RULING ON SECTION 21(4) APPLICATION

Introduction

1. On 28 April 2023 I issued a Notice under section 21(2)(b) of the Inquiries Act 2005 ('the 2005 Act') to the Cabinet Office. The Notice required the production of specified documents in unredacted form.

2. The Notice was made, as it expressly states, on the basis of my judgement that the entire contents of the specified documents are of potential relevance to the lines of investigation being pursued by the Inquiry. That judgement was set out on the face of the Notice.

3. The specified documents are listed in two Annexes to the Notice (Annex A(i) and Annex A(ii)). The Notice set deadlines for the production of the documents and also for the making of any application under s.21(4) of the Act. I allowed somewhat longer deadlines for the documents in Annex A(ii) to allow for those documents to be reviewed for possible national security sensitivities. Following the service of the Notice, the Cabinet Office invited me to extend the time for the making of a section 21(4) application concerning the Annex A(i) documents to 4pm on 15 May 2023, which was the date set in the Notice for the making of such a request in respect of the A(ii) documents. I acceded to that request.

4. On 15 May 2023, the Cabinet Office made an application under section 21(4) of the 2005 Act to revoke the entirety of the Notice ('the application').

5. This is my ruling on the application, which has been informed by advice from Counsel to the Inquiry.

The documents

6. The documents that are required to be produced are specified in some detail in the Annexes to the Notice. Broadly speaking, the documents fall into two categories.

First, WhatsApp communications recorded on devices owned or used by the former Prime Minister Boris Johnson MP and also an adviser named Henry Cook, comprising exchanges between senior government ministers, senior civil servants and their advisers during the pandemic (including both group messages and also messages between individuals (or 'threads')). Second, Mr Johnson's diaries for the same period, together with notebooks that I have been told contain his contemporaneous notes.

7. I regard all these documents as being of significance in two ways. First, they contain information that is potentially relevant to Module 2 of the Inquiry, which is investigating core political and administrative decision-making by the UK government during the pandemic. Second, I consider there will be an expectation on the part of Core Participants, and also on the part of the public generally, that I will satisfy myself that all relevant contents of these documents are disclosed for use in the Inquiry and that I and my team will keep that position under review as the Inquiry progresses, and ensure that any additional disclosure is made as necessary.

8. By the date of the Notice, the Inquiry had received redacted copies of Mr Cook's WhatsApp messages and also, exhibited to the draft statements of other Cabinet Office witness statements, redacted extracts from the diary of Mr Johnson. Whilst it is correct that Mr Johnson's notebooks had not been produced to the Inquiry in redacted form at the date of the Notice,[1] disclosure of these documents was due on the dates provided for in the Notice and the Cabinet Office had already stated that they would be redacted for relevance. It was in those circumstances that I decided to include these key documents in the Notice in addition to Mr Cook and Mr Johnson's WhatsApp messages.

9. I wish to make clear that I have requested potentially relevant WhatsApp materials from a large number of witnesses, including key decision-makers, senior civil servants and government advisers. Mr Cook was the first witness to supply the materials requested and in a form which had been redacted by the Cabinet Office legal team. It is for that reason alone that I identified Mr Cook within the s21 Notice issued on 28 April 2023.

[1] See paragraph 27 of the application

The application

10. In its application the Cabinet Office asserts a jurisdictional objection to the Notice. It argues that the documents specified in the Annexes to the Notice contain what the Cabinet Office describe as *"unambiguously irrelevant material"*, that the Inquiry has no power to issue a Notice in respect of material falling within that category, and that the Notice must therefore be revoked.

11. However the Cabinet Office also provided, *"without prejudice"* to its jurisdictional objection and *"on a purely pragmatic basis"*, copies of a selection of materials, in unredacted form, which it believed to fall within the scope of the Notice and which had already been provided in redacted form. The purpose of providing such material, notwithstanding the challenge to the entirety of the Notice, was said by the Cabinet Office to be so that I could satisfy myself that the redactions that had previously been made to this particular set of materials were necessary on the basis that they covered information that was unambiguously irrelevant to the Inquiry's work.

Decision and reasons

12. I observe at the outset that I am far from persuaded that a wholesale challenge to the legality or *vires* of a section 21 notice is one that properly falls within the scope of section 21(4) of the 2005 Act.

13. Although the application does not make this clear, I infer that it is made under subsection 21(4)(b) of the 2005 Act, which entitles the recipient of a section 21 notice to invite the Chair to vary or revoke the notice on the ground that *"it is not reasonable in all the circumstances to require him to comply with [it]"*. I understand that provision to apply to cases where the recipient of a notice accepts the notice's validity, but wishes to engage with the Chair as to the reasonableness of complying with it. It does not obviously apply to a situation such as the present, where the recipient of the notice contends that the notice itself is unlawful. The better procedure for raising arguments of that nature is, plainly, an application for judicial review.

14. Notwithstanding these concerns, I have decided to treat the application as properly made.

15. However, for the reasons set out below, I reject the contention that the Notice was issued unlawfully. The application will therefore be dismissed.

16. I note that there appears to be no disagreement over the scope of the power conferred upon me by section 21 of the 2005 Act. The application correctly recognises that the statutory scheme permits me to seek disclosure (through the mechanisms of Rule 9 of the Inquiry Rules and/or section 21 of the 2005 Act) of documents that are potentially relevant to the lines of investigation that I am pursuing.[2] That is an inevitable consequence of the inquisitorial function that any public inquiry under the 2005 Act must discharge.

17. The Notice was, as I have explained, premised on my assessment that the entire contents of the documents that are required to be produced are of potential relevance to the lines of investigation that I am pursuing. The essential thrust of the application therefore appears to be that this assessment is irrational, and thus there was no power to issue the Notice, because the Cabinet Office has reviewed the documents for itself and has concluded that those parts which are sought to be withheld from the Inquiry are *"unambiguously irrelevant"*.[3] I do not accept that my assessment was irrational.

18. First, it is self-evident that the Terms of Reference of this Inquiry are of great breadth. It is equally obvious that in order to discharge those Terms of Reference I will need to undertake a large number of extremely diverse lines of investigation. Those lines of investigation are bound to involve factual matters that are not specified in, and which may be collateral to, not only the issues identified in the Terms of Reference itself, but also the issues particularised in the published provisional scope document for any particular module of the Inquiry, and/or any more detailed lists of issues that the Inquiry may provide to Core Participants.

19. For example, in order to evaluate the response of the government and/or of any individual Minister to the pandemic, it may be necessary for reasons of context for me to understand the other (superficially unrelated) political matters with which they were concerned at the time. Such matters may acquire greater significance where it appears to me, or it is otherwise suggested, that a Minister dealt with Covid-related

[2] See paragraph 13(2) of the application
[3] See paragraph 31 of the application

issues inadequately because he or she was focusing (perhaps inappropriately) on other issues. For similar reasons, I may also be required to investigate the personal commitments of ministers and other decision-makers during the time in question. There is, for example, well-established public concern as to the degree of attention given to the emergence of Covid-19 in early 2020 by the then Prime Minister. Moreover, the need for me to investigate allegations that have been aired publicly regarding disagreements between members of the government and breaches of Covid-19 regulations by those within government provides a further basis upon which material such as diary arrangements and content which may not appear to relate directly to the response to Covid-19 are of at least potential relevance to the investigations that I am conducting.

20. The fact that the Cabinet Office has asserted that matters such as *"entirely separate policy areas with which the Inquiry is not concerned"* and *"diary arrangements unconnected to the Covid-19 response"* are *"unambiguously irrelevant"* to the work of my inquiry[4] demonstrates that it has misunderstood the breadth of the investigation that I am undertaking.

21. Second, it does not follow from the fact that the Cabinet Office has itself reviewed material, and considers it *"unambiguously irrelevant"*, that my assessment that the material is of potential relevance is irrational. The application seeks to establish a principle that the Chair of a public inquiry will be acting *ultra vires* in requiring the production of material where the recipient of a section 21 notice declares that material to be *"unambiguously irrelevant"*.[5] I reject that proposition. The key flaw, as it seems to me, is that it wrongly allocates to the holder of documents, rather than to the inquiry chair, the final decision on whether documents are or are not potentially relevant to the inquiry's investigations. This is problematic on a number of grounds.

    a. It is inconsistent with the broader statutory scheme.

    b. It cannot be right that a mere assertion by such a person of *"unambiguous irrelevance"* has the effect of extinguishing any power in the inquiry to require

[4] See paragraph 29 of the application

[5] I note that the term *"unambiguously irrelevant"* does not appear either in the Inquiry Rules or in the 2005 Act.

the production of the documents so that it can determine for itself the relevance or otherwise of the material. In this case the document holder is a government department, but, in another, it might be, for example, a private individual or entity suspected of criminality.

c. Whilst the application draws a parallel with litigation,[6] the practical consequence of the Cabinet Office's position is that, unlike in civil or criminal litigation (where a judge will look at documents to determine cases of disputed relevance), under the s.21 regime the assertion by a document holder that documents are *"unambiguously irrelevant"* and therefore should not be disclosed is conclusive of the matter. The position adopted by the Cabinet Office precludes judicial determination entirely, and undermines the clear purpose of section 21(4).

d. Those who hold documents will never be in as good a position as the Inquiry itself to judge the possible relevance to the Inquiry of documents they hold. Necessarily, they do not know all that the Inquiry knows about the investigations it is conducting, or that it is considering whether to conduct. They are not in a position to keep changes in relevance properly under review. The relevance of documents apparently unconnected to the Terms of Reference may lie in information or further documents known or held only by the Inquiry.

22. This final point is well-illustrated by the unredacted copies of some of the documents sought by the Notice that the Cabinet Office has now provided. The application emphasises[7] that these documents have been provided without prejudice to the jurisdictional arguments that I have addressed, and it is suggested[8] that I consider the unredacted documents *"de bene esse"*. I have now reviewed a sufficient number of those documents, with the assistance of Counsel to the Inquiry, to satisfy myself that the following points emerge.

[6] See paragraph 22 of the application
[7] See paragraph 3 of the application
[8] See paragraph 33 of the application

a. First, it is apparent that some important passages (relating for example to discussions between the Prime Minister and his advisers about the enforcement of Covid regulations by the Metropolitan Police during the public demonstrations following the murder of Sarah Everard) were initially assessed by the Cabinet Office to be *"unambiguously irrelevant"* to my investigations and therefore redacted from copies of the WhatsApp messages initially provided to the Inquiry. Whilst those redactions have now (very recently) been removed, it was not a promising start.

b. Second, there are some passages within the material that remain redacted on grounds of *"unambiguous irrelevance"* that I consider are in fact relevant to my investigation and that I would wish to disclose to Core Participants. Those passages relate, for example, to the way in which WhatsApp messages should be used in policy formation and to relations between the UK and Scottish governments. I recognise that the relevance of at least some of these passages may not have been apparent to the Cabinet Office and its advisers. I repeat, these are matters that I and my team are better placed to assess than any document provider.

c. Third, I would not presently propose to disclose the balance of the redacted material to Core Participants and, in that sense, that material falls to be categorised, at least for present purposes (the Cabinet Office not having formally sought a ruling on relevancy), as not being relevant. However, all this material will be kept under review for possible relevance as the Inquiry progresses and certain passages which have already been identified as being close to the borderline will be considered with particular care in this regard. The fact that I have reached this view after the material has been examined in no way undermines (still less renders irrational) the assessment that I made in issuing the Notice that all of the material required to be produced was of potential relevance to my inquiry.

23. For completeness, I should record that I do not consider that there is any tension between the requirements of the Notice and principles of necessity and proportionality under Article 8 ECHR and/or the UK GDPR. For all the reasons set out above, I consider that the making of, and compliance with, this Notice is necessary in

the public interest to assist me in properly conducting the public inquiry with which I have been charged and to enable me to make recommendations for the better protection of the United Kingdom and its citizens from any future pandemics.

Conclusion

18. The application is dismissed.

19. I extend the time by which the documents listed in Annex A(i) and Annex A(ii) of the Notice are required to be produced to **4pm on 30 May 2023**. Otherwise, the full terms of the Notice remain in effect.

The Right Honourable Baroness Hallett
Chair of the Covid-19 UK Inquiry
22 May 2023