



RULING ON APPLICATION MADE BY THE CABINET OFFICE
UNDER SECTION 21(4) INQUIRIES ACT 2005

Introductory

1. This is my Ruling on an application made by the Cabinet Office under section 21(4)(b) of the Inquiries Act 2005 ('the 2005 Act'). The application is dated 10 July 2023.

2. The application relates to a notice that I made under section 21(2)(b) of the 2005 Act on 28 April 2023 ('the s.21 notice'). The s.21 notice was addressed to the Cabinet Office. It required the production of three categories of documents, First, it required production of WhatsApp communications recorded on devices owned or used by the former Prime Minister Boris Johnson and also one of his advisers named Henry Cook, comprising exchanges between senior government ministers, senior civil servants and their advisers during the pandemic. The material sought in this category included both group messages and also messages between individuals (or 'threads'). Second, it required production of Mr Johnson's diaries for the same period. Third, it required production of notebooks containing Mr Johnson's contemporaneous notes, again covering the same period. The s.21 notice required all this material to be provided in unredacted form (save for certain redactions that I had agreed could be made on the ground of national security).

3. The Cabinet Office took issue with the requirement in the s.21 notice to provide unredacted documents. It asserted that some parts of the documents were 'unambiguously irrelevant' and that I was therefore not entitled to require the production of those parts of the documents, with the consequence that the s.21 notice was unlawful. The Cabinet Office first raised these issues by way of an application made (as is the present application) under section 21(4)(b) of the 2005 Act. That

application was dated 15 May 2023. I rejected that application by way of a Ruling dated 22 May 2023.

4. The Cabinet Office thereafter sought to challenge the s.21 notice by way of judicial review proceedings. The Divisional Court dismissed the judicial review claim brought by the Cabinet Office in a judgment dated 6 July 2023 (*The Cabinet Office v The Chair of the UK Covid-19 Inquiry & others* [2023] EWHC 1702 (Admin)).
5. Further background to this application may be found both in my Ruling of 22 May 2023 and also in the Divisional Court's judgment.

The application

6. Section 21(4) of the 2005 Act provides as follows:

"A claim by a person that:

(a) ...

(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."

7. It is clear from the wording of the statute that my task on an application under section 21(4)(b) is to reconsider the reasonableness of the s.21 notice (and all parts of it) in light of the submissions made in the application.
8. The starting point for the Cabinet Office's present application, as with its earlier application, is its contention that some passages of the documents that are sought under the s.21 notice are 'unambiguously irrelevant' to the work of the Inquiry. As I have mentioned above, the Cabinet Office's first section 21(4) application amounted to a general challenge to the legality of the s.21 notice. This application is different. On this occasion, I have been provided with copies of all the documents caught by the s.21 notice (for the first application I was only given a sample), with the passages that are said to be 'unambiguously irrelevant' marked up. The application invites me to review the documents to determine for myself the relevance of those passages. This is a use of the section 21(4) procedure that was endorsed by the Divisional Court in the judicial review proceedings - see judgment at paragraphs 67-71.

9. All of the documents produced by the Cabinet Office have been considered individually and with care. That task has largely been conducted by members of the Inquiry legal team under my instructions and direction and I have personally reviewed a sample of the documents. The documents have been assessed for relevance to the work of the Inquiry (I will say a little more below about this test, which does not, or at least may not, equate to the Cabinet Office's submitted standard of 'unambiguous irrelevance'). Particular attention has of course been paid to those passages of the documents that the Cabinet Office has highlighted as being, in its contention, 'unambiguously irrelevant'.
10. Where my conclusion is that documents, or passages within documents, are relevant, it must follow that the s.21 notice requiring the production of that document, or part of document, was "*reasonable in all the circumstances*" and, therefore, to that extent the present application falls to be dismissed.
11. However, the position is different where, on the review, my conclusion is that a document, or a part of a document, is irrelevant after all. In that situation, I must consider whether, given that conclusion, the s.21 notice requiring production of the document (or part of document) in question is "*reasonable in all the circumstances*". If not, I must allow the application to that extent and consider an appropriate variation to the s.21 notice. A further and closely related question, which was raised in the Divisional Court's judgment, is whether in such circumstances documents should be 'returned' to the Cabinet Office.

The documents

12. As already noted, I have been provided by the Cabinet Office with all the documents that it holds that are responsive to the s.21 notice. With the exception of a small number of uncontentious national security redactions, the documents have been provided in clean copy.
13. Of the three categories of material identified in paragraph 2 above, the WhatsApp messages are the most voluminous.

14. The WhatsApp material from Boris Johnson's phone comprises 29 sets of exchanges between Mr Johnson and other individuals (or 'threads') and one set of exchanges from a WhatsApp group of which Mr Johnson was a member. It is to be noted that none of this material provided by the Cabinet Office dates from the early stages of the pandemic in the first half of 2020. That is because at that earlier time Mr Johnson was using a different phone. Messages stored on that phone, which was retained by Mr Johnson personally, were not caught by the s.21 notice and are being provided to the Inquiry separately by Mr Johnson.
15. Mr Cook's WhatsApp material comprises 34 separate threads and 67 sets of exchanges from different WhatsApp groups of which he was a member.
16. The threads and group chats vary considerably in length - some are only a page or two in length, others run to over 100 pages.
17. It is apparent from a review of this WhatsApp material that each of the threads and group chats amounts in substance to a transcript of an extended conversation or series of conversations between the participants - often on a single issue or theme. Earlier messages provide necessary context for an understanding of later messages. Any suggestion that every separate message should be treated as an individual document would therefore, in my judgment, be artificial in the extreme. For those reasons, which are essentially pragmatic and which relate very much to the content of this specific material, I will treat each of the threads and group chats as a single document for the purposes of determining this application.
18. Mr Johnson's diaries comprised a single document with detailed, typed appointment diaries for every day between 1 January 2020 and 31 January 2022.
19. Mr Johnson's notebooks contain contemporaneous manuscript notes made by him over a similar period. The notebook entries have been divided into a total of 35 files.

Decision and Reasons

20. All of the documents provided by the Cabinet Office in response to the s.21 notice have been reviewed for relevance. As I have explained above, this exercise has been conducted by the Inquiry legal team under my direction.

21. When I refer to the documents having been reviewed 'for relevance', what I mean is that the contents of the documents have been considered and a decision made as to whether the documents and/or parts of the documents do or do not relate to a matter in question at the Inquiry. This is a binary determination - either documents or parts of documents do relate to a matter in question at the inquiry, or they do not. Whilst it may not always follow that all material that is relevant in the sense that it relates to a matter in question in the Inquiry will be disclosed to Core Participants, in the particular circumstances of Module 2 of this inquiry, I have decided that all such material will be disclosed (subject to any application for a restriction order under s.19 of the 2005 Act) to Core Participants. Irrelevant documents will not be disclosed. Where a document contains some material that is relevant and other material that is irrelevant, the irrelevant material will be redacted prior to the disclosure of the document.
22. I appreciate that the test of relevance that I have described is not (or at least may not be) equivalent to the standard of 'unambiguous irrelevance' referred to by the Cabinet Office in its application. However, given the rapidly approaching hearing dates and the need for the Inquiry to process this (voluminous) material for disclosure to Core Participants, in practical terms it has been necessary for my team to move directly to considering the material on this basis. I would also add (a) that the test of relevance is in any event very similar to, and arguably more generous to the Cabinet Office, than its test of 'unambiguous irrelevance' and (b) that the test that I have adopted is consistent with the Divisional Court's discussion of this aspect of the section 21(4) jurisdiction - see in particular paragraphs 68 and 69 of the judgment.
23. Marked up sets of the documents which reflect my ruling on the issue of relevance have been prepared and provided separately to the Cabinet Office.
24. In summary, I have largely accepted the Cabinet Office's contentions regarding the relevance of the material contained within the documents. Thus, the great majority of the passages initially identified by the Cabinet Office as 'unambiguously irrelevant' are marked as irrelevant in the documents that reflect my ruling. That said, the overlap is not total. There are some passages that I consider are relevant (in the sense that they relate to matters in question at the Inquiry) that the Cabinet Office had marked as 'unambiguously irrelevant'. There are also other passages that I have concluded are

irrelevant which were not previously highlighted as ‘unambiguously irrelevant’ by the Cabinet Office.

25. As a consequence of the review exercise that I and the Inquiry legal team have conducted, there are some documents amongst those provided by the Cabinet Office in response to the s.21 notice that I consider to be entirely irrelevant. At the other end of the spectrum, there are some documents that I consider to be either entirely or almost entirely relevant. Most of the documents, however, fall between these two extremes. They contain lengthy passages that are relevant, but also other passages, sometimes lengthy passages, that are irrelevant.
26. Against this factual context, I return to the legal and practical issues that arise under the section 21(4) application.
27. With regard to documents that I have concluded are irrelevant in their entirety, I accept and endorse the guidance provided in the paragraphs of the Divisional Court’s judgment to which I have already referred. The review that has been conducted for the purposes of the s.21(4) application has demonstrated that the Inquiry does not need to obtain these documents. To apply the language of section 21(4), it would not be “*reasonable in all the circumstances*” to require the Cabinet Office to produce these documents. For that reason, I will vary the s.21 notice to exclude from its scope documents that I have concluded are irrelevant in their entirety. I will also give instructions for these documents to be deleted from the Inquiry’s electronic systems (the Divisional Court’s judgment refers to documents being ‘returned’ to the provider, but this language is more applicable to a situation where, unlike here, hard copy documents had been provided). The documents in question are listed at Appendix A to this Ruling.
28. That leads to the question of how to deal with ‘mixed documents’, which contain both material that I have concluded is relevant and that which I have concluded is irrelevant. I note at the outset that the Divisional Court’s judgment provides no express guidance on this issue, since it only dealt with documents that were either entirely irrelevant or entirely relevant. ‘Mixed documents’ of this nature will of course be disclosed to Core Participants in redacted form. But there are good practical reasons why I and my team will need to have the material beneath the redactions

(which I have currently classified as irrelevant) available during the course of the hearings. It will be necessary to keep the appropriateness of the redactions under review as the modular hearings progress. The relevance of particular passages may only become apparent at a later (perhaps much later) stage of the Inquiry's work. It is also possible that the redacted passages will acquire either a direct or a contextual relevance as a result of further evidence that is obtained - in particular, perhaps, in the course of oral evidence touching on the unredacted parts of these documents. It is also quite possible that Core Participants will wish to challenge and/or ask me to review particular redactions (again, one can readily imagine this happening in the course of oral evidence focusing on redacted documents). I have concluded that, for these very practical reasons, it remains "*reasonable in all the circumstances*" for me to require the production of the entirety of these documents, notwithstanding my conclusion following the section 21(4) review that certain passages within them do not relate to matters in question at the Inquiry and will not therefore be disclosed to Core Participants. I will not therefore make any variation of the s.21 notice in respect of these documents, nor does any question of the return or deletion of these documents arise. The Cabinet Office can, however, be assured that the clean copies of these documents will continue to be held securely by the Inquiry.

Conclusion

29. The application is allowed to a limited degree. I will vary the s.21 notice so that the documents listed at Appendix A to this Ruling (which upon review, I have determined to be irrelevant in their entirety) are excluded from the scope of the notice.

The Right Honourable Baroness Hallett
Chair of the Covid-19 UK Inquiry
15 September 2023

Appendix A: Documents not required to be produced in response to the s21 Notice of 28 April 2023

Mr Johnson's notebooks:

INQ000221287

INQ000221288

INQ000221289

INQ000221291

INQ000221293

Mr Johnson's WhatsApps:

INQ000226214

INQ000226220

INQ000226223

INQ000226226

INQ000226227

INQ000226228

INQ000226229

INQ000226232

INQ000226236

INQ000226243

Mr Cook's WhatsApps:

INQ000226247

INQ000226262

INQ000226283

INQ000226284

INQ000226285

INQ000226304

INQ000226316

INQ000226335

INQ000226337