anything was done on

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1 23 September."

2 Obviously, given the nature of the article that a
3 prosecutorial decision has been taken not to prosecute
4 the police officers, would you have expected something
5 to have been done by the crown on that day?

6 A. 23 September was obviously a Sunday. I would have
7 expected the senior officials, prosecutors, who were
8 involved in the relevant case to be discussing it and
9 assessing it and my recollection is, from looking at the
10 material provided to me by the Inquiry, that there was
11 an exchange I think between the Lord Advocate and
12 Lindsey Miller on the Sunday about the newspaper article
13 in the way that I was describing so I would -- in my
14 experience as a prosecutor, if there's any weekend media
15 reporting of any case that I'm involved in then I would
16 be looking at it and dealing with it at the weekend when
17 it happened.

18 Q. Are you aware if anyone took the step to contact the
19 family?

20 A. I -- by this stage, I wasn't involved in any way with
21 the investigation or with any of the dealings with the
22 family, so I'm afraid I can't answer that. The role
23 that I was performing at this time I had moved into
24 in -- some time between April and June of 2016, so
25 approximately a year after Mr Bayoh's death, and

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1 Lindsey Miller had succeeded me as what was now called
2 the deputy crown agent role for serious case work, but
3 that was essentially replacing me in the role that I had
4 been performing in May of 2015.

5 Q. Right. Thank you.

6 A. So I'm afraid I can't help you with any answers to the
7 question as to whether there was contact with the family
8 on Sunday.

9 Q. We have still to hear from Lindsey Miller, but can we
10 move on to the next paragraph, 81. So this explains
11 your involvement in this matter and your role in the
12 matter. You say:

13 "I have explained my role as deputy crown agent for
14 operational support in answer to question 79. Following
15 my discussions with Lindsey Miller on 24 September, I
16 assumed strategic responsibility for carrying out the
17 Lord Advocate's instruction to determine if confidential
18 information about the death investigation had been
19 provided to the media in an unauthorised manner."

20 So were you brought in to conduct this
21 investigation?

22 A. I'm not sure being brought in quite captures how this
23 works. My responsibilities in the role at the time, as
24 deputy crown agent for operational support, included
25 questions of professional standards, security, data

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1 protection, a range of issues. The role I was
2 performing at the time was essentially a corporate role
3 so I wasn't exercising any prosecutorial function. And
4 therefore the matter was referred to me because it was
5 within my responsibility to carry out that
6 investigation, but of course, given that Lindsey herself
7 was carrying out a role which gave her responsibility
8 for the investigation, it would have been inappropriate
9 for her to carry out any of the investigations and so
10 I was asked to carry them out both because it was my
11 role and because it was thought appropriate to have a
12 degree of separation from the team who had been involved
13 in the death investigation up until that point.

14 Q. As yours was, as you put it, a corporate role, does that
15 mean you had a responsibility to protect the
16 corporation?

17 A. I mean corporate in the sense of I had leadership
18 responsibility for what we would refer to as the
19 corporate functions of the organisation, which included
20 HR, finance, IT, as well as security, policy and a range
21 of other issues.

22 The responsibility you're describing I think is what
23 I would -- I would say that was a shared responsibility
24 amongst the entire senior leadership team that part of
25 being in that senior leadership team is to take steps to

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1 ensure that the reputation of the organisation is not
2 damaged by any of our work.

3 Q. So you were not in the role of an investigative body
4 looking to investigate whether any offence had taken
5 place or there had been any breach of standards of some
6 description?

7 A. I would -- I instructed colleagues who had the means to
8 do this, to carry out preliminary investigations to see
9 if there was any indication that a member of staff had
10 inappropriately shared information. If I had found
11 information that that had happened, I would have
12 immediately commissioned an internal disciplinary
13 investigation and if I regarded it as being a criminal
14 matter, I would have instructed the police to start a
15 criminal investigation.

16 There were other occasions where I did that in
17 relation to allegations of information handling. Where
18 I concluded that a member of staff may have committed an
19 offence, I instructed the police, the police carried out
20 an investigation. They did not report to me because
21 I was not acting as the prosecutor. I gave the
22 instruction to carry out the investigation given my
23 responsibility for security, but it was then reported to
24 a prosecutor with no previous involvement in the matter
25 and they would then take a decision.

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1 Q. So you said you instructed colleagues who had the means
2 to do this investigation. Who were those colleagues?

3 A. I have referred to them in my statement. They were
4 colleagues who had principally access to our case
5 records and our communication information and,
6 therefore, they were able to carry out preliminary
7 inquiries to determine whether there was any indication
8 that someone had acted inappropriately.

9 Q. Let's look through the remainder of paragraph 81:

10 "I concluded that there was no evidence of this from
11 our case management and communications data, that there
12 were no reasonable grounds to carry out interviews of
13 members of staff or instruct a police investigation and
14 that information about the decision and the timing of a
15 meeting with Mr Bayoh's family was known to individuals
16 outside Crown Office for whom I had no departmental
17 security responsibility. In all the circumstances,
18 including the nature and content of the newspaper
19 article, I determined that it could not be concluded
20 that a leak, in the sense of an unauthorised release of
21 information by a member of Crown Office staff, had taken
22 place.

23 "Lindsey Miller was deputy crown agent for serious
24 case work and as such had strategic responsibility for
25 the investigation into the death of Sheku Bayoh at the

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1 time of the article. She drew the article to my
2 attention in that capacity."

3 You refer to the departmental security officer who
4 carries out all security related investigations, is that
5 one member of staff that you instructed to carry out
6 this investigation?

7 A. Yes.

8 Q. And then you also refer to the head of cyber security
9 who's responsible for all aspects of digital security.
10 And is that the second member of staff who carried out
11 this investigation?

12 A. That's correct.

13 Q. And that included analysing digital case related and
14 communications information for evidence of security
15 incidents.

16 So those were two members of staff, head of
17 departmental security officer and head of cyber
18 security, who were involved in doing the investigation.
19 And when you said they had the means to do this, would
20 they have had the means to investigate all aspects that
21 you've talked about, criminality, data protection,
22 professional standards breaches, that type of thing?

23 A. Yes, and the normal way of carrying out these inquires
24 is that they would not -- they would not exercise those
25 investigative abilities without authorisation either

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1 from myself or from HR. They would only do this on
2 instruction.

3 Q. And as well as looking at the data that you've
4 mentioned, the case management and communications data,
5 did they speak to any staff about this matter?

6 A. No, I'm not aware of them speaking to any of the
7 individuals who were involved in the investigation.

8 Q. And did either of them speak to the Crown Office
9 spokesman or spokesperson who had been contacted by the
10 newspaper, it appears to say on the Saturday?

11 A. No, I set the scope for them to carry out their work, so
12 they were doing what I had asked them to do and I did
13 not make any connection between the security
14 investigation and the spokesperson who had provided the
15 media response.

16 Q. Right. And was there a particular reason not to ask
17 that person for any information about the discussion
18 with the newspaper?

19 A. I didn't regard that person as being in any way possibly
20 responsible for any information being provided, because
21 they were acting in response to the newspaper coming to
22 us with the story and therefore the newspaper already
23 had the information and the story written so it seemed
24 to me that the person in the media team -- I can't say
25 that I gave it any thought at the time and reflecting on

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1 it now, I can't say that the person in the media team
2 would have had any responsibility -- possibly any
3 responsibility for that information being provided to
4 the newspaper.

5 Q. Were you content that the information they provided to
6 the newspaper about at the meeting with the family was a
7 reasonable response?

8 A. On the face of it it appears to be exactly the sort of
9 information that would -- that they wouldn't -- for
10 something like that of this nature, they wouldn't act on
11 their own in responding to a media inquiry, particularly
12 if it came in on a Saturday. They would -- we have an
13 established procedure for the media team to contact
14 senior people, particularly senior people involved in
15 any high profile cases such as this. So it is only an
16 assumption, but my assumption is that media response
17 would have been shared with and approved by someone
18 outside the media team before it was given to the
19 newspaper.

20 Q. But that wasn't checked?

21 A. I wasn't part of the investigation or involved in that
22 media work so I can't say whether it was checked or not.

23 Q. I'm going to move back to the article for the moment,
24 but I'm also conscious it's now 3 o'clock.

25 LORD BRACADALE: We'll take a 15-minute break at this stage.

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1 (3.00 pm)

2 (A short break)

3 LORD BRACADALE: Ms Grahame.

4 MS GRAHAME: Thank you. We were going to briefly look again

5 at the article, if I may, which is PS18106. And just at

6 the end of the first page, it talks about two main

7 reasons:

8 "His decision is said to be based [that's the

9 Lord Advocate] on two main..."

10 And then we move on to page 6, just further down:

11 "...two main factors: firstly, the statements of

12 multiple witnesses who confirmed the police acted

13 proportionality and, secondly, forensic evidence that

14 Mr Bayoh's death was caused by the high levels of

15 illegal drugs found in his system."

16 You have talked about the investigation which was

17 carried out which you instructed by the head of cyber

18 security and the departmental security officer. Did

19 their investigation include looking into whether those

20 two factors were correct?

21 A. I think there was an initial assessment at the beginning

22 as to whether or not there was anything in the newspaper

23 article which could only have been reported as a result

24 of an unauthorised release of information and that

25 included an understanding of -- given that none of us

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1 were involved in the investigation or aware of the
2 conclusion of the investigation at that point, included
3 an assessment of both of those factors in relation to
4 the final decision-making, but I can't remember
5 precisely how that was done or -- but it was an
6 important part of trying to understand the scope of what
7 we were dealing with and it took place at very early
8 stages, probably on the first day, 24th.

9 Q. Do you remember the outcome of that aspect of the
10 investigation?

11 A. I remember a general conclusion was reached that there
12 was nothing in this article which could only have come
13 either as a direct quote from a document which had been
14 seen by someone or a very, very specific piece of
15 information which was only known to a small number of
16 people involved in the investigation and therefore that
17 made it -- that presented certain difficulties in terms
18 of trying to understand whether or not in fact there had
19 been -- to use a term that's commonly understood -- a
20 leak of information or not.

21 Q. So in relation to these two factors, the statements of
22 the witnesses and the forensic evidence, are you
23 suggesting that could have come from some sort of
24 authorised release of information?

25 A. This is only my recollection as it stands now, but my

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1 recollection is that those were both factors that had
2 been commented on publicly. It was a matter of public
3 understanding that the record -- that the investigation
4 was looking at whether or not the actions of the police
5 officers amounted to a criminal offence and that that
6 included close examination of forensic evidence.

7 Q. Right, because what it said in the article is the two
8 factors -- the reason for the decision not to prosecute
9 are the two factors: firstly, the statements of multiple
10 witnesses who confirmed the police acted
11 proportionality. Are you suggesting that it was public
12 knowledge and there had been authorised public
13 statements that there were statements from multiple
14 witnesses who confirmed the police acted
15 proportionality?

16 A. No. No, I'm not suggesting that. I'm suggesting that
17 it was public acknowledge that that was an issue that
18 the investigation was considering.

19 Q. But what this says is "there were statements of multiple
20 witnesses who confirmed the police acted
21 proportionality", not -- it doesn't say "the
22 Lord Advocate is considering whether the police acted
23 proportionately". It's saying that one of the two key
24 factors for the decision not to prosecute is statements
25 of multiple witnesses who confirm the police acted

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1 proportionately. Do you see the distinction there?

2 A. In terms of considering whether or not that comes from
3 an unauthorised release of information, I'm not sure
4 I see the distinction. The key point from my point of
5 view at that stage was that neither of those two factors
6 appeared to me to be specific pieces information which
7 could only have come from the investigation.

8 Q. All right. There also a comment that -- do you see it
9 says:

10 "The source said the decision has not yet been
11 formalised, but the Lord Advocate is now confident there
12 will be no criminal proceedings."

13 Do you see that?

14 A. Yes.

15 Q. Do you have an understanding of what that meant, "the
16 decision has not yet been formalised"? Would there have
17 been another step to the process before it was
18 formalised once a decision has been taken not to
19 prosecute?

20 A. Well, as I've said, I wasn't involved in the
21 investigational so I'm not precisely sure what stage it
22 had reached, but my understanding was a decision had
23 been taken that there would be no criminal proceedings
24 and our processes had evolved by that stage to include a
25 victim right to review so I'm assuming therefore -- I'm

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1 making an assumption here, because I wasn't involved,
2 that there would have been a process of victim right to
3 review which would have followed on the communication of
4 that decision to the bereaved family.

5 Q. So it would be correct to say that although the decision
6 had been made, there would be another part to the
7 process that could take place after that decision had
8 been made?

9 A. Yes. But equally, I did not regard that as information
10 that must have come from the investigation, because that
11 was a publicly known process which had been adopted as a
12 result of legislation so it was widely known that that's
13 what the process now involved.

14 Q. Can we go back to your statement, please, for a moment
15 and, in particular, paragraph 82, and you're talking
16 about 24 September:

17 "I have a general recollection of the investigation
18 which followed, its scope in nature and the difficulties
19 to which Ms Miller alludes in her emails. These
20 difficulties included an inability at the beginning to
21 identify anything from the newspaper article which could
22 identify any document or other source of an unauthorised
23 release of information."

24 So was the investigation looking to see if there was
25 a document which had been copied and pasted, in other

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1 words, or an extract from a document?

2 A. That was one line of inquiry. So for example, if the
3 newspaper article had included a direct quote from a
4 document which never gone outside the organisation, then
5 that would have -- that would have allowed the
6 investigation to move forward in that direction so it
7 was one possible but not the only line of inquiry.

8 Q. "Furthermore, the nature of the article in which it was
9 claimed that a source in the justice system knew of a
10 decision in a case which had been highly publicised over
11 three years, including reporting of the details of the
12 incident involving Mr Bayoh's death, and by its nature
13 could only be a decision either to prosecute or not,
14 left a question in my mind as to whether anyone involved
15 in the investigation or with access to information about
16 its conclusion had released information in an
17 unauthorised manner. I also observed that a meeting
18 between Mr Bayoh's family and the Lord Advocate had been
19 fixed for the coming days and this was known to people
20 outside Crown Office."

21 Did you have a view about -- you said the
22 difficulties included an inability to identify anything
23 from the article which could identify a document or
24 other source of an unauthorised release. Did you not
25 consider quotations from a source in the justice system

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- 1 to be sufficient in itself?
- 2 A. No, I didn't, no.
- 3 Q. And why was that?
- 4 A. Because there was nothing in the quote from the source
5 which directly indicated that there had been a release
6 of information and nothing beyond that which could be
7 investigated. It was simply a -- an anonymous quote
8 which was describing a process.
- 9 Q. Did anyone get in touch with the newspaper to speak to
10 them?
- 11 A. I don't know whether it's changed, but in my time
12 carrying out investigations into matters like this, then
13 I would not approach the newspaper, because I would have
14 absolutely no expectation that the newspaper would in
15 any way provide any information about the source of
16 their reporting.
- 17 Q. From what you've said, did you think that there was no
18 source?
- 19 A. I think I tried to be clear in my statement perhaps
20 later on that I was unable to reach a conclusion on this
21 matter.
- 22 Q. Right.
- 23 A. I could not find anything which determined that someone
24 in Crown Office had released information in an
25 unauthorised manner. I was able to establish that the

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1 broad thrust of the information that was reported was
2 known to people outside of Crown Office and I was also
3 of the view that the nature of the article, taken at its
4 broadest, was that in the knowledge that the family had
5 been invited to a meeting and it was my recollection
6 that the investigation was reaching its end was publicly
7 known. It simply was a matter of speculation or
8 guesswork to conclude what the conclusion of the
9 investigation would be and so therefore putting all of
10 that together, I can see nothing that allowed me to
11 determine, first of all, that there had been a release
12 of unauthorised information and, secondly, if there had,
13 that it had been someone in the Crown Office that was
14 responsible, but I couldn't -- equally, I couldn't rule
15 it out.

16 Q. Right. Was the end -- you've said the end of the
17 investigation it was publicly known. Was it publicly
18 known that it was nearing the end of the investigation?

19 A. My recollection at the time was that there was public
20 speculation in the media that the investigation was
21 coming towards its end. I could be wrong in that, but
22 that's my recollection of where things stood in late
23 summer, early autumn of 2018.

24 Q. Do Crown Office comment to confirm that an investigation
25 is coming to an end normally?

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- 1 A. No, we would not, no.
- 2 Q. And just to be clear, just below halfway down the page,
3 as we see it on the screen, you did say "knowledge of
4 this meeting itself"; do you see that?
- 5 A. Yes.
- 6 Q. "Knowledge of this meeting itself, coming towards the
7 end of the investigation, may have caused people in the
8 justice system or journalists to speculate about the
9 decision."
- 10 So are you saying here that you think people just
11 speculated, ie just made up, what they thought the
12 decision was?
- 13 A. It's a possibility.
- 14 Q. And in making that up, in making up they decided not to
15 prosecute, was that a lucky guess?
- 16 A. Well, as I say, the conclusion was either to prosecute
17 or not to prosecute. There had been significant media
18 interest in this investigation over a number of years.
19 It seemed to me that the nature of the story, which was
20 the conclusion of the investigation and the decision,
21 could easily just be speculation about what the decision
22 would be.
- 23 Q. Right.
- 24 A. And that in itself did not help me in determining how to
25 proceed with the investigation. I have to emphasise,

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1 had there been any basis to carry out further
2 investigation or to take this further, then I would have
3 done that. There were a number of investigations I
4 carried out at that time where, as I said earlier, I
5 called in the police. So the only thing that was
6 preventing me from taking this further was any basis to
7 do so.

8 Q. Although from the headline and the references to a
9 "source", it's not presented, would you agree, as if it
10 was speculation?

11 A. You're asking me there to comment on how the media
12 present their stories and I'm afraid --

13 Q. I may be going too far there.

14 A. I think I'm probably limited in any observations I can
15 make, but I can say in my experience, in almost
16 30 years, I have seen many, many stories in the media
17 about our work which, in my view, have never amounted to
18 speculation and in some cases have been completely
19 inaccurate and that continues to this day.

20 It is unfortunately the nature of the
21 confidentiality of our investigations that people will
22 speculate and the media will reference sources which are
23 unnamed and I'm afraid it's something we have had to
24 learn to live with in terms of how we carry out our
25 investigations, but it's particularly difficult for the

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- 1 families in cases such as this.
- 2 Q. All right. Can I ask you generally about the
3 investigation then that was carried out. Was it part of
4 the investigation to identify all the individuals in
5 Crown Office who had the information about the decision
6 not to prosecute?
- 7 A. Yes, that was established very early on, I think on the
8 first day, because that was -- that was then able to be
9 used in order to define the follow-up inquiries which
10 were undertaken.
- 11 Q. Was it also part of the investigation to identify who
12 had been given or was in receipt of that information
13 outwith Crown Office itself?
- 14 A. Yes, that was one of my questions and that was answered.
15 I couldn't carry out any inquiries in relation to that
16 aspect of it, but it was important to my work to
17 understand was this information that was only known
18 within the organisation or outside the organisation.
- 19 Q. And were you satisfied that those who had been told of
20 the outcome of the prosecutorial decision outwith
21 Crown Office that they were properly in receipt of that
22 information?
- 23 A. Yes, my recollection is that the sharing of the
24 information was appropriate and limited and I can't
25 remember how much of the detail I knew of it, but I was

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1 satisfied it was an appropriate sharing of information
2 as opposed to unauthorised.

3 Q. Did you consider whether to interview any of the staff
4 who were within Crown Office who were aware of the
5 prosecutorial decision?

6 A. I gave consideration to that, but I concluded that there
7 was no basis for doing that.

8 Q. And did you consider whether to invite the police to
9 investigate the matter?

10 A. I always had an open mind on that and if I had reached
11 the stage where I thought it was appropriate to do that,
12 then I would have done that and as I've indicated, I did
13 that in a number of other investigations which lead to
14 prosecutions of members of staff for committing offences
15 in relation to the work. So I would have done that if
16 there had been an appropriate stage reached, but I
17 determined there was no basis for asking the police to
18 carry out a criminal investigation.

19 Q. And as you said in paragraph 79, there was -- normally
20 there would be liaison with Police Scotland's
21 anticorruption unit. Was there liaison with the
22 Police Scotland's anticorruption unit?

23 A. On this specific issue?

24 Q. Yes.

25 A. Yes, no. Sorry, there was no specific -- rather than

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1 say, yes, no. There was no specific liaison in relation
2 to this matter. I concluded there was no appropriate
3 basis to ask the police to investigate.

4 Q. Right. So in paragraph 79 where it says "a possible
5 unauthorised release of information or documents is
6 investigated by Crown Office", that would be under your
7 direction, and where you say "it includes liaison with
8 Police Scotland's anticorruption unit", why was then no
9 liaison with their unit on this occasion?

10 A. Because -- there are two aspects to that. What I'm
11 trying to describe there is that in that general role
12 which I occupied, and the way I carried it out, there
13 was general ongoing liaison. So I had quarterly
14 meetings with Police Scotland's anticorruption unit
15 throughout that time where I reviewed with the police
16 anything that would be of concern in relation to
17 security in the organisation.

18 So that's part of what I'm trying to describe there.
19 I wasn't trying to indicate that on the specific matter
20 there was liaison with them. There wasn't on this
21 specific case, because I concluded there was no basis to
22 ask at the police to carry out any investigation. There
23 was nothing -- there was nothing and no one to ask them
24 to investigate.

25 Q. Right. Did you specifically speak to the unit or anyone

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1 from the unit to discuss it with them?

2 A. No.

3 Q. No. And then in relation to the meetings with the
4 family, we have -- the Inquiry has detailed about a
5 number of meetings that took place between May 2015 and
6 3 October 2018. Were you concerned that the newspaper
7 appeared to realise that 3 October 2018 meeting that was
8 coming up after this release would be the final meeting
9 in relation to the investigation? Was the timing of
10 that final meeting of any concern to you?

11 A. It was of concern to me primarily because of the impact
12 this would have on Mr Bayoh's family who would be coming
13 to that meeting. I had experience in other cases of in
14 the build up to critical events in cases and
15 investigations of media reporting and the impact that
16 that had on families, so that was a particular concern
17 of mine.

18 Q. Right. Finally, paragraph 82 I think was the final
19 paragraph that you dealt with this issue and we were
20 looking through that, and you say:

21 "I do not recall any example of a member of staff...

22 "

23 So let me just see where that is. Sorry. I have
24 not -- ...?

25 A. I think it's further down.

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1 Q. Is it further down? Sorry, thank you. Single line
2 spacing so it's quite -- then we are, yes, it is:
3 "Journalists regularly to have unnamed sources who
4 are reported to know confidential information. In my
5 experience insofar as this type of reporting relates to
6 the work of Crown Office, it is either inaccurate,
7 speculative or simply opinion and guesswork on the part
8 of journalists or those in the justice system with whom
9 they engage. It is reported by the media as fact, but
10 in my experience working Crown Office I don't recall any
11 example of a member of staff releasing confidential
12 information to the media or any such media reporting
13 demonstrating that a member of staff could be the only
14 source of an unauthorised release.
15 "While I fully understood and sympathised with
16 Mr Bayoh's family at the nature of the media reporting,
17 the content of the article and its impact on their
18 confidence in the investigation, I sought to give effect
19 to the Lord Advocate's commitment that the matter would
20 be investigated. The circumstances however, insofar as
21 they could be investigated internally within
22 Crown Office, did not allow me to conclude that a member
23 of staff had been responsible for a release of
24 unauthorised information or even that such a release of
25 information had taken place."

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1 And then you reported that. Are you aware of any
2 examples in your own experience in Crown Office of
3 Crown Office staff releasing unauthorised release of
4 information to the media?

5 A. No, I've never -- never been aware of that. I'm aware
6 of media articles which claim to source work from a
7 source or an unnamed -- and some goes as far as saying
8 someone in Crown Office, but I've never been aware of an
9 actual example of that happening and it being
10 demonstrated that a member of staff has shared
11 confidential case-related information with the media.

12 Q. All right. Thank you. Could we move on now, please,
13 and look at COPFS 03988. And you'll see this is again
14 emails from you this time to Lindsey Miller and it's
15 dated 24 September 2018. So it's in the day after the
16 media, the article we've just been looking at.

17 And if we could look at page 3 of 5 first of all.
18 So this is from Lindsey Miller, 24 September 2018:

19 "As you know, I am after some advice from you about
20 how to deal with recent developments in the above case.
21 You may be aware of some of the coverage of the apparent
22 decision in the above case. The formal decision has not
23 been communicated by the crown to the family and the
24 Lord Advocate is both concerned and disappointed that
25 such detailed speculation has appeared in the media

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1 before the meeting with the family which is scheduled
2 for 3 October.

3 "I can confirm that a minute setting out particular
4 options on next steps was sent by the Lord Advocate to
5 the Cabinet Secretary for Justice in early September and
6 Les Brown and I have had some discussion with
7 Scottish Government officials about what the various
8 options, eventualities, timescales would be depending on
9 the decision."

10 So this is conversations that are going on outwith
11 Crown Office about next steps in relation to the
12 decision that's just been taken?

13 A. Yes.

14 Q. If I can move up the page, please. And then it talks
15 about a group within government. Then it says:

16 "The Lord Advocate has asked that I commence an
17 investigation into this purported leak and I'd be
18 grateful to you for some advice on how you see that this
19 might be carried out at Crown Office end. I am waiting
20 a callback from the relevant deputy director at the
21 Scottish Government about what, if anything, they are
22 planning to do."

23 And if we can just look at the bottom, it should be
24 from Lindsey Miller.

25 Can we move up the page, please. I'm looking at the

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1 page 2 of 5. And then this is an email to
2 Lindsey Miller. You have been cc'd into this email:
3 "Thanks Lindsey the, source is allegedly within the
4 justice system, but I believe that I would be able to
5 give you report that would cover the Crown Office side
6 with enough to say that checks have been made and we are
7 satisfied that the leak did not come from us.
8 Obviously, we can only work with what we have.
9 "If you're in agreement, I can do some background on
10 the reporter's social media presence. I would need the
11 names of all our staff who were in both the discussions
12 and the email chain with their phone numbers. To start
13 I will check if there has been any traffic either by
14 email or telephone to the reporter or the newsdesk at
15 the paper. I will check on any friends within social
16 media for any connections.
17 "Whilst I appreciate this is a lot of ticking the
18 boxes, it may give the Lord Advocate a bit of
19 reassurance."
20 Can I ask you about the tone of this email. If we
21 can look at the top again, there's the "I will be able
22 to give you a report that will cover the Crown Office
23 side with enough to say that checks have been made and
24 we are satisfied that the leak did not come from us".
25 So again -- the approach that that's what's expected,

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1 and then at the end this reference to "box ticking", if
2 we can go down the page again.

3 Sorry it's over two pages:

4 "A lot of ticking the boxes, but it might give the
5 Lord Advocate some assurance."

6 Can I ask you about the tone of this?

7 A. Yes.

8 Q. Was this investigation being carried out with an open
9 mind with a determination to find out the truth or was
10 this some sort of box ticking exercise to simply
11 reassure the Lord Advocate?

12 A. It was carried out with an open mind and I should have
13 indicated in response to your earlier questions, I am in
14 absolutely no doubt had I found the slightest indication
15 that a member of staff had released information in an
16 unauthorised fashion, then I would have taken the steps
17 that I had indicated earlier. There would have been no
18 question of doing anything other than that.

19 The tone of this email and the reference to ticking
20 the boxes I think is an indication that elsewhere in the
21 email I think you had read out earlier -- in Lindsey's
22 earlier email that she and I had discussed and -- or you
23 maybe didn't read it out, but it was in the email, that
24 Lindsey and I had discussed and we could see that there
25 was difficulties in this. We could see the limitations

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1 that I have talked about this afternoon and I think
2 that's all that the tone in this email is directed
3 towards is that it's not in any way determining what the
4 outcome is.

5 It's indicating that there are limitations in what
6 we can do. If you think about it, as a matter of logic,
7 if for a moment you consider that a member of staff had
8 broken the law and released information in an
9 unauthorised fashion, they were, first of all, extremely
10 unlikely to have used any of our systems to have done
11 it, because all of our staff are aware that we regularly
12 check our systems for security purposes, we monitor
13 email usage, we have access to email and telephone
14 records. So the security officer who has written this
15 email, who was an experienced police officer before he
16 joined the Crown Office and Procurator Fiscal Service,
17 myself and Lindsey I think had reached the conclusion
18 that we would check everything we could with an open
19 mind and if we found something we would absolutely do
20 something about it. But even allowing for the
21 possibility that someone had broken the law here, they
22 were unlikely to have done it in a way that would leave
23 something to could up found, but that wasn't a reason
24 not to do it. We would absolutely go ahead and do it.

25 So I think that's all that the tone of the email is

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1 really getting at and in terms of ticking the boxes, as
2 I said in my statement, I don't think that's intended to
3 indicate that anything is perfunctory or less than
4 adequate. It is just simply an indication that there
5 are limits and in the absence of a reason, for example,
6 to -- for a police officer to interview someone as a
7 suspect, then you're extremely unlikely to achieve the
8 sort of outcome that some people might imagine is
9 possible in an investigation like this.

10 Q. Well, let's go back up to page 2 of the email, because I
11 think you -- from Lindsey Miller. Sorry. Again, you're
12 cc'd into this. It says:

13 "JTL [I believe that's true you] and I
14 [Lindsey Miller] will discuss further before I come back
15 to you, as there will be some significant HR
16 implications here too."

17 And then if we can move up again, please. This is
18 an email from you on 24 September 2018 to Lindsey Miller
19 and you say:

20 "Our checking can only really involve interviews of
21 the staff who were aware of the decision and checking of
22 their corporate email and phone logs. With appropriate
23 support from SG, we could do something similar for any
24 staff in Scottish Government who were aware or had been
25 given an indication of the possible outcome. We are

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1 unlikely to find anything from these checks.

2 "My real concern is that this is not the normal sort
3 of 'leak' which generates a leak inquiry. We should
4 really only undertake such an inquiry where we can
5 establish there has been a leak. Nothing about at the
6 story allows us to do that. There are only two possible
7 decisions and the family were aware they were coming to
8 a meeting in ten days to be told the decision. It could
9 easily have been a guess on the part of the journalist
10 written up as a leak."

11 Can I just pause there. When you say "my real
12 concern it's that this is not the normal sort of leak
13 which generates a leak inquiry" can you explain to us
14 what a leak inquiry is and how that differs to what was
15 done here?

16 A. Yes. A leak inquiry, as it is commonly and publicly
17 understood, would be the sort of inquiry that would lead
18 to a civil servant being prosecuted and there have been
19 examples of that, prosecuted for breaching the
20 Official Secrets Act and being imprisoned, and a leak
21 inquiry is carried out so there are examples of that
22 having been done in the past.

23 My understanding of those and recollection of them
24 is that they are derived from examples where very
25 sensitive information is made public in a way that it is

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1 clear it could only have come from specific documents or
2 from a small -- it's so specific it could only have come
3 from a small group of people who knew it and, in those
4 circumstances, that is essentially what guides the
5 investigation and you can then investigate.

6 As we have talked about already this afternoon and
7 what I am describing here in a sort of shorthand way
8 with colleagues is my initial assessment. Although
9 I had an open mind on this, my initial assessment was we
10 were not in that territory and it was unlikely to move
11 into that territory unless we could find something.

12 Now, I wasn't ruling it out that we would find
13 something, but I regarded it as unlikely, as I said
14 and -- but had we found something, we would have
15 immediately moved to the next more formal stage.

16 Q. Right, thank you.

17 A. So for example, if we had identified that a member of
18 staff involved in the case had telephoned the journalist
19 in the week before, then I would have taken further
20 action in relation to that or if I could have identified
21 an email trail and a point of contact, but none of those
22 things were established.

23 Q. Or I think earlier you said a direct quote from a
24 document?

25 A. Yes, if there was a particular turn of phrase or a

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1 particular piece of information which was only held in
2 one document and not known beyond that document, that
3 might be a useful indication as to who had access to
4 that document and what did they do with it and that
5 would be a basis to carry out, as I indicated in that
6 email perhaps, interviews either internally or with the
7 police.

8 Q. Right. I would like to move on to something else that
9 you've mentioned today actually. You don't recall any
10 examples of any member of staff releasing confidential
11 information to the media?

12 A. I don't.

13 Q. Crown Office staff?

14 A. No.

15 Q. And in paragraph 82 of your Inquiry statement, I think
16 you've -- you mention that. And we see it on the screen
17 now:

18 "I do not recall any example of a member of staff
19 releasing confidential information to the media or any
20 such media reporting demonstrating that a member of
21 staff could be the only source of an unauthorised
22 release."

23 I'm interested in your experience of any other types
24 of release of information and this type of investigation
25 being carried out by the crown. Am I right in thinking

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- 1 that you were aware of the leaks of information
2 primarily in relation to two reports that had been
3 prepared in the Chhokar Inquiry?
- 4 A. No, I'm sorry, I had no involvement, and I don't recall
5 anything about any leaks or unauthorised release of
6 information in the Chhokar Inquiry. So I'm sorry,
7 I can't help you with that.
- 8 Q. Do you remember -- I'll ask you this to see if it
9 prompts any memory on your part -- that -- well, you
10 have said you started in Crown Office in '94 and this
11 occurred in 2001.
- 12 A. Yes.
- 13 Q. That there were two reports in relation to the
14 Chhokar Inquiry, one by Raj Jandoo did you?
- 15 A. Yes.
- 16 Q. And one by Sir Anthony Campbell, a judge from Northern
17 Ireland?
- 18 A. Yes.
- 19 Q. And there were leaks in relation to both those reports
20 prior to the family being informed as to the outcome of
21 the reports?
- 22 A. I have no recollection of that at all. I'm sorry.
- 23 Q. You have none?
- 24 A. No.
- 25 Q. Right.

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1 A. I -- just to explain, I was -- I'm not sure of the
2 timing of that, but that may have been because of the
3 duties I was performing at the time that I wasn't aware,
4 because there was a period of time where I wasn't
5 performing normal prosecution duties in this country.

6 Q. We have other witnesses coming. Don't worry I can speak
7 to others about that. Were you conscious at the time of
8 this leak and I think you said -- you've mentioned the
9 family as to the impact this leak would have or non-leak
10 would have on the family?

11 A. I think -- sorry.

12 Q. Sorry. Whether leak or speculation?

13 A. Yes. I think -- I think my experience over many years
14 has been that media reporting, particularly in the build
15 up to significant events in cases or investigations, is
16 extremely distressing for families and in the past that
17 has included releases of information, authorised
18 releases, official releases of information that I have a
19 general recollection in the past that the crown may not
20 always have advised the family before information was
21 put into the public domain and we have had to learn the
22 hard way the damage that causes in terms of confidence.
23 I can't give you any specific examples at the moment.

24 So I have experience and recollection of that and
25 experience and recollection of what I have termed

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1 speculation by the media or by people that the media are
2 quoting as to what the crown is going to do or what's
3 bound to happen or what the outcome is going to be and
4 all of that is incredibly damaging to the confidence
5 that families will have, because from their perspective
6 they may well assume that simply because something is
7 reported in the media they're assuming it's true and,
8 therefore, it potentially misleads the family as to the
9 accurate state of affairs.

10 Q. Of course in this particular occasion the speculation or
11 the leak was true. Were you also concerned about the
12 implications for the wider public confidence in relation
13 to leaks or speculation coming from a crown
14 investigation?

15 A. Yes, that would be why -- I think I said earlier that if
16 I had found a basis to do it, I would have taken this
17 very seriously. It would have been for a reason,
18 because I would have wanted to maintain public
19 confidence and demonstrate that if something had gone
20 wrong that it was dealt with appropriately and severely.

21 Q. Can I ask you to look at -- first of all at some
22 questions in the Rule 8 request, so moving on to
23 particular questions in relation to family liaison and
24 from an Article 2 perspective the next of kin, so
25 questions 34 to 39. And you are asked about family

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1 liaison here and your understanding of Crown Office's
2 role in liaison with the deceased family in death cases:

3 "How does Crown Office role interact with the role
4 of Police Scotland and PIRC duties and
5 responsibilities?"

6 And then you're asked to look at an email chain
7 between you, the crown agent, Ms Catherine Dyer, and
8 Mr McGowan of 6 May 2015 and a number of matters along
9 those lines. Carry on. You were asked about what
10 involvement you had in family liaison in relation to
11 Mr Bayoh's death and then, again, you're asked some
12 questions in paragraph 38 and about VIAS.

13 Can I ask you -- can we look at your answers,
14 please, to those questions, and primarily answers 34 and
15 35. So this is where you respond to these questions on
16 family liaison:

17 "Communication with a deceased's family during an
18 investigation as a critical part of the investigation.
19 It allows the crown to share information, keep the
20 family updated on progress and ensure that they have an
21 opportunity to contribute concerns or views on how the
22 investigation should be conducted. These can then be
23 considered by Crown Office in reaching an independent
24 view on the manner and extent of the investigation and
25 its conclusions. The crown's role in such communication

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1 must be carefully coordinated with any family liaison
2 put in place by the investigating authority, be it
3 Police Scotland or PIRC."

4 So just for those listening, Crown Office doesn't
5 have its own family liaison officers, they're engaged by
6 either PIRC or the police where appropriate.

7 A. That's correct.

8 Q. And -- but an organisation that the crown do have
9 communication with is VIAS, and can you give us a little
10 bit of information about VIAS?

11 A. VIAS is the shorthand term we would use to refer to our
12 own service, so colleagues in the service who have
13 direct contact with victims in criminal cases and with
14 bereaved relatives in death investigations, work within
15 what we refer to as the Victim Information and Advice
16 Service. So they are the dedicated staff who will
17 prioritise communication with bereaved families in death
18 investigations and at the point where the responsibility
19 for the investigation moves from the investigating
20 agency to the crown, there is traditionally a handover
21 of the responsibility for the contact with the bereaved
22 families from the family liaison officers to the VIAS
23 staff in the fiscal service and one of the things we've
24 learned over the years is that it's very important that
25 is carefully planned and coordinated, because if it's

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1 not, then it risks the family being confused as to
2 different organisations and the responsibility and
3 that's very unhelpful from their point of view. So
4 it's -- that handover is a critical part of the
5 investigation, as far as we're concerned.

6 Q. Can you help us understand, when does VIAS's role begin,
7 at what point? Is it before criminal proceedings or
8 regardless of whether criminal proceedings are
9 instigated or after they've commenced?

10 A. In prosecutions VIAS is notified at the point where a
11 decision is taken to prosecute and in the majority of
12 our cases that's at the very beginning of the case.
13 They will also become involved in cases where the crown
14 is carrying out its own investigation and the panel
15 appears on petition and there is an investigation before
16 the prosecution begins with the service of the
17 indictment so VIAS will be in contact at that stage. In
18 death investigations the contact with VIAS starts at the
19 point where the crown assumes responsibility for the
20 investigation as a result of the agency reporting the
21 death.

22 Q. So in this case we've heard that the final PIRC report
23 was sent to Crown Office in August 2016. Can you help
24 us understand when VIAS would have been involved or were
25 they involved with the family?

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1 A. So I can't help you -- I can't help you on the actual
2 engagement in this case between VIAS and Mr Bayoh's
3 family, but I would have expected on receipt of the
4 report for -- my expectation would have been that VIAS
5 colleagues would have become increasingly involved from
6 that point on because we would have regarded the PIRC
7 investigation as essentially complete and it was
8 thereafter the crown's responsibility to draw the
9 investigation to a conclusion.

10 Q. So at that point that the crown investigation commences
11 and PIRC have stepped back having delivered the report,
12 that is the point at which VIAS would have had some
13 engagement, if any?

14 A. That would be my expectation, yes.

15 Q. Right. And then you say at 35:

16 "I do not know if there was a handover of family
17 liaison from PIRC to Crown Office. The duty of
18 Crown Office in any death investigation, whether
19 involving PIRC or not, is as outlined in my answer to
20 question 34. Engaging meaningfully and effectively with
21 the deceased's family ensures that they have confidence
22 in the investigation and its outcomes and satisfies the
23 crown's obligations in terms of Article 2 of the
24 European Convention."

25 So you see an engagement with the family as an

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1 important part of an Article 2-compliant investigation?

2 A. Yes. For me personally, I think that's one of the
3 principal learning points for the organisation over the
4 last 15 to 20 years has been the importance of that
5 engagement and I should stress in talking about our VIAS
6 staff, I would not necessarily expect the engagement
7 with the family to be limited only to the VIAS staff.
8 In a lengthy complex investigation, I would expect the
9 investigators, the lawyers involved, to also build up a
10 relationship with the family over time.

11 Q. Right. We've heard much about the Lord Advocate's
12 engagement with the family and we'll no doubt hear more
13 in due course. We've heard less about VIAS's engagement
14 with the family. Were you aware of any engagement that
15 was going on during this period?

16 A. The extent of my awareness was that initial contact by
17 the Lord Advocate which was facilitated by the service
18 and in some cases direct with the Lord Advocate himself,
19 because the Lord Advocate was very clear in a way that
20 we understood that there was a particular need in this
21 case for the crown to do all it could to try and ensure
22 that the family were confident that the investigation
23 would be independent and would be effective.

24 I can't -- I have no recollection as to the extent
25 of any VIAS staff involvement in that, whether they were

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1 present at these meetings or not. It's possible they
2 may have been, I'm not sure, but I wouldn't have
3 expected them in the ordinary course of events to become
4 involved until after the report had been received.

5 Q. Paragraph 36 does say "the Lord Advocate explains", if
6 we can move down. No, sorry, this was a question. I'll
7 move on from that.

8 We have heard some evidence that the family were
9 given what was described as exceptional disclosure by
10 Crown Office in relation to the question of experts,
11 disclosure on an exceptional basis, solely to enable
12 them to instruct their own medical experts, but there
13 was comment made and we've heard evidence from Les Brown
14 that that was given to the family in this case. Were
15 you aware of that exceptional access when
16 Frank Mulholland was Lord Advocate to the family?

17 A. I was. In a very general sense, I was aware of that and
18 it was driven by some of those early discussions that I
19 think I referred to earlier which took place in the
20 immediate aftermath of Mr Bayoh's death, including in
21 discussions with Lord Advocate, where I think it was
22 clear to all of us that -- although as I said earlier
23 I don't recall any other death of a man in these
24 circumstances in Scotland, it was clear to all of us
25 that race was an important element in this and it was

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1 important -- I think we all understood from our own
2 experience in the organisation going as far back as the
3 Chhokar investigations, that it was important that we
4 should seek to meet the individual needs of a particular
5 family in each case and regard -- we should not make
6 assumptions about what those needs would be.

7 It appeared to us in this case I think from a very
8 early stage that it was possible that this family may
9 have distrust of authority, may not believe what the
10 police would say, there was therefore a need for us to
11 ensure that they had confidence that their concerns
12 could be raised with the investigation and that they
13 would be addressed and that was the Lord Advocate's
14 absolute priority, that Mr Bayoh's family from the
15 beginning should know that they could raise their
16 concerns about the manner in which he had died and that
17 they could have them considered by the investigation.
18 That could only be done if information was shared with
19 them at a much earlier stage than would normally be the
20 case and so my understanding of the exceptional nature
21 of it was in that regard that was the purpose of it, it
22 was to ensure that his family's needs during the
23 investigation were met.

24 Q. Do you think this exceptional approach was of benefit to
25 the Crown Office in building a relationship with the

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- 1 family?
- 2 A. That's very difficult for me to answer because I wasn't
3 involved. I've never had a meeting with Mr Bayoh's
4 family, I've never been directly involved, I've never
5 had any discussions or meetings with their solicitor in
6 relation to this. I'm not sure I'm the best person to
7 offer a view as to whether -- I think it really has to
8 be Mr Bayoh's family who offer a view as to whether or
9 not that was successful or not or whether they found
10 that helpful.
- 11 Q. Well, we have heard from the family and we do hope to
12 hear from the Lord Advocate in due course also. We can
13 perhaps ask him.
- 14 A. Yes, I mean I should be absolutely clear the
15 Lord Advocate was directly and personally involved in
16 this matter from the very beginning because he
17 recognised the high-profile nature of the investigation,
18 he recognised the complexity, the need to consider the
19 issues I've talked about earlier today and I think he
20 recognised, as we all did, the need to take appropriate
21 steps to demonstrate to the family that they would be
22 essentially a part of the investigation and would have
23 an opportunity to air their concerns and be confident
24 that they would be addressed.
- 25 Q. I would like to look at paragraph 38, I think it's quite

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1 a lengthy paragraph, if we could move that up. And it
2 says:

3 "The traditional crown approach to engaging with
4 families in death investigations has evolved since the
5 incorporation of the European Convention on Human
6 Rights. This has included engaging with families to
7 ensure that the investigation is Article 2 compliant.
8 The extent of the information provided in this case at
9 an early stage insofar as I was aware of it was unusual
10 and this was a reflection of the high-profile and
11 sensitive nature of the investigation and a judgment
12 about what was needed to meet the family's needs."

13 What was the old traditional crown approach for
14 engaging with families?

15 A. I think it was broader than simply engaging with
16 families but my personal perception is that on joining
17 the organisation in 1994, the independence of our
18 decision-making as prosecutors was treated as paramount,
19 which is correct but it was seen in a very, very narrow
20 way so for example when I joined the organisation, it
21 was explained to me that it was not appropriate to
22 explain to a victim of a crime why there would be no
23 criminal proceedings in the case and that was regarded
24 as being the right thing to do and it was about -- in my
25 view independence was confused with distance and

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1 separation and that's really what I'm getting at in
2 relation to the traditional approach, that had
3 implications I think in relation to death investigations
4 so when I started carrying out death investigations from
5 1994 onwards or was involved in them, there was much
6 more limited engagement with the family. It might
7 consist simply of notification that the investigation
8 was underway and then an offer of a meeting at the end
9 of the investigation and much more limited active
10 engagement and involvement so a number of things over
11 those 30 years have caused us to change that approach,
12 the Article 2 considerations are one of those but there
13 were others.

14 Q. And Article 2 and perhaps other considerations now
15 permit a more engaged way of the crown dealing with the
16 family?

17 A. Article 2 certainly as a legal requirement requires us
18 to do it. I think there probably is still some way for
19 us to go to be as transparent as possible. I think
20 there is still a traditional conservatism about the
21 sharing of information simply because there is a concern
22 that that may somehow put an investigation at risk and I
23 think the organisation is still working to -- I don't
24 think we've yet reached the point that we will get to in
25 terms of transparency. I think there is still work for

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1 us to do on that.

2 Q. Well, if I may, I'll stop you then, and we can maybe
3 come back to that tomorrow, would that be possible?

4 LORD BRACADALE: Yes, we'll continue with your evidence at
5 10 o'clock tomorrow morning.

6 (4.15 pm)

7 (The hearing was adjourned to 10.00 am on Wednesday, 24
8 April 2024)

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