

Rule 8 request: John Sallens

Decision by Chair

Introduction

[1] The Inquiry sent to Mr John Sallens a notice under section 21 of the Inquiries Act 2005 (the 2005 Act) and a request under rule 8 of The Inquiries (Scotland) Rules 2007 for a written statement of evidence. The request was later amended. The legal representatives of the attending officers, with the exception of Alan Paton, submitted that, having regard to my earlier decision that the report prepared by Mr Sallens is subject to litigation privilege, certain questions in the amended request would elicit material subject to privilege. The legal representatives of Mr Paton indicated that they did not intend to insist on privilege in relation to Mr Sallens and had no submissions to make.

[2] In addition, counsel for Sgt Maxwell and PCs Gibson and McDonough, whose submissions were adopted by PCs Smith, Tomlinson and Good, contended that the investigation by Mr Sallens falls outwith the terms of reference of the Inquiry. Counsel for PC Walker, Ms Short and the Scottish Police Federation (SPF) reserved their position on that issue. I shall deal with the terms of reference issue first.

Whether the investigation conducted by Mr Sallens falls outwith the terms of reference

[3] So far as relevant for present purposes, section 5 of the Inquiries Act 2005 provides:

“(5) Functions conferred by this Act on an inquiry panel, or a member of an inquiry panel, are exercisable only within the inquiry's terms of reference.

(6) In this Act “terms of reference”, in relation to an inquiry under this Act, means—

(a) the matters to which the inquiry relates”

[4] The terms of reference include:

- to examine the post-incident management process and the investigation up to, but not including, the making by the Lord Advocate of the prosecutorial decision communicated to the family of Sheku Bayoh on 3 October 2018 (and the Victims' Right to Review process that was undertaken by the Crown Counsel in 2019), including: (i) the effectiveness of procedures for gathering and analysing information, (ii) the securing and preserving of evidence, (iii) the roles and responsibilities of those involved, (iv) liaison with the family of the deceased and (v) compliance with any relevant Convention rights; and make recommendations, if any, for the future in respect of these matters;
- to establish the extent (if any) to which the events leading up to and following Mr Bayoh's death, in particular the actions of the officers involved, were affected by his actual or perceived race and to make recommendations to address any findings in that regard

[5] The legal principles in relation to the scope of the terms of reference of an inquiry under the 2005 Act are conveniently set out in the recent case of *R v Chair of the UK Covid-19 Inquiry [2024] KB 319*. A number of points of principle are relevant to the present discussion:

First, an inquiry is bound by its terms of reference:

"The inquiry may exercise functions only within its terms of reference pursuant to [section 5\(5\) of the Inquiries Act](#)." (Para 61);

Second, an inquiry is inquisitorial and investigatory:

"It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence." (para 52);

Third, an inquiry should not go off on a frolic of its own:

"If an inquiry is bona fide seeking to establish a relevant connection between certain facts and the subject matter of the inquiry, it will not be regarded as acting outside its terms of reference if it does so...In *Douglas v Pindling 1996 AC 890 at p 903* Lord Keith of Kinkel specifically approved dicta of Ellicott J to the effect that

‘This does not mean, of course, that a commission [of inquiry] can go off on a frolic of its own. However, I think a court if it has power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own...’ (Para 53).

[6] In relation to investigations into the death of Mr Bayoh, the terms of reference of the Sheku Bayoh Inquiry do not restrict the Inquiry to examine only the conduct of investigations by Police Scotland, PIRC and the Crown Office. If that had been the intention of the Scottish Ministers the terms of reference would have said so. In addition, an investigation carried out by non-state actors could have a bearing on the investigation carried out by these organisations of the state.

[7] The initial information available to the Inquiry relating to what became known as “the parallel investigation” was to the effect that the investigation had been carried out on behalf of the Scottish Police Federation (SPF). The Inquiry considered that an examination of that investigation would be within the terms of reference, both in relation to the investigation itself and in respect of its potential impact on the investigation being conducted by PIRC and COPFS.

[8] As a result of further investigation the Inquiry ascertained further information:

- the parallel investigation had been conducted on behalf of the attending officers and funded by the SPF;
- Mr Sallens conducted the investigation and prepared a report;
- Mr Watson sent to the Lord Advocate a copy of the Sallens report explaining that the report “summarises our finding thus far and we hope that this is of assistance to you”. He sent a copy to PIRC;
- Kevin Nelson stated that Mr Sallens had made derogatory comments to him about Sheku Bayoh;
- “Speaking ill of the dead” featured in previous cases involving deaths of black men in custody.

[9] It then became a matter of legitimate interest to the Inquiry to explore (a) what PIRC and COPFS did with the report; and (b) whether what Mr Sallens was alleged to have said to Mr Nelson came within the terms of reference as they related to the race of Mr Bayoh.

[10] It seems to me that that process reflects the Inquiry conducting a thorough investigation, following leads and seeking to establish a relevant connection between certain facts and the subject matter of the Inquiry. I do not think that it could be described as the Inquiry going off on a frolic of its own. I therefore reject the contention that the investigation conducted by Mr Sallens falls outwith the terms of reference.

The application of litigation privilege

[11] Counsel for Ms Short, PC Walker and the SPF refer to passages in *Young v National Coal Board* 1957 SC 99 at p 108:

“Each party having a possible interest should be entitled to pursue his own investigations into the cause of the accident, free from the risk of having to reveal this information to the other side”.

They submitted that, having regard to my earlier decision that the report prepared by Mr Sallens is subject to litigation privilege, certain questions in the amended request would elicit material subject to privilege.

[12] I accept that the investigation undertaken by Mr Sallens is covered by litigation privilege. Having reviewed the amended rule 8 request, I accept that there is a risk that certain of the questions in their present form would elicit privileged material. I have also taken the opportunity to review the evidence in this chapter in the light of the extent to which it would assist me in fulfilling the terms of reference. As a result, I have restricted the scope of the request in order to give Mr Sallens an opportunity to confirm or deny the evidence of Kevin Nelson that Mr Sallens said certain things to him about Sheku Bayoh. A new version of the rule 8 request is annexed to this Note. The latest iteration of the rule 8 request is designed to avoid eliciting from Mr Sallens details of his investigation. I consider that when the questions are framed in this way no issue of privilege arises.

[13] As a result of the evidence of Mr Nelson, there is now evidence in the public domain that Mr Sallens made comments critical of Mr Bayoh. There is a public interest in fairness by allowing persons who may be criticised an opportunity to respond. As a matter of fairness, I wish to give Mr Sallens an opportunity to state whether or not he made these comments and whether, if he did make them, they were influenced by Mr Bayoh's race.

[14] Mr Nelson has given evidence that in conversation Mr Sallens said to him certain things about Sheku Bayoh. That evidence is in the public domain. No issue of privilege arises in Mr Sallens simply being asked whether or not he said these things. In responding to that question he does not require to disclose anything about his investigation.

[15] I note that at para 22 of their submissions counsel state:

“If the questions were re-framed so as to exclude the possibility of Mr Sallens having to disclose communications between him and PBW Law or seeks to elicit information that Mr Sallens obtained during the course of his investigation as instructed by PBW Law, there could (and would) be no objection on the basis of LPP”

The latest iteration of the rule 8 request is designed to meet the concerns raised by counsel in their response to the existing questions 3 and 4.

[16] Counsel on behalf of Sgt Maxwell and PCs Gibson and McDonough advanced two further submissions. First, they submitted that litigation privilege covers the identity of a potential witness who may have been approached in a *post litem motam* investigation and any information from a potential witness. In support of this proposition counsel referred to a number of authorities including *Loreley Financial (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd and others* [2023] 1 W.L.R. 1425 at para 43:

“The case confirms that the identity of a potential witness contacted by a solicitor in the course and for the purpose of litigation is privileged, but that is readily explicable: to identify a potential witness would necessarily tend to reveal advice which the solicitor has given or will give as to litigation strategy and information about the solicitor's preparation for trial.”

[17] I have no difficulty in accepting that as a general proposition. But Mr Sallens is not being asked to identify a potential witness. Without objection from counsel for any of the officers, Mr Nelson identified himself as a witness in Mr Sallens' investigation. That is in the public domain. It would seem to me entirely artificial to hold that Mr Sallens cannot respond to the evidence of Mr Nelson as to his conversation with Mr Sallens because privilege adhering to his investigation prevents Mr Sallens from identifying Mr Nelson as a witness in his inquiry. The mischief identified at para 43 of *Loreley* arising from identification of a potential witness does not arise here.

[18] In their second submission counsel contended that in order to avoid disclosing any information which is privileged no comment could be offered by Mr Sallens as to whether Mr Nelson's account was true and accurate or not. Insofar as Mr Sallens had any information about Mr Bayoh to impart, he can only have acquired it in the course of his *post litem motam* investigation. Such evidence or information, whatever its source, would be covered by litigation privilege.

[19] The revised version of the rule 8 request does not require Mr Sallens to comment on the provenance of his alleged remarks. He is simply being asked to confirm or deny evidence which is already before the Inquiry. I am not persuaded that in doing so he would be disclosing privileged material.

[20] In any event, in my view any litigation privilege attaching to the information given by Mr Sallens to Mr Nelson has been lost. In *Scottish Lion Insurance Co v Goodrich Corporation* 2011 SC 534, before addressing the question of waiver, at para [46] the court noted the nature and purpose of privilege:

“In order to answer that question [inference of waiver], it is necessary to begin by understanding the nature and purpose of privilege. Privilege is the name given to a right to resist the compulsory disclosure of information (*B v Auckland District Law Society*, per Lord Millett, para 67). It exists in order to maintain the confidentiality of the information in question. It follows that privilege will be lost if the information in question ceases to be confidential: if, for example, it is published in the press. In such circumstances there is no longer any confidentiality to maintain, and the information therefore ceases to be privileged.”

[21] At an early stage in the Inquiry Mr Nelson gave oral evidence. Before he gave oral evidence his statement given to the Inquiry was disclosed to core participants, including all the attending officers. As is apparent from the quotations in question 3, in both his statement and his oral evidence Mr Nelson gave an account of what Mr Sallens said to him. No objection on the basis that information was privileged was taken by any of the legal representatives of the officers, including counsel for Sgt Maxwell and PCs Gibson and McDonough, either before Mr Nelson gave evidence or during his oral evidence. His statement was published on the Inquiry's website. The transcript of his oral evidence was published on the Inquiry's website. Mr Nelson's account of what Mr Sallens said to him is therefore in the public domain and came into the public domain with the knowledge and acquiescence of the legal representatives of the attending officers. It is no longer confidential and the nature and purpose of any privilege has been lost.

[22] I am satisfied that in respect of the rule 8 request set out in the annex no issue of privilege arises and Mr Sallens should answer the questions.

Lord Bracadale

Issued 9 December 2024

Annex

The numbered questions in the revised request would be in the following terms:

Professional background

1. Please provide a summary of your policing career until your retirement.
2. Without referring to the present case, please provide a summary of your role as a private investigator including how many years' experience you have in this role.

Investigation

3. In Mr Kevin Nelson's statement to the Inquiry,¹ he recalls you and another individual attending at his house to take a statement. He explains that "the guy was telling me negative things about Sheku". In his oral evidence, under reference to that passage in his statement, Mr Nelson had the following exchange with Senior Counsel to the Inquiry:²

103:21 Q. And you say he was -- "the guy was telling me ..."

22 I take it you mean John Sallens was telling you?

23 A. Yeah, when I'm referring to that "the guy is telling

24 me ", yeah, it was him.

25 Q. "... the guy was telling me negative things about Sheku...

"

3 Can you tell me, what things was he telling you?

4 A. He was telling me he wasn't how he was perceived to be

5 in some of the newspapers or online articles as being

6 a good guy, in fact he -- he said he wasn't necessarily

¹ SBPI-00014

² Transcript: day 12, page 103, line 21 – day 12, page 104, line 13

7 a good guy, he had been involved in -- he pretty much
8 described him as like a heavy for a local gangster-type
9 chap that was -- had been in the news round about that
10 time as well, maybe a couple of years before, that he
11 worked for him to sort out -- I think -- I don't know
12 the exact words, whether it was to sort out issues or to
13 help him out with issues.

Later within Mr Nelson's oral evidence to the Inquiry, he had a further exchange with Senior Counsel to the Inquiry:³

106:20 When he was describing Mr Bayoh to you and
21 giving you the information -- the negative information,
22 what sort of words was he using? What sort of language?
23 Did anything strike you at the time?

24 A. No, nothing that's left a lasting memory of words that
25 was used really. It was just the things that he was
1 saying, like he was a -- a gangster's heavy, type of
2 thing. Pretty much it felt to me like he was sprinkling
3 seeds into me to -- you know, to -- not poison my mind,
4 but to try and get me thinking, you know, he wasn't as
5 nice as you maybe think he was, is my lasting impression
6 of it anyway.

Does this accord with your recollection of your conversation with Mr Nelson?
Did you describe Mr Bayoh as having worked as a "gangster's heavy", or
words to that effect?

³ Transcript: day 12, page 106, line 15 – day 12, page 107, line 6

Race

4. If you did describe Mr Bayoh in such terms, was that influenced by Mr Bayoh's race?

5. Please state the following in the final paragraph of your statement:-

"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."

6. Please sign and date your statement.