THE UK COVID-19 INQUIRY

MODULE 2

APPLICATION ON BEHALF OF THE CABINET OFFICE

UNDER SECTION 21(4) OF THE INQUIRIES ACT 2005

Introduction

1. On 28 April 2023, the Chair issued a notice under s.21(2)(b) of the Inquiries Act 2005 ("the 2005 Act") to the Cabinet Office requiring it to produce the documents listed in Annexes A(i) and A(ii) by 12 May 2023 and 29 May 2023 respectively ("the Notice"). The Notice is a coercive measure, failure to comply with which is, without a reasonable excuse, a criminal offence under s.35(1) of the 2005 Act.

2. The Cabinet Office has jurisdictional objections to the terms of the Notice applicable to both parts of Annex A, which it has indicated in correspondence to the Inquiry (see letters of 30 March 2023 and 18 April 2023 in particular). In summary, they are that the Inquiry has no power to use its compulsory powers to demand material that is unambiguously irrelevant to its work. The approach of the Cabinet Office and its legal representatives to that characterisation, as explained in correspondence, is more than sufficient to assure the Inquiry that it will be provided with all relevant material and that it will also be the arbiter of relevance in cases in which there is any reasonable doubt about whether material is or is not relevant.

3. As the Cabinet Office has previously indicated, it is prepared, without prejudice to these jurisdictional objections and on a purely pragmatic basis, to provide unredacted copies of the material which (a) is within the scope of the Notice and (b) has already been supplied in redacted form to the Inquiry.[1] It is anticipated that this will allow the Chair to be satisfied in relation to that set of material that the redactions by the Cabinet Office, on the basis that it is unambiguously irrelevant to the Inquiry's work, have been properly made. As has been noted in correspondence, the redactions have been made by the Cabinet Office's legal representatives, including Leading Counsel, mindful of their professional duties, and applying the high threshold for redaction of unambiguous irrelevance.

[1] Save for a very small number of redactions of information which has been assessed to be national security sensitive.

4. The Cabinet Office also indicated in correspondence that those objections do not readily fall within the process envisaged by s.21(4). However, in the letter from the Inquiry accompanying the Notice and of the same date ("the Letter"), it was said that if the Cabinet Office wished "*to contend that the notice covers information in the materials which it says is irrelevant, then the notice makes provision for such objections to be raised under the process clearly provided for in section 21(4)*". In the light of that invitation and in the absence of a ruling from the Chair on the jurisdictional issues, the Cabinet Office makes this application against the Notice under s.21(4).

The Legislative Framework

5. The role of a public inquiry under the 2005 Act is set by its terms of reference, as determined by the relevant Minister, under s.5 ("the ToR"). Those terms of reference determine "*the matters to which the inquiry relates*": s.5(6)(a). By s.5(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*". This limitation reflects that an inquiry is a creature of statute and has only the powers afforded to it by the 2005 Act, for the purposes envisaged under that Act.

6. Those functions include the powers of an inquiry to request and to compel the production of material by way of disclosure. An inquiry's powers to request disclosure of material are provided by rule 9 of the Inquiry Rules 2006 ("the Rules"). Rule 9(2) provides that "*The inquiry panel must send a written request to any person that it wishes to produce any document or any other thing*"; and rule 9(4) provides that "*Any request for a written statement must include a description of the matters or issues to be covered in the statement*". These provisions are necessarily limited by the general restriction on the exercise of an inquiry's functions imposed by s.5(5). The Rules are made under s.41 of the 2005 Act.

7. The coercive powers of an inquiry are relevantly set out in s.21. The applicable power to the present case is that contained in s.21(2), which provides that:

> "*The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable—*
>
> *(a) to provide evidence to the inquiry panel in the form of a written statement;*
> *(b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry;*
> *(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.*"

8. The power expressly relied upon in the Notice, s.21(2)(b), specifically confines its scope to documents "*that relate to a matter in question at the inquiry*". That is unsurprising given the jurisdictional limits set by s.5(5).

9. A failure to comply with a notice issued under s.21 is, without reasonable excuse, a criminal offence contrary to s.35(1) of the 2005 Act. It is punishable on summary conviction by a fine of up £1,000 and/or imprisonment for a maximum of 51 weeks. Such criminal proceedings may only be initiated by the Chair: s.35(5). The penal sanctions attached to a s.21 notice accordingly and necessarily engage the ordinary principles of statutory interpretation against doubtful penalisation.

10. Sections 21(4)-(5) address the safeguards attached to a s.21 notice, and provide that:

"*(4) A claim by a person that—*

(a) he is unable to comply with a notice under this section, or

(b) it is not reasonable in all the circumstances to require him to comply with such a notice,

is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information."

11. In addition, a statutory inquiry under the 2005 Act is: (a) a public authority within the meaning of s.6 of the Human Rights Act 1998, with obligations to act compatibly with ECHR rights, and (b) a data controller under the UK GDPR, subject to the principles articulated in Article 5 of that legislation.

The Scope of the Inquiry's Jurisdiction

12. The Inquiry has no jurisdiction to request under rule 9, still less to compel under s.21, the provision to it of unambiguously irrelevant material. That is a basic statutory limit on its powers, imposed for good reason.

13. That basic submission, and limitation on an inquiry's compulsory powers, is entirely consistent with the Cabinet Office's acceptance that:

(1) All parties, and the public, must have confidence that the Inquiry is receiving all evidence relevant to its work under its ToR.

(2) It is, not least for this reason, appropriate that the Inquiry receive and consider documents which are relevant or potentially relevant to the ToR.

(3) WhatsApp (and other instant messaging formats) messages between Ministers and officials in relation to Covid-19 are documents which will in some instances contain information of relevance or of potential relevance to the ToR and, as such, be disclosable to the Inquiry.

(4) The terms of the requests made by the Inquiry under rule 9 for WhatsApp communications were unobjectionable; and indeed correctly acknowledged the subject matter limitation on the Inquiry's powers to compel material under the 2005 Act. Those requests have sought disclosure of "*any informal or private communications about the UK Government's response to Covid-19 of which you were a part including but not limited to informal groups (such as text messages and WhatsApp groups) or private messages or email communications with Ministers, senior civil servants or advisors*" (emphasis added). These rule 9 requests capture all such relevant or potentially relevant messages. They do not encompass messages which are not "*about the UK Government's response to Covid-19*".

14. A threshold of unambiguous irrelevance fairly and properly respects both this common ground and the statutory limits on the Inquiry's powers.[2] It is a high threshold for a party declining to disclose to meet, particularly in the context of the wide-ranging nature of the Inquiry's ToR.

15. **First**, there must be jurisdictional limits on the powers of the Inquiry to compel the disclosure of material to it, as defined by the relevance of that material to its statutory functions as set by its ToR. That follows directly from the limitation imposed by s.5(5), and the specific terms of s.21(2)(b) of the 2005 Act ("*that relate to a matter in question at the inquiry*"). The relevance of the evidence sought was repeatedly emphasised by Jacobs J in *Chairman of the Manchester Arena Inquiry v Taghdi* [2021] EWHC 2878 (Admin) in terms which recognise that relevance is an effective pre-condition to enforcement (in that case, under s.36); see too *Chairman of the Manchester Arena Inquiry v Romdhan* [2021] EWHC 3274 (Admin) at §13(2).

16. **Secondly**, purposive considerations strongly support the natural reading of the Act. No conceivable legislative policy supports the idea that Parliament intended to allow inquiries to exercise penal powers of compulsion to demand material that was obviously irrelevant to its work. On the contrary:

(1) Such an attempted expansion of the powers of inquiries would infringe the principle against doubtful penalisation, risking the criminalisation of persons who could never reasonably have expected that the Inquiry would be entitled to demand the provision to it of material unambiguously irrelevant to its ToR.

[2] It is arguably more generous to the public inquiry than the statutory language in fact suggests. An obvious point of contrast with production powers in, e.g., s.2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, s.97 of the Magistrates' Court Act 1980 and s.9(1) read with Sch.1 to the Police and Criminal Evidence Act 1980, all of which use the phrase "*likely to be material evidence*" or "*likely to be relevant evidence*". The wording "*likely to be*" conspicuously does not appear in the 2005 Act. See further the discussion in *R (BBC) v Newcastle Crown Court* [2019] EWHC 2756 (Admin).

(2) It would represent a serious intrusion into the privacy of those who come within its sphere, particularly given the informal and conversational nature of the WhatsApp communications which are the focus of the Notice: see, e.g. *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin) at §28.

(3) Moreover, far from assisting the work of an Inquiry, the provision of irrelevant material, which will then need to be considered by the Inquiry itself for redaction, risks adding unnecessarily to its burdens, for no good reason.

17. It is accepted, as noted above, that the public should be able to have confidence that all relevant material has been produced to an inquiry. That important objective is entirely achieved by the powers in s.21 extending to the production of potentially relevant material; and by the Inquiry having powers to determine (subject to the mechanisms of challenge in the 2005 Act) cases of doubtful relevance. A power to require the production of unambiguously irrelevant material, or the use of the general power to encompass what will inevitably be unambiguously irrelevant material, is wholly unnecessary for that purpose.

18. **Thirdly,** the lack of jurisdiction over unambiguously irrelevant evidence is all the more clear in circumstances where that evidence is personal and private. The Inquiry owes duties as a data controller under the UK GDPR to protect personal data, and as a public authority under the Human Rights Act 1998 to act compatibly with Article 8 ECHR rights. WhatsApp messages are particularly likely to involve the processing of personal data, potentially of various data subjects and potentially of data of some sensitivity (including special category data as defined in Article 9), including of junior officials whose identities the Inquiry has otherwise generally accepted should be redacted. To take a simple example, Article 5(1)(c) UK GDPR imposes the principle of data minimisation, requiring that processing be, amongst other things, "*relevant*". That principle extends to judicial proceedings, and consideration must always be given as to whether some less intrusive form of processing is available: see, e.g., Case C-268/21 *Norra Stockholm Bygg AB* (EU:C:2023:145) at §55: "*The national court is therefore required to determine whether the disclosure of personal data is adequate and relevant for the purpose of attaining the objective pursued by the applicable provisions of national law and whether that objective cannot be achieved by recourse to less intrusive means of proof in respect of the protection of the personal data of a large number of third parties*". Although the UK GDPR applies a more granular set of controls, the essential point is the same under both the UK GDPR and Article 8 ECHR: processing and compulsory disclosure must be necessary and proportionate and unambiguously irrelevant material cannot be either.

19. For the avoidance of any doubt, these are jurisdictional objections. They cannot be avoided by the Inquiry's Protocols relating to redactions, or by the pragmatic

decision-making of any party responding to requests for disclosure made by this, or any other, public inquiry.

20. It is also important to note that the Cabinet Office has explained, in correspondence, the measures it has taken as a result of which the Inquiry can be assured that the appropriately high threshold has been, and will be, accurately and properly applied. The ability of parties to distinguish between potentially relevant material (including adverse material) and unambiguously irrelevant material is seen day in and day out in all litigation contexts. Such judgements are made by qualified legal representatives, owing professional obligations beyond those owed to their client, up to and including Leading Counsel.

21. In the present context, the Cabinet Office has already explained in correspondence that it is only in the clearest of cases that material will be redacted on grounds of unambiguous irrelevance; and that, if there is any room for reasonable doubt as to whether material is in that category, it will be disclosed to the Inquiry as potentially relevant for the Inquiry to make the ultimate judgement call on actual relevance. Moreover, there is an array of practical safeguards in place. The Cabinet Office will (and has to date) in the case of any redaction made to material on grounds of unambiguous irrelevance:

    (a) indicate clearly that unambiguous irrelevance is the reason for the redaction;

    (b) briefly summarise the reason why the redacted content is unambiguously irrelevant;

    (c) ensure that the judgement as to irrelevance has been taken, or reviewed, by Leading Counsel with the assistance of the relevant client. No decision to redact material as unambiguously irrelevant has been or will be taken by a witness or client alone;

    (d) respond promptly to any query raised by the Inquiry in relation to such a redaction which questions the judgement of irrelevance in the particular context, and provide any further explanation it is possible to provide.

22. In addition, as the Cabinet Office continues to process material for disclosure – including where material falls within the requests made of more than one witness – it continues to keep existing redactions under review. Where it is considered possible to provide further disclosure it intends to do so. It is adopting the same approach as in litigation, regardless of whether or not such an approach strictly applies to a public inquiry, namely that compliance with disclosure requests and obligations is a continuing duty.

23. This approach is more than sufficient to ensure that the Inquiry receives, and the public and the Interested Parties can be entirely confident that it has received, all relevant material; and that it is the ultimate arbiter of relevance in cases in which there is any rational room for doubt.

The Notice

24. The Cabinet Office is grateful for the Chair's extension of time to make this application in relation to Annex A(i), so as to align both aspects of Annex A in a single application.

25. Annex A(i) of the Notice imposes three disclosure obligations:

    (1) Disclosure of the "*Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned / used by Henry Cook and which: (a) Comprise messages in a group chat established, or used for the purpose of communication about the UK Government's response to Covid-19 ("group messages"); or (b) Were exchanged with any of the individuals listed in Annex B ("individual threads")*". Annex B lists 40 named individuals in addition to Mr Cook.

    (2) Disclosure in the same terms as (1), but concerning the former Prime Minister, The Rt Hon Boris Johnson MP.

    (3) The "*Unredacted diaries for*" Mr Johnson "*covering the period 1 January 2020 to 24 February 2022*".

26. Annex A(ii) of the Notice of the Notice imposes a further disclosure obligation:

    (4) Copies in "*clean unredacted form, save only for any redactions applied for reasons of national security sensitivity*" of "*the 24 notebooks containing contemporaneous notes made by the former Prime Minister*", Mr Johnson, during the period 1 January 2020 to 24 February 2022.

27. As at 28 April 2023, when the Notice was issued, the Inquiry had been provided with a substantial proportion of Mr Cook's WhatsApp messages, particularly the 'group messages', with redactions made in application of the unambiguously irrelevant test, and summary explanations of the reason for those redactions supplied to the Inquiry. Disclosure of material relating to Mr Johnson directly had not been supplied, and was not yet due as at the date of the Notice. (Various of Mr Johnson's group messages have been supplied indirectly through the disclosure provided in relation to Mr Cook and others.) The inclusion of Mr Johnson's diaries and notebooks in the Notice is not readily understood by the Cabinet Office, as that particular material had not been the subject of any discussion or purported concern on the part of the Inquiry in

correspondence, which was focussed upon WhatsApp messages. No explanation for the specific choice of material in the Notice was set out in either the Notice or the Letter.

28. Entirely unsurprisingly, the work of Government prior to, and throughout, the pandemic concerned a huge variety of matters entirely unconnected with that pandemic. *A fortiori* that individual communications within Government, and documents created by it, will contain information and comments about matters entirely unconnected with that pandemic. Moreover, even within a WhatsApp group with a title or purpose which concerns the response to Covid-19, there will be some individual messages which are on no view relevant to the Inquiry's ToR. Still more so in WhatsApp threads between individuals who had Covid-19 related functions amongst many others. It is equally unsurprising that WhatsApp threads may contain personal information of a kind which could have no conceivable bearing on the issues being considered by the Inquiry, including personal information of junior officials. All of these points apply with similar force and obviousness to Mr Johnson's notebooks containing contemporaneous notes on all manner of subjects which he was, as Prime Minister, required to consider.

29. It is in that common-sense context entirely unsurprising that the Cabinet Office's reviews of WhatsApp threads and groups for relevance and potential relevance has identified messages which are unambiguously irrelevant to the Inquiry (but which may be interspersed between relevant or potentially relevant material) because they are or involve:

    (a) Discussions of entirely separate policy areas with which the Inquiry is not concerned.

    (b) References to diary arrangements unconnected to the Covid-19 response.

    (c) References to personal and family information, including illness and disciplinary matters.

    (d) Comments of a personal nature about identified or identifiable individuals which are unrelated to Covid-19 or that individual's role in connection with the response to it.

30. These are categories of material to which the Inquiry has no entitlement, and which are inherently sensitive (regardless of any security classification applied) and/or personal. The more senior the Government Minister, official or advisor targeted by the Inquiry's disclosure requests, the more likely it is that their communications will address, in particular, policy matters of particular sensitivity which are unambiguously irrelevant to Covid-19 and which should not be disclosed outside of Government without it being strictly necessary to do so. This has been explained to

the Inquiry in correspondence: see the Cabinet Office's letter of 18 April 2023. Moreover, it was understood that this (self-evident) outcome was in fact common ground, given that the Inquiry's letter of 24 March 2023, notes that there is "*likely to be content within exports from WhatsApp messages*" which would fall to be redacted as irrelevant to the work of the Inquiry. The same objections and conclusions apply equally to Mr Johnson's diaries and notebooks.

31. The Notice asserts that the "*entire contents of the documents listed in Annex A(i) and (ii) to be potentially relevant to the lines of investigation being pursued*" by the Inquiry. That is an untenable assertion without any rational basis or explanation:

    (a) It is contrary to common-sense, the factual position as explained by the Cabinet Office and the Inquiry's own (accurate) recognition in correspondence. There is, as is entirely unsurprising, material within the documentation sought to be compelled which is unambiguously irrelevant material.

    (b) The Inquiry has offered no explanation as to why it considers the entire contents to be potentially relevant; or why it considers (if it considers) the explanations of the nature of the unambiguously irrelevant material that have been provided to be either indicative of potential relevance or inaccurate.

    (c) Nor has the Inquiry explained how it could continue to maintain this position that the entire contents are potentially relevant in circumstances in which all the safeguards indicated by the Cabinet Office and described above are in place and have been applied.

32. Moreover, the Inquiry is being provided with WhatsApp threads and messages (relating to Mr Cook) to which those safeguards have been applied and which can (without prejudice to the jurisdictional objections) be checked to provide the Inquiry additional assurance.[3] This constitutes a particularly appropriate representative sample by which the Chair can satisfy herself that the redaction exercise has been carried out by reference to the unambiguously irrelevant threshold because: (i) it is a category of material which is within the scope of the Notice, specifically as it is targeted against Mr Cook;[4] (ii) it is a category of material which has already been supplied by the Cabinet Office in redacted form, with the redactions summarily explained; (iii) they are group messages, in which a variety of unambiguously irrelevant messages are sent in a variety of contexts and by a variety of individuals (including both Mr Cook and Mr Johnson); and (iv) they are groups which might on their face be expected to be

[3] Given the sensitivities of disclosing, even on the present very limited and specific basis, material to which the Inquiry has no legal entitlement, the Cabinet Office requests that the unredacted material be handled by the minimum number of the Inquiry legal team necessary to facilitate determination of this application by the Chair.
[4] Given the nature of the Notice's requests for WhatsApp group messages in particular, the material supplied in relation to Mr Cook overlaps to some degree with that which would be supplied on behalf of Mr Johnson and so the sample is relevant to both parts (1) and (2) of Annex A(i).

largely relevant to Covid-19, but which in fact reveal the degree to which unambiguously irrelevant material can be interspersed with potentially relevant material.

33. The Cabinet Office invites the Chair to consider that unredacted material on a *de bene esse* basis, so as to provide her assurance that the Cabinet Office's approach of principle and practice will not in fact materially risk depriving the Inquiry of information or documents which are potentially relevant to its lines of investigation. The Notice as formulated is unnecessary for this reason too.

Conclusion

34. For the reasons set out in this application, the Cabinet Office invites the Chair to revoke the entirety of the Notice. The fact that there is no dispute that it will also capture documents which are relevant and potentially relevant does not operate to save the Notice.

35. The Cabinet Office reiterates its commitment to disclose all material requested by the Inquiry which is potentially relevant to its ToR, and to do so on timescales which will assist the Inquiry in meeting its planned schedules to the best of its ability. It is unnecessary to set out the extensive disclosure already provided by the Cabinet Office in Module 1, and the extensive public resources being devoted to the wide-ranging and onerous requests placed upon the Cabinet Office in the context of Module 2. It will continue to work with the Inquiry in a constructive and co-operative way to enable the Inquiry to meet its ToR, to the expected benefit of Government and the public.

SIR JAMES EADIE KC
CHRISTOPHER KNIGHT

15 May 2023