

PUBLIC INQUIRY INTO THE DEATH OF SHEKU BAYOH

STATEMENT OF JAMES WOLFFE KC

Personal information

1. My full name is [REDACTED] James Wolffe. I am an advocate and barrister and a King's Counsel. I hold part-time positions as a Judge of the Courts of Appeal of Guernsey and Jersey and I am the Investigatory Powers Commissioner for those jurisdictions. My professional addresses are the Advocates Library, Parliament House, Parliament Square, Edinburgh EH1 1RF and Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD.

Qualifications and professional experience

2. I have a LLB Degree and a Diploma in Legal Practice from Edinburgh University and a Bachelor of Civil Law Degree from Oxford University. I qualified as a solicitor in 1989 and as an advocate in 1992. I was an advocate in private practice at the Scottish bar from 1992 until 2007 and again from 2010 until I was appointed Lord Advocate, practising mainly in public and commercial law. Between 2002 and 2007 I was First Standing Junior Counsel to the Scottish Ministers. I took silk in 2007.

3. Between 2007 and 2010, I served as an Advocate Depute (from 2008 as a Senior Advocate Depute). In 2009-10 I was engaged full-time in leading for the Crown in the fatal accident inquiry into multiple deaths at Rosepark Care Home. The hearing in that FAI lasted some nine months. I was called to the bar of England & Wales in 2013. I was elected successively Vice-dean (2013) and then Dean (2014) of the Faculty of Advocates, combining the responsibilities of those offices with practice at the senior bar. I was appointed Lord

Advocate on 1 June 2016 and served in that office until June 2021. Since I left office, I have returned to professional practice.

4. I have prepared this statement myself. With the passage of time, my present specific recollection of the events of interest to the Inquiry is limited, but I have refreshed my memory both as to the general course of those events, and, so far as possible, as to specifics, by reference to the documents which have been provided to me by the Inquiry. My evidence is, to a large extent, dependent on the documentary record. I was initially given access to a limited tranche of documents. It was evident to me that in order to answer the Inquiry's questions, I would need access to further documents. In response to my request, the Inquiry has helpfully obtained and provided a substantial body of additional documentation, including a significant body of material to which I was given access on 26 March 2024. I have not had access, other than through the Inquiry, to documents held by COPFS and I do not hold any such documents personally.

The duties and responsibilities of the Lord Advocate

5. In order to set my responses to the Inquiry's questions about my role and experience in context, it seems to me that it will be helpful for me to describe in general terms the functions of the office of Lord Advocate, though I appreciate that the Chair of the Inquiry will be well aware of these. This general background provides both content and context for my response to Question 1 and to some of the other questions which I have been asked to address.

6. The Lord Advocate is the senior Scottish Law Officer. The holder of the office is head of the systems of criminal prosecution and investigation of deaths in Scotland. These are functions which are exercised independently of any other person. The Lord Advocate also exercises numerous statutory functions which are conferred specifically on the holder of that office. These include, notably, functions in relation to extradition and mutual legal assistance and constitutional functions under the Scotland Act 1998 in relation to Scottish legislation and the litigation of devolution issues.

7. The Lord Advocate is, by statute, a member of the Scottish Government. The role and responsibilities of the Law Officers (ie the Lord Advocate and the Solicitor General for Scotland) within the Scottish Government are described in the Scottish Ministerial Code 2018 edition¹, at paragraphs 2.30 to 2.43 (I do not believe these parts of the Code will have

¹ <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

changed materially since the earlier edition). In addition to these Law Officer functions, the Lord Advocate had Ministerial responsibility for the Civil Recovery Unit, which fulfils Scottish Ministers' functions under the Proceeds of Crime Act. Although, as Lord Advocate, I was a member of the Scottish Government, I had and have no party-political affiliation.

8. The Lord Advocate is assisted, in the exercise of the responsibilities which I have described, by the Solicitor General for Scotland, who, by virtue of section 2 of the Law Officers Act 1944, may exercise any of the Lord Advocate's functions. Throughout my period of office, the Solicitor General for Scotland was Alison di Rollo KC.

9. The following paragraphs are concerned solely with the Lord Advocate's role as head of the systems of criminal prosecution and investigation of deaths in Scotland. I do not propose to refer further to the Lord Advocate's other functions and responsibilities. As head of those systems, the Lord Advocate is Ministerially responsible for the work of the Crown Office and Procurator Fiscal Service (COPFS), the agency responsible for the prosecution of crime and investigation of deaths in Scotland. The Lord Advocate exercises Ministerial oversight over the work of COPFS and is constitutionally accountable for that work, for example by responding to questions in the Scottish Parliament. The Lord Advocate's responsibilities include, for example, the promulgation of prosecution policy and negotiation of the COPFS budget.

10. COPFS employs staff (procurators fiscal, procurator fiscal deputes and others) engaged in the prosecution of crime and investigation of deaths in Scotland. The professional head of COPFS and accountable officer is the Crown Agent. Throughout my period of office, the Crown Agent was David Harvie. He was assisted by three Deputy Crown Agents, each responsible for separate areas of the work of COPFS. Lindsey Miller and John Logue, who are referred to later in this statement, were Deputy Crown Agents at the relevant time. Lindsey Miller was the Deputy Crown Agent for Serious Casework. I cannot recall John Logue's title, but his portfolio encompassed what one might describe as central functions – HR, IT systems and the like.

11. COPFS was divided into a number of departments, divisions or units, which undertook different aspects of the Service's work. These included High Court and Local Court, which undertook the bulk of the Service's prosecutorial work and the Scottish Fatalities Investigation Unit ("SFIU"), which undertook the Service's non-criminal death investigation work, as well as the Policy Unit which supported the Law Officers' policy work. There were also a number of specialist units, including, for example, Health and Safety Division, the

Proceeds of Crime Unit, the Wildlife and Environmental Crime Unit, and, of particular relevance to this case, Criminal Allegations Against the Police Division (CAAPD), which dealt with allegations of criminality against the police. CAAPD and SFIU fell within Ms Miller's Portfolio, as DCA for Serious Casework.

12. The Lord Advocate's functions in relation to the prosecution of crime and investigation of deaths may, as a matter of law, be exercised, and are routinely exercised, on behalf of the Lord Advocate by Advocate Deputes (also referred to as "Crown Counsel"). The Lord Advocate issues commissions to Advocate Deputes empowering them to exercise the Lord Advocate's functions, although the Lord Advocate remains answerable for the actions of Advocate Deputes in the exercise of those functions. That constitutional position is reflected in the Lord Advocate's warrant of appointment: my own warrant appointed me by name "and his deputies for whom he shall be answerable to use and exercise the aforesaid office of Lord Advocate". The leadership of the cadre of Advocate Deputes at the relevant time comprised Principal Crown Counsel [REDACTED] Assistant Principal Crown Counsel (Ashley Edwards KC) and Deputy Principal Crown Counsel (Iain McSparran KC) .

13. The system of criminal prosecution in Scotland, for which the Lord Advocate is responsible, includes the investigation of crime as well as the prosecution of criminal proceedings and other prosecutorial action. Whilst the police generally investigate alleged crimes on their own initiative, they have an obligation (subject to any directions by the Lord Advocate) to report the outcome of their investigations to the procurator fiscal and to act in accordance with any direction or instruction of the relevant prosecutor. The obligation of the police to act, in relation to the investigation of offences, in accordance with any lawful instruction of the prosecutor is reflected in section 17(3) of the Police and Fire Reform (Scotland) Act 2012. The Lord Advocate has statutory power (by virtue of section 12 of the Criminal Procedure (Scotland) Act 1995) to issue directions to the Chief Constable as regards the reporting of alleged crimes to the procurator fiscal. Analogous provision is made in section 41A of the Police, Public Order and Criminal Justice (Scotland) Act 2006 in relation to investigations undertaken by the Police Investigations and Review Commissioner on the direction of the prosecutor.

14. The system for the investigation of deaths, for which the Lord Advocate is also responsible, encompasses the investigation of sudden, suspicious, accidental or unexplained deaths. Such deaths require to be reported to the procurator fiscal by medical practitioners in accordance with directions issued by or on behalf of the Lord Advocate. Where there is potential criminality, the death would be the subject of a criminal

investigation. Depending on the circumstances, this might be a homicide investigation, or, for example, an investigation into a Health and Safety at Work Act offence (or an offence under other statutory provisions) or a Road Traffic Act offence. The investigation would be undertaken by the appropriate specialist division within COPFS. Where there is no suspicion of criminality, or criminality has been excluded, the death would be investigated as a non-criminal death through the SFIU. A death investigation may result in a fatal accident inquiry, where that is required by statute or where, in terms of section 4 of the Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, the Lord Advocate decides that it is in the public interest for such an inquiry to be held.

15. The Solicitor General and I maintained a general overview of COPFS' casework through written weekly briefing. We received this in advance of a weekly meeting with the Crown Agent (described as a "LOB" meeting, the initials referring to "Law Officers' Briefing"). As I recall it, every other week, at least one of the Deputy Crown Agents also attended. We also received bespoke written briefing on specific issues which required to be brought to our attention, or which we requested, and were in regular contact with the Crown Agent, Deputy Crown Agents, Head of COPFS Policy Unit, Head of COPFS Communications and other senior COPFS staff as required.

16. By convention, certain decisions which could, as a matter of law, be taken by an Advocate Depute, were referred to Law Officers for decision or approval. These included decisions to discontinue a rape prosecution and, significantly for this Inquiry, decisions to prosecute on-duty police officers. Advocate Deputes might refer other cases to the Law Officers for one reason or another. Cases would generally be referred to the Law Officers by way of a written report from Crown Counsel with a recommendation, although where an issue arose urgently (for example during a trial), Law Officer approval for a proposed course of action might be sought face to face at a meeting or by telephone. In all such cases, although a Law Officer might have made or approved the decision, the usual practice was for Crown Counsel to mark the case and issue any consequent instruction. I had regular contact in this way with individual Advocate Deputes. The Law Officers also personally reviewed or oversaw the review of some decisions not to prosecute, under the Victims' Right to Review Scheme. In particular, if the initial prosecutorial decision had been taken or approved by a Law Officer, any subsequent review would generally be undertaken or overseen by the other Law Officer.

17. Against that background, I address the first suite of questions which the Inquiry has asked, about my role and experience.

Question 1: Please explain the duties and responsibilities of the office of Lord Advocate as it relates to your involvement in the post incident management and investigation into the death of Mr Sheku Bayoh including the reporting of the case to Crown Counsel (the “Investigation”)?

18. The investigation into the death of Mr Bayoh engaged the Lord Advocate’s responsibilities as head of the system of criminal prosecution and as head of the system for the investigation of deaths in Scotland. I have described those responsibilities in more detail, albeit in general terms, above.

Question 2: What do you understand to be COPFS’ role in the investigation of sudden, suspicious, accidental and unexpected deaths in Scotland as of the date you became involved? What do you understand COPFS’ duties and responsibilities to be in this regard?

19. As at the date when I became involved in this particular case, I understood that the investigation of sudden, suspicious, accidental and unexpected deaths in Scotland could engage COPFS’ functions in relation to criminal prosecution (including its functions in relation to the investigation of crime) and for non-criminal death investigations. As regards the investigation of crime, I considered that COPFS’ responsibility was to undertake a thorough investigation with a view to ascertaining whether or not there was sufficient evidence that a crime had been committed and, if there was sufficient evidence, whether (applying the policies set out in the Scottish Prosecution Code) action should be taken against an accused person by way of criminal proceedings or otherwise. As regards a non-criminal death investigation, I considered that COPFS’ responsibility was to undertake a thorough investigation directed to establishing the cause of the death and, insofar as required, into the circumstances, and thereafter to address whether or not a fatal accident inquiry should be instructed in terms of the relevant legislation². Where appropriate, COPFS would require to report the outcome of a non-criminal death investigation to Crown Counsel for a decision as to whether or not a fatal accident inquiry should be held. I understood that these aspects of COPFS’ work were and are part of the system which fulfils the UK’s obligations under Article 2 of the European Convention on Human Rights in cases to which that Article applies.

² At the time of my appointment, the Fatal Accidents and Sudden Deaths Inquiries Act 1976, which was replaced by the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, the provisions of which progressively came into force between September 2016 and June 2017.

Question 3: Prior to the date you became involved, what experience did you have in investigations of deaths in police custody, or deaths during or following police contact? Please provide details and the outcome of the cases. Was race a factor to consider in any of these cases? If so, please provide examples.

20. So far as I can recall, when I was appointed Lord Advocate, I had not had any prior experience of the investigation of deaths in police custody, or deaths during or following police contact.

Question 4: Prior to your involvement, what experience did you have in relation to family liaison in deaths cases? Was race a factor to consider in family liaison in any of these cases? If so, please provide examples.

21. During the period when I was an Advocate Depute, I had some, albeit limited, experience of family liaison in deaths cases. So far as I now recall, this was generally in the context of the prosecution of cases involving a death (principally homicides). I cannot now remember specifically how many such cases I prosecuted during that period. So far as I can recall, the family liaison in which I was involved during that period was through meeting bereaved family members at court, immediately before, during and/or after a trial or sentencing hearing. In addition, in advance of and during the lengthy fatal accident inquiry into the deaths at ██████████ ██████████, which I conducted in 2009-10 (and in which the Determination was issued in 2011), I had regular meetings, in my capacity as counsel leading for the Crown at the FAI, with relatives of the deceased. So far as I can now recall, race was a potential factor in one of the homicide cases which I prosecuted when I was an Advocate Depute, in which the victim was an asylum seeker, but I do not now recall whether I was personally involved in family liaison in that case.

Question 5: What were the circumstances in which you first became involved in the Investigation? When did your involvement end? Did you receive a briefing or "handover" in relation to the Investigation from the previous Lord Advocate? If so, what was covered and what was your understanding of the Investigation up to the point you became involved? What did you understand COPFS required to do in order to bring the Investigation to its conclusion? Please refer to the summary of the Investigation in the Minute by Mr Les Brown dated 27 June 2016.

22. I was constitutionally responsible for the investigation into Mr Bayoh's death from the date of my appointment as Lord Advocate. I did not receive any briefing or induction on this, or any other, matter, from the previous Lord Advocate; such a "handover" on the appointment of a new Lord Advocate from the previous incumbent would not, I believe, be usual. The earliest document which I have been shown by the Inquiry relating to this case is an email dated 9 June 2016 sent to my office by PC Paton's wife³. I cannot now recall whether I saw this email, though I think it likely that I did; I recall being advised that it was for others to respond to the communications from Mrs Paton. A very brief high-level note, which did no more than alert me to the case, and advised me that there was a PIRC investigation, formed part of the weekly LOB briefing for 16 June 2016⁴. I received the briefing to which the Inquiry has asked me to refer from Mr Brown, then head of CAAPD, on or shortly after 27 June 2016. I may well also have received some oral briefing on the case, which I cannot now recall, from senior COPFS staff at LOB briefings or otherwise.

23. I cannot now specifically recall what I understood about the state of the investigation at that time though it is apparent from the documents that I was made aware that the case was under investigation by the PIRC. It followed that the PIRC would require to complete its investigation, and thereafter COPFS would require to consider the PIRC report and decide whether any further investigation should be instructed or undertaken. I note from Mr Brown's minute that COPFS had also invited the HSE to consider whether to investigate the case, but that the HSE had deferred consideration of that question until it had sight of the PIRC report.

24. So far as I now recall, my last personal involvement with the case was in relation to the establishment of this Inquiry. From the outset, I appreciated that, if there was no criminal prosecution (and possibly even if there was a criminal prosecution) there would require to be a fatal accident inquiry or other process of public inquiry into the circumstances of Mr Bayoh's death in order to satisfy the state's obligations under Article 2 of the European Convention on Human Rights. Although this was not a death in custody (which would have triggered the statutory requirement for a mandatory fatal accident inquiry), I took the view that the Article 2 investigative obligation applies to deaths, such as the death of Mr Bayoh, which have occurred in the course of contact with the police. In due course, in the exercise of my responsibilities as head of the system of deaths, I took the view that a fatal accident

³ [REDACTED]

⁴ COPFS-06376.

inquiry would be unable to address important issues which arose in relation to the post-incident handling of the case. I accordingly recommended to Scottish Ministers that this Inquiry should be established; and, along with the then Cabinet Secretary for Justice, I met with the Chair around the time his appointment.

Question 6: What was the interaction between the role of Lord Advocate and Crown Counsel appointed to the Investigation?

25. At the time of this investigation, only the most significant and complex cases had a specific Advocate Depute allocated to them. In this case, the then Assistant Principal Crown Counsel (“APCC”), now Principal Crown Counsel, was the allocated Advocate Depute. This is noted in paragraph 9 of Mr McGowan’s minute to the Law Officers dated 29 August 2016⁵, which proposed that APCC be kept up to date at all stages with the ongoing work being undertaken by the Crown. Consistent with that, and with the practice as I understood it, I expected that APCC would provide such direction as might be required by the investigation team. I can see from Mr McGowan’s minute of 7 February 2017⁶ that, consistent with that expectation, Crown Counsel had agreed the investigative strategy (para. 2) and had instructed further investigations (para. 5). I can also see from other documents that there were meetings between APCC and the investigative team in July and November 2017⁷, and there may have been others.

26. Although the convention about Law Officer involvement in decisions to prosecute an on-duty police officer strictly applied, I believe, only where a prosecution was recommended, I envisaged that this case would be reported to me, whether or not APCC concluded that a prosecution should be initiated, with her conclusions and recommendations so that I could take or approve the final decision. If at any point during the course of the investigation, APCC wished to raise any issue, I would have been available to discuss the case with her. I recall a discussion with her about disclosure and the documents which have been made available to me contain a reference to a meeting in December 2017, which is couched in terms which suggest that there were other meetings which I cannot now recall⁸.

⁵ COPFS-05119(b)

⁶ COPFS-03252(a)

⁷ COPFS-02214 (a)

⁸ COPFS-04389

27. Following the completion of the Crown investigation, APCC did, as expected, report the case to me on 4 June 2018, with her conclusion and recommendation⁹. On 19 June she submitted a further report, which addressed the question of whether the evidence disclosed a basis for a Health and Safety at Work Act prosecution¹⁰. I had a meeting with her to discuss her recommendation. Whilst I do not have a detailed recollection of what was discussed, I do recall instructing that some further work be undertaken. I can see from the papers provided to me that this discussion took place on 15 August 2018, and the additional work involved further consultation with the restraint expert and consideration of whether the evidence disclosed a basis for a Health and Safety at Work Act prosecution unconnected with the death of Mr Bayoh¹¹. On 23 August 2018 APCC re-reported the case to me, following that additional work, [REDACTED]

Question 7: To the best of your understanding, to what extent was your predecessor Lord Mulholland's involvement in the Investigation consistent with normal practice? To what extent was your involvement in the Investigation consistent with normal practice? Please explain any departures from normal practice.

28. I am not aware, other than in general terms, of the extent of Lord Mulholland's involvement in this case and it would not therefore be appropriate for me to comment on how far the approach which he took to Lord Advocate involvement was consistent or not consistent with normal practice. However, for my own part, I question the assumption implicit in the expression "normal practice" in this context. The extent to which Lord Advocate becomes personally involved in any individual case or matter (or indeed in any particular aspect of the various responsibilities of the office) and the balance between personal consideration by Lord Advocate of any particular matter and reliance on others, will depend, among other things, on the particular issues arising from time to time across the whole portfolio of responsibilities, as well as on the incumbent's own judgement. The competing pressures vary significantly from time to time (so, for example, my own incumbency was marked by the particular demands arising from Brexit and Covid), and, in any event, different holders of the office may reasonably take different approaches – it being accepted, of

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COPFS-02232

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course, that the Lord Advocate is answerable for all of the functions of the office regardless of the extent of the Lord Advocate's personal involvement in any particular matter.

29. The nature of the role generally places very significant constraints on the personal involvement which the Lord Advocate can have in any individual case. Thus, it would, I believe, be unusual for a Law Officer to become personally involved whilst a case is being investigated by the relevant investigating agency, though, for the reasons I have just outlined, I would not myself characterise such involvement, in a case where the incumbent considers such involvement to be justified, as a "departure from normal practice". During my incumbency, I did not, so far as I can now recall, get involved in personally directing any criminal or death investigation in the way that an allocated Crown Counsel does, although there were cases which were reported to me for a decision (eg in relation to discontinuation of proceedings) where I instructed further investigative work to be undertaken and other cases in relation to which I was specifically briefed and asked to approve or endorse a particular decision or approach. It was very unusual indeed for me to meet with bereaved relatives or to correspond directly with a solicitor in the context of a live death investigation. I do not believe that any aspect of my own approach to these issues involved any departure from "normal practice".

The Police Investigations and Review Commissioner ("PIRC")

Question 8: What experience did you have in COPFS-directed PIRC investigations prior to the date you became involved in the Investigation?

30. So far as I can recall, I had no involvement in COPFS-directed PIRC investigations prior to my appointment as Lord Advocate. Quite early in my tenure as Lord Advocate, I paid an official visit to the then PIRC at her offices. I would have received briefing about the work of the PIRC in advance of, and during, that visit, although I cannot now recall the details.

Question 9: What was your involvement, if any, in COPFS' instruction of PIRC in relation of the Investigation?

31. None, so far as I can recall.

Police officers' status

Question 10: What is COPFS' role, if any, in determining if a person's status is that of witness or suspect in an investigation into a death in custody or a death during or following contact with the police? What is the significance for the Investigation of a person's status? In the event that there is no reasonable suspicion in respect of any person(s) in an investigation, what is COPFS' role in identifying a suspect?

32. As a general rule, I would expect it to be the investigating agency (whether the police or the PIRC) which would determine, in the first instance, whether or not a particular individual should be regarded as a suspect. I would expect investigating officers to be alive to the possibility that an individual, who has been or is being spoken to as a witness, might become a suspect as information emerges. Generally, I would expect officers to make that judgment as they proceed with an investigation. If reasonable suspicion has fallen on a particular individual, answers to questions elicited from that individual by the police or the PIRC when he or she has not been cautioned and given the opportunity to take legal advice are likely to be ruled inadmissible.

33. Again, speaking generally, the police may seek guidance in relation to an investigation from COPFS, and I see no reason, in principle, why the police (or indeed the PIRC) might not, in an appropriate case, ask for guidance from the prosecutor as to whether a particular individual should be treated as a suspect. Since any criminal investigation is ultimately subject to the direction of the appropriate prosecutor (whether under section 17(3) of the Police and Fire Reform (Scotland) Act 2012 or section 41A of the Police, Public Order and Criminal Justice (Scotland) Act 2006), the appropriate prosecutor could, it seems to me, lawfully issue a direction that a particular individual should (or should not) be treated as a suspect. I cannot speak to whether this was common or unusual.

34. Any such decision would fall to be made by reference to whether or not there is a proper basis for reasonable suspicion that a particular individual has committed a crime. Even if there is a basis for reasonable suspicion that an individual has committed a crime, cases may arise where the prosecutor may decide to treat that individual as a witness, with a view, for example, to obtaining evidence against another suspect. And the Crown might take the view that a suspect should not be prosecuted, with a view to taking evidence from that individual as a witness against a co-accused or other accused persons. None of these considerations are specific to deaths in custody or deaths during or following contact with the police.

Question 11: When was the police officers' status decided? Why was it decided at that time? Was it subject to change? When would it be reconsidered, if at all? What was your involvement in any reconsideration of the police officers' status?

35. I have no recollection of being involved in any consideration of the status of the police officers. I understand from the material which the Inquiry has provided to me that a decision had been made at an early stage in the PIRC investigation not to treat the officers as suspects. That long pre-dated my appointment as Lord Advocate, and I cannot speak to why that decision was made. My own understanding was that the purpose of the investigation was, in the first instance, to determine whether or not a crime had been committed and whether criminal proceedings should be instituted against any person. That is explicitly stated at paragraph 3 of Mr McGowan's minute to the Law Officers dated 29 August 2016¹³, to which the Inquiry has directed my attention. It is implicit in that understanding that the status of the officers was potentially subject to change (because they and Police Scotland were the only persons in respect of whom criminal proceedings might be anticipated). I do not recall being asked to give any personal consideration to this issue.

Question 12: To what extent is it normal for PIRC to conduct an investigation and prepare a report of findings when there is no reasonable suspicion in respect of any person? To what extent is it normal for the Crown Precognition to be drafted and submitted where there is no reasonable suspicion in respect of any person? In light of your answers and to the extent that you were involved, please set out why the Investigation and precognition process was conducted in the way it was standing the status of the police officers.

36. It is evident from the statutory functions of the PIRC that the PIRC may conduct an investigation and prepare a report of findings in non-criminal cases. Thus, the PIRC may investigate and report on a serious incident involving the police referred to the PIRC by the SPA or the Chief Constable under section 33A(c) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, whether or not the serious incident involves potential criminality, and section 41C of that Act envisages investigations by the PIRC of a non-criminal nature.

¹³ COPFS-05119(b)

37. The power of the prosecutor to direct an investigation under section 33A(b)(i) of that Act is in respect of “any circumstances in which there is an indication that a person serving with the police may have committed an offence”. The words “indication” and “may have” suggest that circumstances can arise in which this power could potentially be exercised, even though no reasonable suspicion has settled on a particular individual. I cannot say whether this would or would not be ‘normal’ since I have very limited personal experience of PIRC cases.

38. I would expect that usually, in such a case, suspicion would be directed to, or fall on, a particular person or persons and the report would be directed to the evidence bearing on the question of whether the suspect(s) has/have committed a crime. However, where there is a live question as to whether a crime has been committed at all, I would expect that question to be investigated fully and to be the subject of a report and, if so advised, a Crown precognition. In my understanding, a “Crown precognition” is simply the vehicle for seeking Crown Counsel’s Instruction following a Crown investigation and I am not surprised that the matter should have been reported to Crown Counsel for instruction in that form.

39. So far as I can now recall, I simply accepted that there was a live PIRC investigation (which was, of course, ongoing when I took office), and that, [REDACTED], once the PIRC report had been completed, the Crown would require to consider the report and address whether any further inquiries should be undertaken. Mr McGowan’s minute of 29 August 2016, which followed receipt of the report from the PIRC, contained advice about the further work which it was proposed the Crown should undertake and the arrangements for progressing the Crown’s investigation.

Ingathering of evidence and analysis

Question 13: What is your understanding of COPFS’ role in investigating a death in custody or death during or following contact with the police? How does COPFS’ role interact with the role of Police Scotland and PIRC in investigating?

40. As a general rule, in most cases the police take the initiative in investigating a potential or alleged crime and it is for the police to decide the investigative approach. They are obliged to report the outcome of the investigation to the procurator fiscal and then to proceed in accordance with any instructions of the procurator fiscal. In more serious or complex cases, the procurator fiscal may be involved during the police investigation and may give such direction to the police as is appropriate. In unusual cases, Crown Counsel may be

involved in giving direction to the police during the investigation (I have seen this, for example, in the context of a complex and sensitive serious organised crime investigation).

41. Where a death occurs during or following contact with the police, or while in police custody, the SPA or the Chief Constable may request the PIRC to investigate such a case, pursuant to section 33A(c) of the Police, Public Order and Criminal Justice (Scotland) Act 2006. But where there are “any circumstances in which there is an indication that a person serving with the police may have committed an offence”, the Crown may direct the PIRC to undertake an investigation under section 33A(b)(i) of the Act. In such a case, the PIRC must, by virtue of section 41A of the Act, thereafter act in accordance with any lawful instruction given by the prosecutor.

42. The Crown’s responsibility and involvement, in such a case, and the reason why the PIRC may be directed to carry out the investigation, is, in the first instance, to ensure the structural independence of the investigation from Police Scotland. Thereafter, as the statute envisages, the appropriate prosecutor may give instructions to the PIRC. Once the PIRC has completed their investigation, they will report the case to COPFS, so that the prosecutor can consider what further action, if any, should be taken in relation to the case. The structural arrangements, as I read them, are intended to place the PIRC in the same position as the police would be in relation to a non-PIRC investigation – namely, that the PIRC generally has primary responsibility for undertaking the investigation, but is subject to any directions which the appropriate prosecutor may give, whether during the investigation or after the PIRC has reported the case to the Crown.

Question 14: What was your role in fixing timescales for the Investigation? What considerations were relevant for this? Please note Mr Les Brown’s Minute to you dated 3 April 2018¹⁴ which explains you indicated recommendations in respect of the individual officers should be provided by the end of the financial year.

43. I note that Mr McGowan’s minute to the Law Officers of 29 August 2016¹⁵, at paragraph 10, expressed the anticipation that the Crown would be in a position to make a decision on criminal proceedings “by the end of the calendar year”. Reading that minute now, I doubt whether it was, in fact, realistic to expect the work required to be completed by the end of 2016. At the time, relatively shortly after I had been appointed Lord Advocate, I probably did

¹⁴ COPFS-02160 (a)

¹⁵ COPFS-05119(b)

not appreciate just how long complex death investigations commonly took. It soon became evident, as I gained experience in the role, that such investigations routinely took a long time, and that more complex and significant cases often took very much longer than the average. [REDACTED]

[REDACTED]. During my period of office, I became increasingly alive to, and concerned about, the impact which the passage of time can have on victims of crime, on bereaved families in the context of death investigations, and on persons whose actions are under investigation (whether or not those persons are suspects or accused persons). I refer further below to steps which I took to address delays generally.

44. I remember becoming concerned about the time which the Crown investigation into this particular case was taking. I recall raising, at some point a question with the Crown Agent about whether the investigation within CAAPD was adequately resourced – regrettably, I cannot identify even approximately when that was, though it was likely in the course of 2017. I also recall a meeting with Mr Brown in my room in Crown Office (again, I cannot identify when that was, though I think it must have been in 2017) at which Mr Brown advised me that the Crown had instructed, and was awaiting, the creation of a compilation disc containing all of the available audio and video evidence but that this was expected to take a very considerable time to produce (so far as I can now recall, I was told that this because of the demands on the limited resource available within SPA to undertake this work). I recall being concerned at the timescale envisaged and directing that the question of whether those concerned could re-prioritise their work to expedite the exercise for this particular case should be considered - although I recognised that there might well be constraints on any re-prioritisation which would be possible, such as, for example, the need to undertake work in order to meet statutory time bars and other timing imperatives in other cases. The documentation discloses that in August 2017 I was advised that, whilst timescales for completion of this work were dependent on SPA turnaround, it was anticipated that it would be completed in time to allow a recommendation on whether there was a basis for criminal proceedings against any individual officer by the end of 2017¹⁶. In the event it was not until December 2017 that I was advised that this work had been completed¹⁷.

45. It is possible that it was in the context of the exchange to which I have referred (although, equally, it might have been at a LOB meeting or in some other context) that I indicated – as

¹⁶ COPFS-04757(b) [REDACTED] paras. 6-7.

¹⁷ COPFS-04389 [REDACTED]

[REDACTED] COPFS-04757(a)

stated in Mr Brown's minute to me of 3 April 2018¹⁸ - that the team should "aim to" complete the work required to make recommendations in relation to the potential criminal liability of police officers by the end of the financial year. I have no present recollection of doing so. As the language of the minute indicates, I think it unlikely that I intended this as a fixed timescale but rather an indicative target, designed to seek to create some focus on bringing the investigation to a conclusion. I would have remained open to being advised that the completion of the investigation within such a target would not prove, or had not proved, possible and/or that further work was required to bring it to a conclusion. [REDACTED]

Question 15: What is your recollection of how race was investigated by PIRC and COPFS? How did this change or develop over the course of the Investigation? Were you satisfied that race was explored fully in the Investigation?

46. I have very limited recollection of this, other than that I recall learning at some point that there was an allegation that one of the police officers involved had made racist comments. Mr Brown's minute of 27 June 2016 stated that the PIRC had been instructed to inquire into and report on whether there was evidence of racism associated with Mr Bayoh's death or evidence of racism within the former Fife Constabulary. I do not now have an active recollection about the outcome of those investigations. I was, so far as I can recall, given no reason to believe that they (or the subsequent COPFS investigation) had not been undertaken properly.

Question 16: Mr Brown in his Minute to you dated 27 June 2016¹⁹ states: "PIRC were also instructed to enquire into and to report on whether there was evidence of racism associated with the death of Mr Bayoh or evidence of racism within the former Fife Constabulary." What did you understand this aspect of the investigation to involve?

47. Given the context and immediate purpose of the minute of 27 June 2016 (which was to allow me to respond to correspondence from a Member of Parliament), I would likely have been reassured by the statement that the allegations were being investigated by the PIRC but it is unlikely that I would have interrogated this particular statement further.

¹⁸ COPFS-02160 (a)

¹⁹ COPFS-02327

Question 17: Mr Brown further states in his Minute to you dated 27 June 2016²⁰ the following: “The [Bayoh] family and their solicitor have raised directly allegations that one of the arresting officers, PC Alan Paton has expressed racist views in the past and in relation to the death of Mr Bayoh. These allegations have been the subject of media interest including broadcast by the BBC and the allegations are being investigated by PIRC with their findings to be incorporated in the final report.” What did you understand these allegations to be and how would they be incorporated into the final report? Did you understand this to be an investigation of a separate offence in respect of these allegations? Was race to be a factor in relation to PC Paton’s actions and decisions in engaging with Mr Bayoh?

48. I recall generally the allegation that one of the officers involved had expressed racist views. I cannot now recall what I understood at the time about the content of those allegations. Mr Brown’s minute of 27 June 2016²¹ suggests that two issues were being considered: racism associated with the death of Mr Bayoh; and racism within Fife Constabulary more generally. Looking to the context and immediate purpose of the minute of 27 June 2016, I would likely have been reassured by the statement that the allegations were being investigated by the PIRC but would not have interrogated further how that matter was to be incorporated into the final report.

Question 18: Please read Mr Stephen McGowan’s Minute to you dated 7 February 2016.²² Mr McGowan sets out the progress in the Investigation following receipt of the PIRC report. There is no mention of race, racism or further investigation in this regard; were you cognisant of this at the time and did this, or does this now, cause you any concern in relation to the Investigation?

49. I take it that the minute to which I am directed is Mr McGowan’s minute dated 29 August 2016 (not 7 February), with reference COPFS-05119(b). This is a high-level report, the key purpose of which, as I read it, was to ensure that Law Officers were generally content with the further steps which it was proposed the Crown would take to investigate the case following receipt of the PIRC report. The minute drew two specific issues to Law Officers’ attention. I remember the issue about intelligence-gathering in relation to Mr Anwar, which I

²⁰ COPFS-02327

²¹ COPFS-02327

²² COPFS-05119(b)

recall causing me concern. The minute indicated that this matter would be the subject of further consideration within COPFS.

50. I note from the documents made available to me that the Solicitor General's Private Secretary responded to this minute on 21 September 2016 in the following terms²³:

"I refer to your minute of 29 August to the Law Officers. The Solicitor General has noted the progress and is content with the investigation timetable and reasons for it.

However, the Sol Gen has commented that the Data Protection issues (paras 12-15 of your Minute) are serious and urgent and asks what further discussions and with whom are proposed?

Grateful if you could update on this point."

I have not seen any separate response from me, but it would not have been particularly unusual, where a minute was addressed to both Law Officers, for one of us to respond in effect for the Law Officers collectively.

51. The key point which I would have taken from Mr McGowan's minute would be that the Crown required to undertake significant further work on the case. I would have assumed that this work would include consideration of any issue of racism associated with Mr Bayoh's death, without that requiring to be specifically mentioned in this minute. I would also have assumed that any other new or separate issue which, like the point about intelligence-gathering, required to be specifically drawn to Law Officers' attention at that time would have been mentioned in the minute or would otherwise be drawn to Law Officers' attention.

Expert witnesses

Question 19: What involvement, if any, did you have in the instruction of expert witnesses? Please include your involvement in the instruction of experts by both PIRC and COPFS separately. Please include your involvement, if any, in the following aspects of the instruction:

²³ COPFS-02230

- (i) *the identification and choice of experts (including consideration of their qualifications, expertise and independence), and ensuring they had no conflict;*
- (ii) *preparation of the letters of instruction, and*
- (iii) *the information and documentation provided to experts to assist in framing their opinion.*

52. The documents which have been provided to me by the Inquiry contain an email exchange between my office and APCC in December 2017 in relation to the identification of a suitably qualified restraint expert, in which I suggested that inquiries might be made with police forces elsewhere in the UK and with police training institutions north and south of the border²⁴. Otherwise, so far as I can recall, I had no personal involvement in the matters referred to in this question. These were all matters for the investigative team under the direction of APCC. As I have already noted, when I received APCC's report, with her recommendation in relation to prosecution of the officers, I had a discussion with her, which resulted in further consultation with a restraint expert before a final decision was taken²⁵. I cannot now recall the specific point upon which I considered that further work was required.

Question 20: Were you aware of any issues relating to Dr Steven Karch that were apparent from a time prior to your involvement in the Investigation? Were you aware of Mr Bayoh's family's views of Dr Karch? Were you aware of any media statements attributed to Dr Karch? What were the previous Lord Advocate's views of Dr Karch, as far as you were aware? How, if at all, did any of these matters affect your understanding of Dr Karch and his opinion?

53. I have no recollection of the issues referred to in this question. If they were drawn to my attention, I would expect that to be apparent from the documentary record.

The Health and Safety Executive ("HSE")

Question 21: Prior to your involvement in the Investigation, what experience did you have in COPFS investigations involving HSE?

²⁴ COPFS-04389

²⁵ COPFS-02232

54. Following the fatal fire at Rosepark Care Home, the Crown made three attempts to prosecute the partnership which ran the care home (which had been dissolved) and/or the individual partners for statutory offences, including health and safety offences. I became involved in that case, so far as I now recall, in dealing with the third (and final) of these indictments and, as I have explained above, I conducted the subsequent lengthy fatal accident inquiry. I do not now recall whether the investigation into that fire involved HSE, but it may well have done. It is, further, quite likely that, during the time when I was an Advocate Depute, I marked cases which had been investigated by HSE, although I have no specific recollection of doing so. In the course of my incumbency as Lord Advocate, I saw reports of cases in which HSE was a specialist reporting agency and had interactions with the head of the Health and Safety Division of COPFS about the work of that Division, but I cannot now relate that experience in time relative to any particular phase of the present case.

Question 22: What difference, if any, would it have made for HSE to have become involved in the Investigation?

55. HSE is the agency with general responsibility for the regulation of health and safety at work, including investigating potential breaches of the Health and Safety at Work etc Act 1974 and/or health and safety regulations. It is a specialist reporting agency (ie it may itself report cases to COPFS for consideration of prosecution). Generally speaking, it would be for HSE to determine its regulatory approach to breaches of health and safety law (including the balance to be struck between enforcement through reporting cases for prosecution and other regulatory mechanisms available to it). However, there is nothing in principle to prevent COPFS itself from investigating a potential breach of health and safety law, even though usually COPFS would leave the investigation of such cases to HSE. By contrast with the position with the police and the PIRC the prosecutor has no power to direct HSE to investigate a particular matter and accordingly, if HSE declines to take up a case, COPFS requires to rely on the police, the PIRC or work undertaken by COPFS itself to undertake the investigation. I note that in this case there was, in fact, a supplementary report to Crown Counsel addressing the question of whether there had been breaches of health and safety law, so I cannot say that the involvement of HSE would have made a difference in this particular case.

Data protection offences

Question 23: What was your involvement in the aspects of the Investigation relating to the possible offences by Police Scotland and/or their officers in respect of data protection?

Please note Mr Brown's Minutes to you dated 22 August²⁶ and 25 September 2018²⁷ on the matter of Police Scotland retaining intelligence records in respect of Mr Anwar.

56. So far as I recall, I was made aware of this issue in Mr McGowan's minute of 29 August 2016²⁸, to which I have referred above. I received the two minutes dated 22 August and 25 September 2018 from Mr Brown to which the Inquiry has referred me. I recall being very concerned to learn that the police had been gathering intelligence relating to Mr Anwar, but I recognised the need for the issue (which was obviously highly sensitive) to be addressed appropriately, and took advice as to the right way to proceed. I was initially advised that, in the first instance, the matter should be raised in writing directly with the Chief Constable by the Crown Agent²⁹. I do not know whether that was done; I recall a discussion with the Crown Agent in which he advised that it would be appropriate to refer the matter to the Information Commissioner but I cannot now recall whether that was instead of, or in addition to, raising the issue directly with the Chief Constable. Mr Brown's minute of 22 August 2018 informed me of the state of play in relation to the ICO's consideration of the matter³⁰ and a copy of the Crown Agent's letter to the ICO dated 6 January 2017 was provided to me with that minute³¹. His minute of 25 September 2018³² advised that there was insufficient evidence to establish that any individual had committed a data protection offence and recommended that the potential breach of the data protection principles in relation to intelligence gathering, should be taken forward by the ICO with Police Scotland, and that the ICO should report its findings to the PIRC with an assessment as to whether any disclosure to Mr Anwar would prejudice any operation.

²⁶ COPFS-04029 (e)

²⁷ COPFS-00532

²⁸ COPFS-05119(b)

²⁹ COPFS-04136

³⁰ COPFS-04029 (e)

³¹ COPFS-00582 (f)

³² COPFS-00532

Question 24: What is COPFS' interest, if any, in the legality of Police Scotland's intelligence gathering beyond the detection and prosecution of criminal offences perpetrated by Police Scotland?

57. COPFS has an interest, first, in the detection and prosecution of any criminal offences perpetrated by Police Scotland, and, secondly, in the integrity of any criminal investigation undertaken by Police Scotland which might be compromised should the ingathering of evidence be tainted by unlawful activity. The Crown also has a strong interest in public confidence in the criminal justice system generally, which is liable to be undermined if the police themselves engage in unlawful activities.

Family liaison

Question 25: What involvement did you have in family liaison in relation to Mr Bayoh's death? What was your involvement, if any, in deciding what to disclose to Mr Bayoh's family?

58. I had two meetings with members of Mr Bayoh's family. I can see from the documents provided to me that the first of these meetings took place on 8 February 2017 and the second on 3 October 2018. I refer to these meetings further below. I was from time to time made aware that prosecutors involved in the investigation were meeting with Mr Anwar and with members of Mr Bayoh's family³³, but these meetings took place without reference to me. I explain my involvement in deciding what to disclose to Mr Anwar below.

Question 26: Please read Mr Aamer Anwar's letters to you dated 7 March³⁴ and 12 October 2017³⁵ and your letters in response dated 22 March³⁶ and 16 October 2017.³⁷ What was your understanding of why the Crown had exceptionally provided information for the purpose of instructing expert witnesses? What was it about the nature and stage of the investigation that meant further disclosure to Mr Bayoh's family was not appropriate? Why would it be appropriate to disclose the expert reports obtained by PIRC under the direction of COPFS

³³ Eg COPFS-03252a, para. 2; COPFS-02160(a), para. 5; COPFS-01356

; COPFS-02955 ; COPFS-03560

³⁴ COPFS-05103 (j)

³⁵ COPFS-01423

³⁶ COPFS-03221b

³⁷ COPFS-01353 (a)

but not those instructed by COPFS? In a prosecution or Fatal Accident Inquiry (“FAI”), what difference is there, if any, between the expert evidence provided under instruction by PIRC and by COPFS? Please refer to Mr McGowan’s Minute to you dated 7 February 2017³⁸ and his email to you dated 8 February 2017³⁹ if relevant to your decision-making.

59. I cannot now recall what information I was given (or when) about the provision of information to Mr Anwar at an earlier stage although I was made aware that he had been provided with certain information. Mr Anwar’s letter to me of 19 August 2016⁴⁰ stated that he had received copies of all statements and reports by pathologists and requested a copy of Professor Crane’s report. Mr Brown’s minute to me of 13 October 2017⁴¹ advised me specifically that my predecessor had given a commitment (or that there had, at least, been an understanding) in relation to the disclosure of expert reports commissioned by the PIRC for the purposes of instructing an expert on behalf of the family.

60. When the issue arose in the context of further detailed disclosure requested by Mr Anwar in February and March 2017, I was presented with a dilemma. On the one hand, it would have been contrary to my own experience of Crown practice for disclosure of the sort requested to be made in the context of a live criminal investigation. That general practice reflected a compelling public interest in avoiding any risk of prejudice to future criminal proceedings. On the other hand, in this case, Mr Bayoh’s family had already been given certain disclosure and were now seeking further disclosure. Mr McGowan’s advice in paragraphs 11 to 13 of his minute of 7 February 2017⁴² and in his email of 8 February 2017⁴³ was, accordingly, consistent with my own experience. I also recall having a brief discussion with APCC about the issue.

61. I took the view that my over-riding responsibility, at that stage, was to avoid any risk to the integrity of criminal proceedings, should they eventuate. It would neither be in the interest of Mr Bayoh’s family nor in the public interest if disclosure of information by the Crown whilst the investigation was pending were to prejudice a future prosecution. I also had to be mindful that if information were to be disclosed to the family in this case, issues would likely arise in other death cases to which Article 2 applied about the disclosure of similar information whilst an investigation was ongoing.

³⁸ COPFS-03252a

³⁹ COPFS-04513

⁴⁰ COPFS-03068

⁴¹ COPFS-03325a

⁴² COPFS-03943 (a).

⁴³ COPFS-04513

62. I considered whether the investigative obligation under Article 2 of the European Convention on Human Rights required a different approach to be taken and took the view that it did not. It seemed to me that the question of compliance with the UK with its obligations under Article 2 fell to be addressed in light of the whole process of investigation and inquiry which could be anticipated. I expected the position in relation to disclosure to be different in the context of a fatal accident inquiry (or, indeed, a public inquiry), once any issue of criminal proceedings had been resolved. Not only would the family of the deceased see the evidence being led at the inquiry, but they would likely be represented and would receive disclosure in that context.

63. I accordingly concluded that further material should not be disclosed where that disclosure presented a risk of prejudice to future criminal proceedings. As regards the specifics of what information could safely be disclosed without a risk of prejudice to future criminal proceedings, I relied on the judgment of the professional prosecutors directly involved in the case.

64. In relation to the request for disclosure made in October 2017, I received a minute from Mr. Brown advising that my predecessor had given a commitment (or at least that his actions had given rise to an understanding) in relation to the disclosure of expert reports which had been commissioned by the PIRC for the purposes of instructing an expert on behalf of the family⁴⁴. Although I had reservations as to whether the earlier disclosure had been sound, I accepted Mr Brown's advice that the existing commitment or understanding should be honoured, and that if there were any further reports falling into that category which had not yet been disclosed, those should also be disclosed⁴⁵.

Question 27: In your experience and understanding, in what circumstances does the Lord Advocate meet with the family of a deceased person as part of a COPFS investigation? To what extent is it normal practice for the Lord Advocate to meet with the family of a deceased person?

65. There is significant scope for differences of approach to be taken by Law Officers to the question of personal meetings with members of the family of a deceased person, and I do not believe that one could prescribe any general rule or

⁴⁴ COPFS-03325a

⁴⁵ COPFS-01353(a)

normal practice as to the circumstances in which this would be appropriate. In my own practice, I very rarely met with the family of a deceased person in the context of a live investigation. I took the view that it would usually be more appropriate, and more helpful to the members of a deceased person's family, for the prosecutors directly involved in the case – who would be in a better position than a Law Officer to speak to its specifics - to meet with bereaved family members. I was conscious that, at any given time, COPFS would have on foot a large number of death investigations, and these would include a number of investigations which could be regarded as particularly sensitive and/or significant. Most of those would involve bereaved family members. It would not be practically realistic for Law Officers to meet bereaved family members other than in very exceptional circumstances. It also seemed to me that the quasi-judicial nature of the office, and the need to be able to respond to any issues which might arise in relation to the handling of individual cases, meant that, generally, it was both appropriate and sensible for the Lord Advocate to maintain a degree of distance. I took the view that all these considerations justified, in general, a very restrictive approach to requests for personal meetings. I accordingly routinely took advice from senior professional prosecutors and (given the potential for any meeting with the Lord Advocate to give rise to press comment) COPFS' Head of Communications as to whether any particular meeting request should be accepted. I cannot say to what extent the approach which I took was consistent or not consistent with the approach taken by other incumbents of the office.

Question 28: Please explain your involvement in meetings with Mr Bayoh's family. Which meetings did you attend? Who was present? What was your recollection of these meetings? What was the outcome of these meetings and what, if anything, did you undertake or promise to do and why?

66. As I have explained above, so far as I can recall, I had two meetings with members of Mr Bayoh's family.

67. I can see from the documents provided to me that the first of these meetings took place on 8 February 2017. The meeting was set up at the request of Mr Anwar, following discussions which he had with Lindsey Miller in December 2016⁴⁶. Advice on Mr Anwar's request indicated that, although there was no specific new information which could be

⁴⁶ COPFS-03252a, paragraph 2; COPFS-03189

provided to Mr Bayoh's family, a meeting would provide an occasion to assure them that the case was a high priority for me, as it had been for my predecessor⁴⁷.

68. That meeting took place, as I recall it, in my room in Crown Office. I recall that Mr Johnson (Mr Bayoh's brother in law) was present, as well as other members of Mr Bayoh's family, and Mr Anwar. I do not now have any recollection of who was present from COPFS. I note from Mr McGowan's minute of 7 February 2017⁴⁸ the identity of the members of Mr Bayoh's family who were expected to attend, as well as their advisers, and the identity of the COPFS staff who were expected to be in attendance, though I cannot now confirm whether all of those named were in fact present.

69. I cannot now recall what was said during the meeting. A very detailed letter had been received from Mr Anwar the previous day⁴⁹, which raised a number of significant issues. It would not have been appropriate or possible to seek to address the points raised in that letter during the meeting⁵⁰. The briefing provided to me on receipt of the letter was that the purpose of the meeting was not to discuss the evidence in detail but to enable me to provide reassurance to Mr Bayoh's family about the commitment to an impartial investigation and progress made⁵¹. It is evident from the correspondence received from Mr Anwar following the meeting⁵² that I gave Mr Bayoh's family my personal commitment to an "effective rigorous and fair investigation" into the circumstances of Mr Bayoh's death. That language, which appears in Mr Anwar's letter of 7 March 2017, is consistent with words which I would use. I gave that commitment because it was my responsibility, as head of the systems of prosecution and investigation of deaths in Scotland, to secure that such an investigation be undertaken – whether that should lead to a criminal prosecution or to a fatal accident inquiry (or both), or indeed, as I ultimately considered appropriate, by way of a public inquiry.

70. [REDACTED]

⁴⁷ COPFS-05395 [REDACTED]

⁴⁸ COPFS-03252a [REDACTED]

⁴⁹ COPFS-02937 [REDACTED]

⁵⁰ COPFS-04513 [REDACTED]

⁵¹ COPFS-04513 [REDACTED] COPFS-03252a [REDACTED].

⁵² COPFS-05103 (j)

[REDACTED]

Question 29: What promises or undertakings were made to Mr Bayoh's family by your predecessor Lord Mulholland? How were you made aware of these? Were these promises or undertakings binding on you? Please explain your reasoning.

72. Mr Brown's minute of 27 June 2016 advised me that there had been a commitment to hold "at least a Fatal Accident Inquiry"⁵⁵. At the time, I would probably have taken this to mean that there would at least be a FAI but that there might be criminal proceedings instead, rather than a commitment to an inquiry whether or not criminal proceedings ensued. However, ahead of the meeting on 8 February 2017, I saw the public statement which my predecessor had issued committing to an inquiry⁵⁶ (which I would have taken, presumptively, to be a fatal accident inquiry, but not to exclude the possibility of a public inquiry) in terms which suggest that this would take place whether or not there were criminal proceedings. I was, further, advised in Mr Brown's minute to me of October 2017⁵⁷ that my predecessor had given a commitment (or at least that an understanding had arisen) in relation to disclosure of expert reports obtained by the PIRC. I was also made aware that there was a difference of view between COPFS officials and Mr Anwar as to whether my predecessor

⁵³ [REDACTED]

⁵⁴ [REDACTED]

⁵⁵ COPFS-02327.

⁵⁶ COPFS-01402 [REDACTED]

⁵⁷ COPFS-03325a [REDACTED]

had made a commitment to. meet with the family in order to advise them of the outcome of the investigation⁵⁸.

73. Commitments given by my predecessor were not, I think, in this context, binding on me in a technical or legal sense – ultimately, it was my responsibility, during my incumbency, to do what I considered to be the right thing - but any specific commitment would have significant moral force such that there would need to be a good reason to depart from it. That general approach can be seen in my response to the issue which arose in October 2017 in relation to disclosure of reports obtained by the PIRC, where I accepted Mr Brown’s advice that the commitment should be honoured⁵⁹, notwithstanding the reservations to which I have referred above.

74. Even if no commitment to an inquiry had been made by my predecessor, it was plain that, in order to satisfy the state’s Article 2 obligations, there would require to be a public investigation into the circumstances of Mr Bayoh’s death. As I have already explained, I took the view that a fatal accident inquiry would not be able to address all of the issues which required investigation and consideration, and accordingly that a public inquiry, with a remit which would include all of the matters which would otherwise have been the subject of a fatal accident inquiry, but which would extend also to other matters, should be established. The question of whether my predecessor had given a commitment to meet with the family to advise them of the outcome of the investigation was in the event not relevant, because it was right, given the whole background, that I should meet with them for that purpose.

Question 30: Please read your letter to Mr Aamer Anwar on 17 August 2018.⁶⁰ Who were the officials who briefed you of the case and what did they explain to you? What did the letter mean by: “I... wish to assure all of you that I will continue to take a close personal interest in this case”? What did the letter mean by: “...a decision in this regard will be made as expeditiously as possible and thereafter I intend to have a meeting with you and the family to outline the next steps”?

75. The letter to which I am referred is a letter dated 17 August 2016, some six weeks after I had taken up office. This was a response to two letters from Mr Anwar, the first dated 25 July

⁵⁸ COPFS-06400 [REDACTED]; [REDACTED]

COPFS-04249 [REDACTED]

⁵⁹ COPFS-03325a [REDACTED].

⁶⁰ COPFS-03444a

2016⁶¹, and the second dated 10 August 2016⁶², which reported that he had been advised that the PIRC report had been submitted to the Crown. The latter stated:

“Your predecessor had assured Mr Bayoh’s family that when the Crown had taken receipt of the PIRC’s report, he would meet with them before any decisions were taken by the Crown.

We therefore wonder whether it would be possible to arrange a meeting at a mutually convenient time for the family, yourself and us.

This would enable them to be updated as to the current position, and allow them to provide their own input in relation to next steps.”

76. The body of my reply is in the following terms:

“I am aware of the impact that this investigation has had on Mr Bayoh’s family and I have been briefed by officials since my appointment on the present position. I wish to assure all of you that I will continue to take a personal interest in this case. The report from the PIRC has, as you are aware, now been received. I understand that the Head of CAAPD has written to you to advise you and the family of this development.

You will appreciate that I cannot at this very early stage anticipate the extent of any further work that may require to be carried out before a decision is made on how to proceed. However, I would be glad to meet with Mr Bayoh’s family and yourself once I have had an opportunity to consider the report and before any formal decisions are taken.”

77. I cannot now recall specifically what briefing I had received at that stage. As I have explained above, the LOB briefing for 16 June 2016 contained a very brief summary, which did little more than alert Law Officers to the case and advise them that the matter was under investigation by the PIRC. I had also received the written briefing from Mr Brown dated 27 June 2016 to which reference has been made above. But I may well also have been given information orally about the case, which I cannot now specifically recall, whether at a LOB meeting or in the context of the correspondence from Mrs Paton, from Mr Anwar or otherwise.

⁶¹ COPFS -02933.

⁶² COPFS – 06263(a).

78. My assurance that I would continue to take a personal interest in the case was intended to reassure Mr Anwar and Mr Bayoh's family that, by contrast with the generality of the work of COPFS, I would continue myself to take an interest in this particular case. The final sentence was a response to Mr Anwar's request for a meeting, and intended to convey that I would indeed be happy to meet with members of Mr Bayoh's family. It would appear from the documentation which has been provided to me that the question of the timing of a meeting was subsequently discussed between Mr Anwar and Ms Miller in December 2016, and that Mr Anwar indicated that he would likely request a meeting early in 2017⁶³. That, indeed, proved to be the case, and I met with members of Mr Bayoh's family, along with Mr Anwar, in February 2017.

Question 31: Please read the emails between Mr McGowan and Ms Ashley Edwards QC dated 7 February 2017.⁶⁴ Do you agree with the position set out in the emails? Why would it not be appropriate for Crown Counsel to be present in the meeting with you and Mr Bayoh's family at that time? At what stage would you be involved with Crown Counsel and why?

79. I do not read the exchange of emails to which I have been directed as stating that it would not be appropriate for Crown Counsel to be present at the meeting. Rather, I read APCC's email, in the context of her receipt of the briefing which was being sent to me ahead of a meeting to which she had not been invited, as accepting that it was appropriate (or perhaps not inappropriate) for the meeting to go ahead without her. I read Mr McGowan's response as agreeing with that. There would, in my view, have been nothing inappropriate in APCC being present at that meeting if she had been available to attend and, as I have explained, I do not for my own part read these communications as suggesting that this would be inappropriate.

80. I agree with the view expressed in these communications that, given that the purpose of the meeting (against the background of the family's contact with my predecessor) was to give the family an opportunity to meet me, and that it was likely that any discussion would be at a very general level, it was not necessary for APCC to attend the meeting. However, with the benefit of hindsight, it would have been much better if she had been present, so that she could be introduced to Mr Bayoh's family at that stage, and the different roles and responsibilities of the various personnel involved explained to them.

⁶³ COPFS-03252a, paragraph 2

⁶⁴ COPFS-04515

81. I expected to be involved with APCC at the point when she came to make a recommendation as regards the decision to be made in this case. I would also have been available to her throughout the investigation, if there were any issues which she wished to discuss with me or matters which she wished to refer to me for decision. Equally, if there were issues which I wished to discuss with her, I was able to do so; for example, I have a recollection of raising the question of disclosure of documents with her.

[REDACTED]

[REDACTED]

[REDACTED]

65 [REDACTED]
66 [REDACTED]
67 [REDACTED]

68 [REDACTED]
69 [REDACTED]

70 [REDACTED]
71 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Question 35: What is your understanding of the role of COPFS' Victim Information and Advice service ("VIA") in family liaison in a death investigation? Were VIA involved in this case? Insofar as you are aware, what was the basis for VIA involvement or non-involvement with Mr Bayoh's family?

72 [REDACTED]

85. VIA's general role was, as I understood it, to provide victims of crime with a point of contact in COPFS who could provide relevant information to them about the process. It was not a general support service, though VIA officers might signpost victims of crime to other support services. I am not now sure whether the VIA support which was provided to victims of crime was, at the time, made generally available to bereaved families in death investigations (COPFS should be able to confirm the position), though that should not have affected this case, given that it was treated as a criminal investigation. I do not recall a VIA officer being involved. If there was no such involvement, I do not know the reason for that, although this may well have been because Mr Bayoh's family had instructed a solicitor to represent them (COPFS should be able to confirm whether VIA support was offered to families where they had a solicitor). Any communication between COPFS and members of Mr Bayoh's family would, rightly, require to be through him, and if they required information about the process, it could be anticipated that either he would provide it to them, or seek information from the Crown.

Crown Precognition

Question 36: Please explain the process of reporting a COPFS investigation to Crown Counsel. What is the role of Crown Counsel and the Lord Advocate in the Precognition process?

86. At the conclusion of an investigation which required the instruction of Crown Counsel, COPFS would report the case to Crown Counsel by way of the Crown Precognition. The Crown Precognition contained a report which narrated the circumstances and provided an analysis and recommendation and included (or made available to Crown Counsel) the available evidence, which might include witness statements, precognitions taken from witnesses by the Crown, expert reports and other material. This was a long- and well-established system which, speaking generally, was intended to ensure that cases are prepared in a particular format and to a particular standard.

87. The requirement to report a case to Crown Counsel ensures that, once the investigation has been completed, the case as a whole is reviewed and assessed by an experienced and independent prosecutor. Crown Counsel might also be involved in giving direction or instruction in relation to the investigation and might be asked by those investigating the case and charged with preparing the Precognition to give direction or instructions as required. In a complex case, where there is an allocated Crown Counsel, allocated Crown Counsel may be more actively involved as required, for example in meeting expert witnesses, and also

provides continuity. Ultimately, the purpose of the Precognition is to draw all the material together, so that Crown Counsel can review and analyse the evidence as a whole and reach a conclusion.

88. I would not expect Crown Counsel to be directly involved in the drafting of the Crown Precognition which takes the form of a report to Crown Counsel, signed and counter-signed by the relevant staff within COPFS, seeking an instruction, although no doubt instructions or directions could be sought from Crown Counsel if a particular issue were to arise in the course of the preparation of the Precognition. I would not expect the Lord Advocate to have any role in the Precognition process.

Question 37: Who decided what to include in the Crown Precognition?⁷³ What was your role in this?

89. I did not have any involvement in deciding what to include in the Crown Precognition in this case. This would have been a matter for the experienced professional prosecutors who were responsible for investigating the case and for preparing the Crown Precognition, acting, so far as required, under the direction and subject to the instruction of allocated Crown Counsel.

Question 38: To what extent was Mr Bayoh's race considered in the Crown Precognition?⁷⁴ Did you have any involvement in deciding the extent to which race should be a matter to address in the Crown Precognition? Did the extent to which race was covered in the Crown Precognition reflect your understanding of how it would be investigated and the evidence analysed? In particular, were you expecting race to be covered to some extent in the Analysis section?⁷⁵ Would you have expected race to have been covered to a greater extent in order to assess the reasonableness of the officers' decision-making and actions in engaging with Mr Bayoh?

90. I have been provided with the Narrative and Analysis sections of the Crown Precognition. The Narrative describes, albeit in summary form, the findings of the PIRC in relation to both the allegation of racist behaviour on the part of one of the officers and the question of racism

⁷³ COPFS-06360 ; COPFS-06361 ; COPFS-00003

⁷⁴ COPFS-06360 ; COPFS-06361 ; COPFS-00003

⁷⁵ COPFS-06361

within the former Fife Constabulary. I had no involvement in directing or influencing the content of the Crown Precognition. I had no preconception or expectation about the way that the issue of race would be investigated and analysed. This was, in the first instance, for the professional prosecutors charged with preparing the Precognition, subject to any direction or instruction from Crown Counsel.

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

Question 39: When did you first become aware of the Mail on Sunday newspaper article dated 23 September 2018⁷⁶ reporting the decision not to prosecute any of the officers, prior to Mr Bayoh's family being informed? If you were notified prior to its publication, please explain these circumstances. Were you provided with a copy of the article and did you read it at the time?

91. I recall that it was reported in the press, in advance of the meeting with the family, that the Crown had decided not to prosecute the police officers. The Inquiry has provided me with a copy of the article, and I note that the journalist had sought a comment from COPFS before publication. The documentation provided to me confirms that I was advised of the journalist's approach on 21 September 2018 and approved the COPFS response⁷⁷. I think it likely that I saw the article (or at least the headline) on the day that it was published; I emailed the Crown Agent and the Deputy Crown Agent on the afternoon of its publication. An extract from the article was sent to me with a note from Mr Shields, COPFS Head of Communications, on 25 September 2018⁷⁸.

Question 40: What was your role and involvement, if any, in the investigation within COPFS into the source of the information in the Mail on Sunday's article? What is your understanding of how the investigation into the possible leak was conducted?

92. On 23 September 2018 (the day on which the article was published), I emailed the Crown Agent and the Deputy Crown Agent stating that an investigation should immediately be commenced. So far as I can now recall, I had no prior experience of dealing with an issue

⁷⁶ PS18106

⁷⁷ COPFS-00639

⁷⁸ COPFS-01336

such as this and I had no preconception as to how such an investigation should be conducted. My current understanding of what was done relies on the documents which have been provided to me by the Inquiry, upon which I comment below. I see amongst the documents provided to⁷⁹ me that on 26 September 2018 Ms Miller responded to my email of 23 September with an explanation of what she proposed should be done. In due course, I received the minute dated 7 December 2018 from Mr Logue, then the Deputy Crown Agent with responsibility for data protection, which is quoted in Question 41 below. This advised me of the steps which had been taken.

93. Ms Miller's email of 26 September 2018 also discloses that I had raised the issue with the Permanent Secretary, with a view to investigation by Scottish Government, and that there was to be liaison between COPFS and Scottish Government. This was because by the time the publication occurred there had been discussions with Scottish Government, with a view, as Ms Miller put it in the email of 2 October 2018 which is quoted in Question 43, to planning for every eventuality. If Mr Bayoh's family did not wish to exercise their right to have a review [REDACTED], I wanted to be able to advise Mr Bayoh's family quickly about what would happen next by way of an inquiry in public. I had already concluded that, if there was no criminal prosecution, a public inquiry should be held rather than a fatal accident inquiry but the decision to hold a public inquiry was not within my gift. There had, accordingly, been discussions with Scottish Government Justice Department to ascertain whether the Scottish Government would be receptive to a request from me to establish a public inquiry. This significantly complicated the position, since COPFS was not the only possible source of information about the case, and it was also necessary for Scottish Government to undertake an investigation. I note from Mr Logue's email that, in the event, the Scottish Government took similar steps to those which were undertaken by the Crown.

Question 41: Please read [REDACTED] email to Ms Miller on 24 September 2018⁸⁰ where he states:-

Thanks Lindsey, the source is allegedly within the Justice System, but I believe that I would be able to give you a report that would cover the COPFS side with enough to say that checks have been made and we are satisfied that the leak did not come from us. Obviously we can only work with what we have.

⁷⁹ [REDACTED] COPFS-03571

⁸⁰ [REDACTED] COPFS-03988

If you are in agreement, I can do some background on the reporters social media presence, I would need the names of all our staff who were in both the discussions and the E Mail chain with their desk phone numbers. To start I will check if there has been any traffic either by E Mail or telephone to the reporter or the News desk at the paper. I will check on any friends within social media for any connections.

Whilst I appreciate this is a lot of ticking the boxes it may give the LA a bit of reassurance

Further, please read Mr Logue's email to you dated 7 December 2018⁸¹ where he states:-

I have now concluded such enquiries as are possible and proportionate in light of the nature of the original article. The enquiries did not amount to a formal "leak inquiry", which could involve interviewing on a formal basis relevant members of staff, because the nature of the Mail on Sunday's reporting could not be shown conclusively to amount to a "leak" in the sense that confidential documents or detailed information known only to certain people was published. Rather, the essential element of the reporting was the Crown's purported decision in circumstances where it had to be one of two options - to prosecute or not to prosecute. In those circumstances, we cannot rule out the possibility, based on the reporting alone, that the Mail on Sunday simply "guessed" and claimed to have obtained the information (this has happened before in long running high-profile investigations). In addition, the essence of the decision was clear to officials and ministers in the Scottish Government as well as in COPFS.

For those reasons, I concluded that it would only be appropriate to interview a member of staff where I could obtain information from COPFS systems which indicated contact with the journalist or newspaper. I have therefore reviewed all COPFS communications data to establish whether COPFS emails or telephones were used to send or receive information to or from the journalist or newspaper during the short window between the decision being taken and

⁸¹ COPFS-03939

the story being printed. There is no evidence of any such contact in the relevant COPFS systems and I am therefore satisfied that the information held in relation to the decision has been processed appropriately and consistent with the Service's data protection obligations. I do not see any appropriate basis to interview formally the members of staff and Crown Counsel involved in the decision making.

Was this approach consistent with your understanding of the how the inquiry would proceed? Did you, or do you now, have any concerns about how this inquiry proceeded? In particular, did you understand that this would be "a lot of ticking the boxes"? Do you agree that it should not be a normal leak inquiry? In light of the terms of the article stating the source was a "well-placed source in the justice system" and the detail of the reasons for the decision not to prosecute, would this not be a sufficient basis for conducting a normal leak inquiry? Did you share Mr Logue's view that the journalist may have guessed the outcome?

94. As I have observed above, I had no preconception as to what would be involved in an investigation of this sort. I relied on senior staff within COPFS to advise on and to undertake appropriate investigations. I would have expected the investigation to be a thorough one. I would expect it to be systematic (and, in that sense, involve "ticking the boxes") but certainly would not expect it to have been a "tick box" exercise, if that phrase were intended to imply an exercise which was merely going through the motions without being a good faith investigation to seek to find out what had happened.

95. The email from Mr Logue (then the Deputy Crown Agent responsible for such issues) advised me that such enquiries as were "possible and proportionate" had been carried out, even if those enquiries did not amount to a "formal" (not "normal") leak inquiry. I cannot now say whether I had the article in front of me when I received Mr Logue's email (it is quite likely that I did not) and I cannot now recall whether I had any view, when I received Mr Logue's email, about the proposition that the journalist might have simply guessed the outcome. Looking at the article now, a copy of which has been provided to me⁸², I am sceptical, given the detail provided, that this could have been the result of a journalistic "guess". However, it appears that I had received advice shortly after the publication, noted in the email from Ms Miller of 26 September 2018, from Mr Shields (who was an experienced journalist whose

⁸² PS-18106

understanding of journalistic practice I would have had no basis in my own experience to challenge), giving credence to the view that this was possible⁸³.

Question 42: Please read your email to Ms Miller and her response dated 23 and 26 September 2018.⁸⁴ You state: "Subject to your advice... we will need immediately to commence an investigation into this leak". Ms Miller replied to you stating: "At the very least Law Officers will require reassurance that this is being taken seriously by COPFS and that they can have confidence in the discretion of officials and counsel." In light of the above emails by ██████████, Ms Miller and Mr Logue, were you, and are you now, content that this inquiry was robust enough to give you this reassurance?

96. Although the first paragraph of Mr Feighan's email suggests that he was proceeding on an assumption that the information did not come from within COPFS, I have no reason to doubt that the examination of communications data which is referred to in Mr Logue's email to me was undertaken with appropriate rigour or that, had it disclosed anything contrary to that starting assumption, this would have been revealed. I remained, and remain, dissatisfied that the investigations undertaken did not identify how the article came to be published.

97. It is impossible for me now to be entirely objective in revisiting the position. It would be easy with hindsight to say that I should have insisted on the further process of interviewing referred to in Mr Logue's email – on the basis that, even if one might be sceptical that such a process would generate further information in the absence of a concrete "lead", at least it could then be said that every step had been taken which could be taken. The question of what investigation was justified and worthwhile was, ultimately, a question of judgment. I had before me advice from the relevant member of the COPFS senior leadership team (a very experienced and senior professional prosecutor) that the steps which were possible and proportionate had been taken. I have not seen any response which I made to Mr Logue's email of 7 December 2018, and I cannot now reconstruct with confidence my contemporaneous thinking, but I suspect that I would have taken from his advice reassurance that an appropriate investigation into what had happened had been undertaken. In assessing whether I should insist on more being done, I would likely have considered whether a process of interviewing staff would really be likely to generate any further information in the absence of any concrete "lead" (about which one might be sceptical). The passage of time may also have played into my thinking – the damage had been done, and

⁸³ ██████████
COPFS-03571

⁸⁴ ██████████
COPFS-03571

could not be undone. Further, as I have already observed, the position was undoubtedly complicated by the fact that COPFS (which, although it holds significant quantities of highly sensitive information, does not have a history of leaks) was not the only source in the “justice system” from which a journalist might have obtained information.

Question 43: Please read Ms Miller’s email to you and others dated 2 October 2018⁸⁵ regarding the approach to the meeting on 3 October 2018 with Mr Bayoh’s family, particularly the following paragraph:-

In terms of the focus on the “leak”, I think that we should push back quite hard on that. I think that there has to be a recognition in the meeting that we have had discussion with other parts of government for the purpose of paving the way for planning for every eventuality, including the holding of a public inquiry, and that while you have asked for certain work to be carried out internally for reassurance in terms of the potential for inappropriate information sharing, we should be careful not to characterise it as a leak or an investigation and if there is the opportunity then we should confirm that the feedback from the media is that they are aware that the information did not come from Crown office or Crown officials.

Was this suggestion incorporated into the approach to Mr Bayoh’s family regarding the possible leak? Was the understanding at the time that there was there was a leak to the Mail on Sunday but that it was not from COPFS or Crown officials? What was your understanding of how reliable this information was? What effect, if any, did this information have on the COPFS investigation? If you were confident that COPFS were not the source, why did an inquiry take place?

98. So far as my recollection goes, the suggestions set out in Ms Miller’s email were not incorporated into the approach taken to Mr Bayoh’s family. [REDACTED]

[REDACTED]

⁸⁵ COPFS-04140

[REDACTED]

[REDACTED] In particular, I think it highly unlikely that I would have said anything about any “understanding” that the release had not come from the Crown.

Question 44: What was the outcome of this inquiry? Did you make any decisions or take any further action in light of its findings?

99. The inquiry did not identify any communication between COPFS staff and the publication in question. That being the outcome, there were no further steps to be taken, other than to inform Mr Anwar of the position, as Mr Logue proposed to do in his email of 7 December 2018.

Question 45: What was the impact of this information being published in the media to the Investigation? How did you and your colleagues think this would be received and interpreted by Mr Bayoh’s family? What was done to address these concerns?

100. I do not believe that the publication of this information affected the substance of the investigation (which had by that point already been completed), but it must have been devastating to Mr Bayoh’s family. It compromised the communication to them of what would, in any event, be an unwelcome decision and was liable to undermine their trust in the Crown. They had received news of the decision not directly from myself and from senior prosecutors but on the front page of a newspaper. There was unfortunately a limit to what could be done at the time to mitigate the impact of what had happened (apart from to carry out investigations), though I note that my email of 23 September 2018⁸⁷ to the Crown Agent and Deputy Crown Agent suggested that, in addition to investigating what had happened, the Crown should offer to accelerate the anticipated meeting with Mr Bayoh’s family.

Meeting Mr Bayoh’s family at the conclusion of the Investigation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸⁷ PS18106

[REDACTED]

[REDACTED]

[REDACTED]

Question 47: Please read the email chain dated 22-28 August 2018.⁸⁹ Ms Miller writes:

I had a chat with Graham Shields yesterday and we were both of the view given the regular meetings with the family thus far, facilitated by both the previous and the current LA, there has been an understandable expectation created that just as the family were kept updated on progress of the investigation, they should have a meeting where the outcome of that investigation should be communicated to them. On that basis it is difficult to see how the Lord Advocate could extricate himself from that and not end up the focus of any story thereafter.

...

Graham and I discussed the "How, where, when and who". We anticipate recommending a structured meeting where we would hand over the detailed decision letter and then take the family through it. It would be a scripted, prepared meeting, setting out the messages to convey with the Lord Advocate advising of the decision and reasons, and opens up to others more immersed in the detail to offer further information. That is where I would welcome a steer from you - should you be there or should we leave it that Les and I (and perhaps Alasdair) would be there in support to provide that detail?

...

We would have an "extraction plan" as Graham terms it for the LA - it would be in the conference room rather than his room and on a Thursday afternoon. That proposed timing is for two reasons - it is too late for the First Minister to get ambushed at FMQs and means that the inevitable press conference is covered in Friday's media rather than over the weekend.

To what extent, if at all, were you involved in this planning? Were you informed of this approach prior to the meeting? Is this an accurate summary of how the meeting with Mr Bayoh's family proceeded? Did you, or do you now, have any concerns about any aspect of the approach being planned?

⁸⁸ [REDACTED]

⁸⁹ COPFS-04249

[REDACTED]

102. I can see from the documents provided to me that I was informed of this plan in an email from Ms Miller to me dated 31 August 2018⁹⁰. I have a recollection of the issue, touched on in this email, about whether the meeting should be in my room or the conference room. There were advantages to meeting in the conference room rather than in my own room. These included the ability of myself and COPFS personnel present to leave once the business of the meeting (which could be anticipated to be a difficult one) had been concluded. It would also allow members of Mr Bayoh's family and their advisers to make themselves comfortable there before the meeting, and to remain there after the meeting if they wished, before leaving the building. I don't now have any recollection about the issue about the timing of the meeting, though I can see that it was dealt with briefly in Ms Miller's email to me of 31 August 2018.

[REDACTED]

[REDACTED]

[REDACTED]

⁹⁰ COPFS-06400 [REDACTED]

⁹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accounts by Mr Bayoh's family

Question 50: Ms Adama Jalloh is Mr Bayoh's sister. Do you recall meeting her? Please provide your recollection. She gave the following account in her statement to the Inquiry at para 16:-⁹⁸

93 [REDACTED]
94 [REDACTED]
96 [REDACTED]
98 SBPI-00233

I am asked how I felt after those meetings [with the Lord Advocate] and whether I had trust in the process. With the very first Lord Advocate, Frank Mulholland, we met, yes. That changed with the other Lord Advocate, James Wolffe. We had a meeting with him, and, again, he gave us his word that he would do his best for the family and make sure we find out the truth, but I believe it was that same Lord Advocate we had a last meeting with that we were told that the officers were not going to be prosecuted. We felt let down.

Do you recall giving your word that you would do the best for the family and make sure they found out the truth? What did you mean by this? Why did you think Ms Jalloh felt let down and could anything more have been done to prevent or mitigate this?

106. I recall meeting Ms Jalloh at the meeting in October 2018 and I believe that she was also at the meeting in February 2017. I believe that I gave a commitment at the February 2017 meeting with members of Mr Bayoh's family to an effective, rigorous and fair investigation. That is referred to in Mr Anwar's letter to me dated 7 March 2017, and is the sort of language which I would use. It is quite likely that I would also have said something to the effect that one of the purposes of the investigation was to enable Mr Bayoh's family to know the truth about what had happened to him. Again, that is consistent with language which I would use.

107. In committing to an effective, rigorous and fair investigation, I meant exactly what I said. At that stage, I expected the fruits of that investigation to result either in a criminal prosecution or in a fatal accident inquiry, or quite possibly both, so that (among other things) Mr Bayoh's family could see and hear the evidence about the circumstances which had led to his death, as well as the outcome of an independent and public process directed, if there were a criminal prosecution, to establishing whether there was criminal responsibility for that death, and, if there were no criminal proceedings, to making findings about the cause or causes of his death and the relevant circumstances. My request to the Scottish Government to establish this public inquiry was directed to that end.

108. [REDACTED]
[REDACTED]
[REDACTED]

Further, relations with Mr Bayoh's family had been adversely affected by my decision not to make the further disclosure requested by Mr Anwar.

109. With hindsight, and the benefit of experience (including my experience of this case), there are a number of steps which I could have taken which might have mitigated the position. The meeting in February 2017 could have better managed expectations about timescales, roles and responsibilities, processes and access to information. I could have asked, subsequently, for a meeting in order to explain why I had decided not to disclose the product of the Crown's investigation as the investigation was ongoing rather than dealing with the matter in correspondence. The February 2017 meeting was, as I understand it, set up following discussions between Mr Anwar and COPFS staff and, so far as I can recall, there were no requests from Mr Anwar for further meetings, except to advise the family of the outcome of the investigation, but I could, particularly as the duration of the investigation became much longer than I had initially anticipated, have been more proactive in seeking to ascertain what the family, advised by their solicitor, would wish by way of interaction with the Crown, including further meetings with myself. Whilst none of these steps would necessarily have mitigated the family's disappointment about the outcome of the investigation, they could perhaps have made a difference to the family's confidence in the process.

Question 51: Ms Kosna Bayoh is Mr Bayoh's sister. Do you recall meeting her? Please provide your recollection. She gave the following account in her statement to the Inquiry at para 12:-⁹⁹

He [Lord Mulholland] had to step down and then there was a new one. I am asked about my views on the next Lord Advocate, James Wolffe. He was not on our side. We felt that it was a waste of time. We were upset, gutted with his actions. We never got any support from him. We thought that as a family he never dealt with it accordingly, the way Frank dealt with it before he left. We didn't get any support from him, I think he was more the police side than our side.

What is your comment on Ms Kosna Bayoh's above account? Do you agree that you did not give any support to Mr Bayoh's family? What support was given and what

⁹⁹ SBPI-00231

further support could have been given? Do you know why she thought you were more on the police side and why it was a waste of time?

110. I believe that Ms Bayoh was one of the family members at the meeting in February 2017. I am very sorry indeed that she feels the way that she does. As I have observed above, at the time I thought that the meeting in February 2017 had been positive. The correspondence from Mr Anwar does not suggest otherwise. The Inquiry's question about support begs a question about my role and responsibility to provide support (as opposed to exercising general oversight of the process), particularly in a context where a bereaved family have the support and advice of their own solicitor. I responded to Mr Anwar's request for a meeting in February 2017 and his request that I meet with the family to advise them of the outcome of the investigation. I would have been open to other requests to meet. As I have observed above, though, I recognise that I could have been more proactive in seeking to ascertain whether a further meeting or meetings would be useful.

111. I do not accept that the Crown investigation was a waste of time, although I can well understand why members of Mr Bayoh's family might take that view, when, after a protracted period, there was a decision not to initiate criminal proceedings. It was, of course, not appropriate for me to be on anyone's "side". My responsibility, as Lord Advocate, was for a fair, thorough, independent and objective investigation, undertaken in the public interest with a view to determining whether or not criminal proceedings should be brought and, in any event, so that the evidence about the circumstances of Mr Bayoh's death could be aired and inquired into in public. But I did not, and do not, accept the views of some in the legal profession that there is a conflict between prosecutorial independence and providing appropriate support to victims of crime; indeed, I took then, and take now, the view that prosecutors cannot do their job of securing the proper administration of justice unless victims have confidence in the system and are prepared to come forward and give evidence. I profoundly regret that Mr Bayoh's family lost confidence in me and in the Crown.

Question 52: Mr Ade Johnson is Mr Bayoh's brother-in-law. Do you recall meeting him? Please provide your recollection. He gave the following account in his statement to the Inquiry at para 48:-¹⁰⁰

With Frank Mulholland, things were moving fast. When he moved away, James Wolffe came into place. Then we saw the other side of the Crown: the

¹⁰⁰ SBPI-00248

nastiness of the crown. I think we had at least two meetings with him, at the first one in which he talked about himself and his history and what he's done. Then we asked him some straightforward questions like, had he watched the CCTV? He said, "No." What does he know about the case? He said he "had not read much about it." He said he was depending on Lindsay and the other guy to give him feedback and, once he's up to speed, then he will get back to us, and that never happened.

What is your comment on Mr Johnson's above account? Does it accord with your recollection?

112. I remember meeting Mr Johnson at the meeting in February 2017. Whilst I have no specific recollection of what was said at that meeting, it may well be correct that, at that date, I had not seen the CCTV footage. I recall viewing the footage at a much later stage (certainly I did so after the compilation had been made) and I cannot now recall whether I had viewed any of it at an earlier stage. I may well also have advised the family that I would be relying on briefing from other members of the team; that was in fact the case.

113. The key purpose of the meeting, knowing that the family had had meetings with my predecessor, was to introduce myself to them and to give them my own commitment to a thorough investigation. Mr Anwar's letter of 7 March 2017 suggested that this was appreciated at the time. I do not recall saying that I would 'get back to them' (that is not, I think, language I would have used), but I might well have expressed a general willingness to meet with the family again. As I have observed above, I recognise, with hindsight, that I could have been more proactive than I was in seeking to ascertain what the family would wish by way of interaction with the Crown and with me personally. The criticism implicit in Mr Johnson's statement of the duration of the Crown investigation is entirely understandable, given the time which this investigation took even if that was not, as I came to learn, out of the ordinary for an investigation of this sort.

Question 53: Ms Kadi Johnson is Mr Bayoh's sister. Do you recall meeting her? Please provide your recollection. She gave the following account in her statement to the Inquiry at para 25:-¹⁰¹

¹⁰¹ SBPI-00236

When James Wolffe became involved, the first time we met him it was like he was not interested. It was as if he didn't even have a proper knowledge of the case. I felt that maybe they had briefed him a few minutes before we got in the room because there was no interest at all; there was nothing. When we had the other meeting, when he told us that he's not going to prosecute the police officers, first of all, he did say that he would let us know his decision beforehand, but we got to hear that decision through the media before we met him. We got to know that decision through the media, and that again was upsetting for us because he did promise to involve us before he made any decision, and yet we heard it from the media. When we got to his office again, when he explained why he didn't prosecute, he was bringing up medical evidence. He was bringing up that it might be the drugs that killed him. Nothing in regards to how the police treated him, nothing at all that the police contributed. It was all about Sheku having caused his own death basically.

What is your comment on Ms Johnson's above account? Do you recall promising Mr Bayoh's family that they would be involved before you made any decision? Was this promise adhered to?

[REDACTED]

114. I recall meeting Ms Johnson in October 2018 and I believe that she was also present at the February 2017 meeting. The purpose of the 2017 meeting was to introduce me to the family and to allow me to give them my own commitment to a thorough investigation, rather than to go into detail about the case. I very much regret if that left the family with an unfavourable impression. I entirely accept that the fact that the decision was reported in the media before I met the family in October 2018 was upsetting and distressing; I was, personally, horrified by it.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

103 [REDACTED]
104 SBPI-00236 [REDACTED]

Question 55: Ms Collette Bell was Mr Bayoh's partner and mother of his child. Do you recall meeting her? Please provide your recollection. She gave the following account in her statement to the Inquiry at para 53:-¹⁰⁵

I am asked about any meetings I attended with the Lord Advocate. I remember a lot of those meetings where I was very angry because they would always talk about the restraint being proportionate, or the right amount of violence and the right amount of restraint was used.... I just remember being really angry, and I do remember at a meeting there was a comment made, and I can't remember what the comment was now, but I just remember totally losing it because it was almost, "He'd done it himself," or "He brought it on himself." I am asked if that comment was made by the Lord Advocate himself. It was made by the Lord Advocate, and I think it was something like "He brought it on himself" or "He has done this to himself." I remember flying off the handle and shouting and being really angry. I stopped going to the meetings with the Lord Advocate shortly after that because it wasn't helping my mental health at the time.

What is your comment on Ms Bell's account? Do you recall her becoming angry in any meetings? Do you recall saying "He'd done it himself" or "He'd brought it on himself" to Ms Bell or other members of Mr Bayoh's family? Do you recall saying anything that would give this impression to Ms Bell?

116. I note from Mr McGowan's minute ahead of the meeting in February 2017 that Ms Bell was expected to attend that meeting. I regret that I cannot specifically recall now if she was present. I have no memory of any member of Mr Bayoh's family becoming angry at that meeting. Mr Anwar's letter following the meeting suggested that Mr Bayoh's family had appreciated my commitment to a thorough investigation and does not indicate that there was, at that stage, unhappiness or concern about anything which had been said by me or by anyone else. I would never suggest that Mr Bayoh "brought it on himself" or otherwise use language to that effect. [REDACTED]

European Convention on Human Rights ("ECHR")

¹⁰⁵ SBPI-00247

¹⁰⁶ [REDACTED]

Question 56: During the Investigation, what discussions in any form were you involved in relating to COPFS' obligations under Articles 2 and 14 of the ECHR in respect of Mr Bayoh and his family? If so, what was your understanding of these obligations and how, if at all, did this affect your approach to your work?

117. I recall considering COPFS' obligations under Article 2, firstly in the context of the requirement for there to be an appropriate process of public investigation to establish the circumstances of Mr Bayoh's death, and, secondly, in relation to the question of disclosure of documents to the family. In addition, one of the reasons why I was concerned about the passage of time in 2017 was because of my awareness of the Article 2 investigative obligation, as well as my increasing general appreciation of the impact which the passage of time has on those affected by an investigation.

118. I understood that the Crown's investigation, and any subsequent prosecution, fatal accident inquiry and/or public inquiry would all be parts of the system designed in Scotland to fulfil the State's investigative obligation under Article 2 ECHR. I had argued (for Mr Ruddy) the case of *Ruddy v. Lord Advocate and Chief Constable*, which concerned the investigative obligation under Article 3 of the European Convention on Human Rights in cases of alleged police assault, and I was accordingly aware of the Convention requirements for an effective investigation (which apply also under Article 2), namely that the investigation should be independent, effective, prompt, reasonably expeditious, afford sufficient public scrutiny and enable the victim (or in the case of a death, the victim's family) to participate effectively.

119. I did not understand that Article 2 required every request for documents to be met; and it seemed to me that, in the context of a live criminal investigation there was a countervailing public interest reason which fell to be taken into account. As I have explained above, it seemed to me that the Crown was generally justified in being circumspect about the disclosure of material generated whilst a criminal investigation is ongoing, to avoid any risk of prejudice to future criminal proceedings. I was also concerned that a significant change in Crown practice would have consequences for other cases which would need to be considered. I took the view that the requirement for effective participation fell to be considered across the whole process of investigation and inquiry – including the role which the bereaved family would have in a fatal accident inquiry or public inquiry and the disclosure which they would receive in that context.

120. Following the initial decision not to initiate criminal proceedings, I expressed the view that the Crown should now be prepared to look again at the question of disclosure of further expert reports specifically under reference to Article 2¹⁰⁷. APCC ██████████ ██████████ ██████████ took the view, ██████████ that the medical reports instructed by the Crown should not be disclosed until the review period had expired. I expressed myself content to proceed as she advised¹⁰⁹. There was a further exchange the following day in which APCC confirmed that her view was not affected by Article 11(3) of the Victim Rights Directive¹¹⁰. I can see from the documents provided to me that Mr Anwar wrote further on the Article 2 issue in May 2019¹¹¹, and that Mr Brown gave further consideration to it in June 2019. Mr Brown's email on the issue was copied to my office¹¹². ██████████ ██████████ ██████████ .

121. Once I had received APCC's recommendation ██████████ ██████████ I started to consider actively what process of inquiry in public would be appropriate. I sought and received advice on whether there were issues which should be examined but which would not fall within the remit of a Fatal Accident Inquiry¹¹³. In the context of a request for a meeting to discuss this, I briefly commented on the scope of the Article 2 obligation¹¹⁴.

122. I do not recall any consideration being given to Article 14.

Question 57: To what extent was Article 2 of the ECHR considered in the Investigation in respect of the duties of Police Scotland and PIRC?

123. I do not recall being involved in any consideration of Article 2 ECHR in respect of the duties of Police Scotland and PIRC. The involvement of the PIRC in the investigation provided structural independence from Police Scotland, given the circumstances of Mr Bayoh's death.

¹⁰⁷ COPFS-04245 ██████████
¹⁰⁸ ██████████
¹⁰⁹ COPFS-04393 ██████████
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¹¹⁰ COPFS-04122 ██████████
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¹¹⁴ ██████████

Question 58: To what extent did you consider your own, and COPFS', compliance with Article 2 of the ECHR in the course of the Investigation? Did you, or anyone else, consider COPFS' compliance with Article 2 at the conclusion of the Investigation?

124. See my answer to Question 56.

Question 59: In your letter to Mr Anwar dated 22 March 2017¹¹⁵ you explain that the impact of Article 2 of the ECHR can only be assessed at the conclusion of the ongoing investigation into the circumstances of Mr Bayoh's death and any subsequent proceedings. What effect, if any, did this position have on ensuring that you and COPFS were conducting and overseeing an Article 2 compliant investigation?

125. I remain of the view that the question of whether or not there has been a breach of the State's investigative obligation under Article 2 can be determined only once the investigations into the death (which include, in the present case, the work of this public inquiry) have been concluded. I acknowledge, immediately, that COPFS has a central role to play in securing compliance with the state's investigative obligation, first by investigating the circumstances independently and thoroughly, and, secondly, by instructing either a criminal prosecution or an appropriate process of inquiry (or both) so that, if there is criminal responsibility, that can be brought home to the perpetrator, and in any event so that the evidence about the circumstances can be exposed to scrutiny by the public and by the family of the deceased. I also acknowledge, of course, that a deficiency in a COPFS investigation, in a case to which Article 2 applies, could be capable of contributing to a breach of the state of its Article 2 obligations - for example, if the way in which COPFS proceeded with an investigation were to justify or to contribute to a conclusion that it had not proceeded with reasonable expedition. It follows that issues can arise, as an investigation is ongoing, as to whether anything done by the Crown is such as to breach Article 2 ECHR in any particular case.

Learning from other investigations

Question 60: Prior to and during your involvement in the Investigation, what awareness did you have of investigations by the police and/or the CPS into race in England and Wales? What learning did you derive from these investigations? Did anything you learned from these investigations result in any change in approach to your involvement in this case compared with your involvement in prior investigations?

¹¹⁵ COPFS-03221b

126. I do not recall being aware of investigations by the police and/or the CPS into race in England & Wales before my appointment as Lord Advocate. At some point, I became aware that Dame Elish Angiolini was carrying out an inquiry into Deaths in Custody in England & Wales. Following publication of her report, I received two minutes from Mr Brown. The second of these provided detailed briefing on issues arising from Dame Elish's report¹¹⁶. That briefing identified both issues arising from her report which had specific relevance for this case, and issues which had a more general relevance. I expected that Mr Brown (who was both the author of the briefing and also one of the two prosecutors undertaking the investigation) would take on board the specific points which he had identified of relevance to this case. The general implications for the system were, as I recall it, addressed by relevant COPFS staff in conjunction with Scottish Government Justice officials.

Question 61: Insofar as not covered above, to what extent did you consider the approach of the CPS in cases of deaths in custody or during or following contact with the police in which restraint was used? What were you interested in understanding or learning from the approach of CPS?

127. So far as I can recall, I did not consider the approach of the CPS in such cases.

Race

Question 62: Do you have any experience of racism being a factor to investigate in an investigation relating to:

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

If so, please provide details of the year(s) you were involved, how race was a factor, how you investigated the race aspect and the outcome.

128. Other than in connection with this case, I had, so far as I can recall, no experience of these matters.

¹¹⁶ OPFS-04868 (a) and COPFS-03998 (a)

; COPFS-02214 (a)

Question 63: Insofar as not already covered, to what extent, if any, was Mr Bayoh's race a factor in any of your decisions and actions?

129. Mr Bayoh's race was not a factor in any of my decisions or actions, except to the extent that the allegations of racism on the part of the police was an element in the circumstances prompting greater than usual Law Officer involvement in this case.

Question 64: Prior to your involvement in the Investigation, in your experience, did COPFS routinely consider the role of race when dealing with a death in custody or death during or following police contact?

130. I do not recall being involved in any case involving a death in custody or death during or following police contact prior to my appointment as Lord Advocate, although it is possible that, as an Advocate Depute, I may have had some involvement (eg marking) in such a case, which I cannot now recall. I therefore cannot speak to COPFS practice in relation to these matters.

Training

Question 65: At the time of your involvement in the Investigation, what training had you completed that was relevant for your role in the Investigation? Please provide details of the type of training and explain what you can recall from the session.

131. I had accumulated professional training and experience over many years as a professional advocate dealing with a wide variety of cases, including as an Advocate Depute. Following my appointment as Lord Advocate, I received some media training. However, so far as I can recall, I had no training specifically directed to the role which I had in relation to this particular case. I am not aware of any consideration being given to training for the role of Lord Advocate; and it is difficult to envisage training which would cover all the different facets of that role. Nevertheless, I suggest below two issues in relation to which training should, in my view, be offered to incoming Law Officers if they have not previously had relevant training on those issues.

Question 66: Insofar as not already covered, what training had you completed at the time of your involvement in the Investigation in relation to the matters relevant to your role?

132. See my answer to Question 65.

Question 67: Insofar as not already covered, what training had you completed by or during the time you were involved in the Investigation in relation to equality and diversity issues? Which aspects of this training, if any, were applicable to your role?

133. I attended a training session on equality and diversity issues when I was on the management committee of my advocates' stable, specifically directed to fair decision-making in relation to stable recruitment. As Dean of Faculty, I had been involved in equality and diversity issues, for example through re-establishing the Faculty's Equalities Committee, seeking to ensure visible representation on the Faculty of Advocates website, and supporting a social mobility initiative of the President of the Law Society of Scotland. This was not training as such, but this experience and reflection on the issues in that context proved to be relevant to my role as Lord Advocate. So, for example, whilst in that office, I supported COPFS' work on equality, diversity and inclusion both internally and externally, publicly challenged the legal profession to tackle issues of gender imbalance and bullying, and took proactive steps to diversify the instruction of counsel by the Government.

Question 68: What guidance or reference materials in relation to race were you aware of being available to you in the time you were involved in the Investigation? Over the course of your involvement, did you make use of any of these materials?

134. I do not recall whether I was aware of any such materials.

Question 69: What, if any, training do you consider would have assisted you in your involvement in the Investigation? This may be training you have carried out since, training you are aware of but have not completed or training that is not, as far as you're aware, provided by COPFS

135. It is difficult to identify or to envisage training which would be apt to cover all the different facets of the multifarious role of the Lord Advocate. The extent to which any new Law Officer would require specific training on any particular issue would depend to a very large extent on that particular individual's previous professional knowledge and experience. In practice, any incumbent will be an experienced lawyer and, moreover, will have the support, from the outset, of highly experienced and skilled professionals in relation to all of

the various functions of the office. There will usually be very little, if any, lead time between a new incumbent being appointed and taking up office, whilst the continuing flow of work, from day one, will be very significant. Inevitably, there is a great deal of learning “on the job”.

136. Nevertheless, there are two issues with which I now believe any leader of a public sector organisation working in the field of criminal justice should be familiar. These are trauma-informed practice and EDI. The impact of trauma and the importance of trauma-informed practice became evident to me through my involvement in the work of the Scottish Government Victims Taskforce (which was set up in November 2018), an illuminating training session held for Advocate Deputes which I attended in, I think, 2019, as well as reflection on my experience of professional practice and encounters with people who had been victims of crime. As I have explained, I had occasion to think about EDI issues both as Dean of Faculty and as Lord Advocate and I have, since leaving office, continued to reflect, in different contexts, on issues of inclusion and exclusion and the systemic effects of power and oppression. It follows that, in my view, an incoming Law Officer, who has not had relevant training in these issues, should be offered such training within a reasonable period of being appointed.

Records

Question 70: Is there a requirement for you to take contemporaneous notes or any other record of your involvement in an investigation? Is there a requirement to retain them? Are there any forms that you must complete in the course of the Investigation for internal record-keeping?

137. There was, so far as I was aware, no requirement on me to take contemporaneous notes. I relied on the established administrative systems for supporting the Law Officers and within COPFS. There were, so far as I am aware, no forms which I required to complete in the course of the investigation for internal record-keeping.

Question 71: What records did you keep in relation to the Investigation? Were these retained and archived? To what extent was your record-keeping consistent with normal practice? Please confirm the basis for any departures from normal practice.

138. I did not personally keep records in relation to the investigation. As I have observed above, I relied on the established administrative systems of COPFS and which supported the work of the Law Officers to keep records appropriately and to retain and archive them properly. I have no reason to believe that, in this regard, I approached the issue of record-keeping and administration differently from my predecessors.

Miscellaneous

Question 72: In your experience, was the Investigation lengthy? Was it unduly lengthy? What is the reason for the length of time required for the case to be reported to Crown Counsel? Are you aware if anything could have been done differently to reduce the length of time from Mr Bayoh's death to reporting to Crown Counsel?

139. I have explained above that during the course of this case, I was concerned about its duration. Others should be able to provide detailed information as to why the investigation took the time that it did. Looking to the number of experts from whom reports were required, I am not surprised that it took very much longer than the period indicated in Mr McGowan's minute to me of 29 August 2016¹¹⁷. As I have explained, I understood that there was a particular bottleneck in relation to the production of the audio/video compilation. At the time, though, this was not the only complex death investigation which was taking, and which took, a very long time to reach a conclusion. Indeed, others were taking, and have taken, significantly longer to reach a conclusion.

140. With experience in office, I came to appreciate that the duration of complex death investigations did not reflect what I believed that the public was entitled to expect. As part of a programme of modernisation of the SFIU which was subsequently undertaken at my direction, processes were put in place designed to ensure that such investigations are effectively planned from the outset and their progress monitored. Addressing the systemic issues was possible only with the benefit of significant additional resources which I secured from Scottish Government for that and for other programmes of reform. In this case there was an investigative strategy approved by Crown Counsel and significant involvement of senior COPFS staff. I accordingly cannot know whether the application to this case of the kind of approach which was later introduced generally for SFIU complex cases would have reduced the length of time between Mr Bayoh's death and reporting to Crown Counsel but it might have done.

¹¹⁷ COPFS-05119(b)

Question 73: What was your position in respect of whether a FAI would take place at the conclusion of the Investigation? Did this position have any effect on the way the Investigation was conducted? In the event that a FAI would follow the Investigation, would this be before or after the prosecution and why? What was the status of your predecessor, Lord Mulholland's, position in this regard? Please refer to Mr McGowan's letter dated 23 October 2017¹¹⁸ which states a FAI would be held.

141. It was always clear to me that, in order to fulfil the state's Article 2 obligations, there would require to be an appropriate process of public inquiry into the circumstances of Mr Bayoh's death. If there was no criminal prosecution there would require to be a fatal accident inquiry or public inquiry. Even if there were to be a criminal prosecution, it might be appropriate to have a fatal accident inquiry as well, and I became aware, in this case, that my predecessor had committed publicly to an "inquiry" (presumptively a fatal accident inquiry, although potentially a public inquiry) in terms which indicated that such an inquiry would take place even if there were criminal proceedings.

142. The usual course, in my experience, where a death involved potential criminality, was for a criminal investigation to take place first, and a decision made as to whether or not to bring a criminal prosecution, before consideration would be given to whether or not to hold a fatal accident inquiry. If, following a criminal investigation, a decision is made not to bring a criminal prosecution, the Crown would then, as I understand it, undertake further investigations (usually through the SFIU) directed to the issues which might be explored at a fatal accident inquiry, with a view to deciding whether or not a fatal accident inquiry should be instructed. This sequential approach has a logic, since a criminal prosecution may exhaust the requirement for a public process in relation to the death (this is explicitly recognised in the statutory provisions relating to mandatory fatal accident inquiries).

143. As I understand it, it would be very unusual for a fatal accident inquiry to be held in advance of a criminal prosecution (although that did happen in the unusual circumstances of the Lockerbie case) because of the difficulty of conducting an inquiry in public into the circumstances of a death in a manner which would be fair to a potential accused and which would not run the risk of compromising the criminal process.

¹¹⁸ COPFS-01542

144. I cannot speak directly to whether the expectation that an inquiry would take place in this case had any effect on the investigation. My understanding, from the point when I was first briefed on the case, was that the Crown was engaged in a criminal investigation. Consistently with that, the Crown's investigation was undertaken within Criminal Allegations Against the Police Division. The narrative which has been disclosed to me is therefore focused, unsurprisingly, on the question of whether or not criminal proceedings should be initiated.

145. If Principal Crown Counsel and the Solicitor General [REDACTED] [REDACTED] also concluded that there should be no criminal proceedings, I would have expected (if I had not requested the Government to establish this public inquiry) that the Crown would likely require to undertake further work to investigate any additional issues which might properly be explored at a fatal accident inquiry. At the very least, the evidence would require to be looked at through a different lens and the question of whether there were other non-criminal issues which required to be considered addressed.

146. With hindsight, it is for consideration, given the commitment which had already been given in this case to an inquiry, whether the Crown's investigation might, from the outset, have encompassed both the question of whether a crime had been committed and wider questions which would fall to be addressed in the context of a fatal accident inquiry. Whilst there is, as I have explained, a logic to the sequential approach which is normally taken, where a decision has already been taken that there will be an inquiry, it may be that this should be departed from.

147. There may be a learning point for COPFS to consider. Whilst there is, as I have explained, a logic to the usual sequential approach, there may be some cases – (where Article 2 is engaged and there are potential reasons for holding a fatal accident inquiry even if there are criminal proceedings) – where there would be merit in a criminal investigation and a SFIU investigation running in parallel (potentially within the same team). This would likely expedite any fatal accident inquiry once questions of criminal responsibility have been addressed.

Question 74: When did you become aware of the possibility that a public inquiry would be commissioned to examine Sheku Bayoh's death and the Investigation? Was anything done or not done in light of this? Was this a factor in relation to the issue of whether a FAI should take place?

148. As the investigation was reaching its conclusion, I required to consider the next steps if the decision was not to prosecute. There clearly had to be process of inquiry in public into the circumstances of Mr Bayoh's death, not least in order to fulfil the state's Article 2 obligations, but also in the public interest. I took the view that a fatal accident inquiry could not adequately (or arguably at all) address the post-incident handling of the case, and I was particularly concerned that the issues in relation to the way that the police officers had behaved and were dealt with in that period should be examined as an issue in its own right (and not merely as an adjunct to the question of whether police officers were credible and reliable). I accordingly recommended to the Scottish Government that it hold a public inquiry, and that recommendation was accepted. Once it was decided that a public inquiry should take place, it was plain that its remit should encompass the issues which would otherwise be dealt with in a fatal accident inquiry as well as the post-incident issues. There would have been no point in holding a fatal accident inquiry as well.

Question 75: Please read Mr McGowan's email to Ms Fiona Carnan dated 12 February 2020¹¹⁹ relating to a request from the SPA for the redacted statements of the police officers who engaged Mr Bayoh. Were you aware of this issue at the time? What was the basis for not giving them the statements under GDPR etc? [REDACTED]

[REDACTED] *Is the suggestion that disciplinary action against the officers by the SPA would be encroaching on the Lord Advocate's powers under the Scotland Act? What is your position on this? What was the outcome of this issue?*

149. I have no recollection of this matter and I do not know the outcome of the issue. However, at the level of generality, I would not, myself, consider that disciplinary action against police officers, at least once questions of potential criminality have been addressed, would encroach on the Lord Advocate's constitutional position. As I understood it, following a CAAPD investigation, the Crown might proactively draw an issue to the attention of the police disciplinary authorities so that they could consider taking such action as they might consider appropriate.

Question 76: Insofar as not already covered, to what extent was your involvement, decisions and actions in the Investigation consistent with normal practice? If there were any deviations

¹¹⁹ COPFS-00336

from normal practice, please explain your reasoning. In your view was race a factor in any departures from normal practice you have identified?

150. As I have observed above, I question the assumption inherent in the expression “normal practice” in relation to the work of the Lord Advocate, given the range of the responsibilities of that office. As I have already observed, the fact that I met with Mr Bayoh’s family personally was very unusual indeed, at least in my own practice. It was also very unusual indeed for me to engage directly in correspondence with the solicitor for a bereaved family in relation to an ongoing death investigation; I do not currently recall any similar case. I discuss this further in response to the next question. I do not believe that race was a factor in these features of this case except to the extent that allegations of racism on the part of the police were one of the factors which prompted a higher level of Law Officer involvement than was usual. At least some of the disclosure which the Crown made in this case (for example, in October 2017) was, as I have explained, I believe, a departure from normal practice; I have explained that above. Race was not a consideration in those decisions.

Question 77: Insofar as not already covered, what significant difficulties or challenges did you encounter during your involvement in the Investigation? Would any changes to practice or procedure would have assisted you in overcoming these difficulties or challenges? To what extent were these difficulties or challenges normal or expected in your role? To what extent was race a factor in these difficulties or challenges?

151. This case involved a complex investigation, but, in that respect, it was not different from a number of other death investigations which were already on foot when I took up office, or which proceeded during my tenure. There were other cases which were also technically complex and sensitive, and indeed there were cases which involved more than one death. In such cases, Law Officer oversight was generally achieved through the weekly LOB briefings, and bespoke briefing (whether in writing or orally) as and when a particular issue required to be addressed.

152. A feature of this case was the extent to which my predecessor had, as I understand it for good reason, been personally involved in this case, and the extent to which I too had personal involvement directly, at meetings and in correspondence, with members of Mr Bayoh’s family and with their solicitor. There was nothing in this which was inherently outwith the expectations of the role, but it was unusual. Race was only a factor in this to the extent that allegations of racism against the police were one of the considerations which prompted a higher level of Law Officer involvement in the case than would otherwise be usual.

153. With hindsight, and with the benefit of the reflection which responding to the Inquiry's questions has provoked, it seems to me that it would have been helpful if, at the outset, I had been given – or had proactively asked for - a full, clear and detailed written briefing, setting out in particular the way that my predecessor had approached the case, identifying any commitments which he had given, any understandings and expectations to which his approach had given rise, and other relevant considerations, with a view to formulating a strategy for this case going forward. Whilst I, of course, inherited responsibility for very many significant cases, and it would likely have been impractical to expect briefing of this sort for all such cases, the previous level of Law Officer involvement in this case, as well as the substantive considerations which had prompted that Law Officer involvement, would have justified treating this case differently.

154. Such a briefing would have been valuable not simply from the point of view of ensuring a consistency of approach. It could well have prompted a planned approach to communications with Mr Bayoh's family and their solicitor, which would have identified, in advance, the different "levels" of meeting and correspondence which might be appropriate, and the point or points at which, or the issues upon which, it would be appropriate for Law Officers to become personally involved. Had the Crown done this, it would have enabled a much more substantive initial meeting (perhaps at an earlier stage), directed to finding out, before the strategy was finalised, what interaction with that process (within the necessary institutional constraints) Mr Bayoh's family would find valuable and supportive and ensuring that arrangements were put in place for consistent liaison at the right level and at the appropriate points in the process. Such an approach might also have helped to ensure that Mr Bayoh's family understood the different roles and responsibilities of those who would be involved in the Crown investigation once the PIRC report had been received.

155. Such a briefing could well also have prompted proactive consideration of the question of disclosure, in light of the previous decisions. I remain of the view that the Crown is entitled to decline to disclose material where such disclosure poses a risk of prejudice to criminal proceedings. But the issue of how to balance that with the understandings or commitments which had already been given in this case would have been grappled with proactively and the approach which would be taken going forward could have been addressed directly at an initial meeting. As it was, the first time I was prompted to think about the point was on considering Mr Anwar's letter received on the eve of the meeting of 8 February 2017. It was plainly not possible to address the issue substantively at that meeting. In response to the requests in Mr Anwar's letters of February and March 2017, I took the view that I did -

which, it became apparent, adversely affected the family's confidence in the Crown. It was only subsequently, in October 2017, that I had to consider whether there was material which, nevertheless, should be disclosed by reason of earlier commitments or understandings. Whilst being in a position to address the issue proactively at the first meeting, or at an early meeting, would not necessarily have avoided disputed issues arising about the level of disclosure, it might have helped to mitigate the impact of the issue on the confidence of the family in the Crown.

156. Such a briefing would also perhaps have led me to address at an early stage the fact that a commitment had been given to hold an "inquiry", apparently whether or not there were criminal proceedings. That would have provided an opportunity to consider whether, once the PIRC report had been received, the Crown should, in this case, depart from the normal sequential approach which I have described above to death investigations where an issue of criminality has to be addressed with a view to undertaking the investigations required to provide the foundation for an inquiry (whether a fatal accident inquiry or a public inquiry) in parallel with the criminal investigation.

Concluding Paragraph

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

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14 April 2024