

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) (“the Notice”). The Cabinet Office made an application under s.21(4) of the 2005 Act for the revocation of that Notice raising jurisdictional objections. That application did not separately seek a ruling on the relevance of the documents sought by the Notice, although the Cabinet Office provided with the application – on a *de bene esse* basis – a sample of some of the documents within the scope of the Notice so that the degree of irrelevant material caught could be understood.
2. The Chair rejected that application in a ruling of 22 May 2023. The Cabinet Office then issued a claim for judicial review of the Notice and the ruling. The Divisional Court dismissed that claim in a judgment of 6 July 2023: *R (Cabinet Office) v Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 (Admin).
3. However, the Court also explained that the s.21(4) process could be used to raise any objection as to the irrelevance of a document caught by the notice: a person who has an obviously irrelevant document “*is protected by section 21(4) from producing it*”: §71. The Court explained the way in which the s.21(4) process should operate in such a case at §§68-69:

“If a person responding to a section 21 notice contends that a document caught by the request does not, as a matter of fact, relate to a matter in question at the inquiry, it will be for the Chair of the Inquiry to determine how to deal with such a contention. The Chair might accept the claim at face value, but is more likely to require the provision of the disputed documents on a “de bene esse” basis, namely without prejudice to the objection to produce them, so that the Chair of the Inquiry can consider the application under section 21(4) that it is unreasonable to comply with the notice. The Chair of the Inquiry will be able to decide whether they do relate to a matter in question at the inquiry. The Chair of the Inquiry will have knowledge of the lines of inquiry which persons asked to produce documents do not have.”

If, on examination, the Chair of the Inquiry rules that the document relates to a matter in question at the inquiry, and the person who has the document accepts this, that will be an end of the matter. If the Chair of the Inquiry rules that the document does not relate to a matter in question at the inquiry, then the Chair will not be entitled to retain the document, and it might be noted that it would be a waste of time and resources to do so. Further it is not fair to a person for the inquiry to retain a document which does not relate to a matter in question at the inquiry. This is particularly so if the document contains sensitive personal information.”

4. The Court encouraged the use of this process in relation to the present Notice at §76.
5. Upon the handing-down of the Divisional Court’s judgment on 6 July 2023, the Chair issued a further notice which relevantly provided that:

“The Cabinet Office is required to comply with the Notice by 4pm on Monday 10 July 2023. Any application by the Cabinet Office under s21(4) of the Act must also be made by 4pm on Monday 10 July 2023 attaching both clean and provisionally redacted copies of the documents to which the application relates.”

6. The Cabinet Office welcomes the invitation of the Chair to invite her to rule on relevance in connection with the documents sought under the Notice, and accordingly makes this application under s.21(4) to obtain such a ruling.

The Relevant Information

7. The Cabinet Office has already provided to the Inquiry all of the documents it holds which are responsive to the Notice, redacted for national security information and for unambiguous irrelevance. Save for one small category, the Inquiry therefore already has the information sought by the Notice and which the Cabinet Office holds which is agreed to be relevant or potentially relevant (however so defined).
8. The only exception to this is the recent discovery by the former Prime Minister, Mr Johnson, of two further Notebooks. These are being provided with this application, with only national security redactions being made to them.
9. The Inquiry will be aware that as a separately represented party, Mr Johnson has possession of some of the information requested by the Notice, in particular his old telephone. The Cabinet Office does not have possession of the old telephone. HM Government continues to work with Mr Johnson’s representatives to assist Mr Johnson’s in aiding the Inquiry in this respect. Material not in the possession of the Cabinet Office is not responsive to the Notice.

The Documents Responsive to the Notice

10. The Notice sought from the Cabinet Office clean, unredacted, versions of all the documents sought by its terms. Following the judgment of the Divisional Court, and in accordance with its explanation of the s.21(4) process, the Cabinet Office will comply with that request.
11. With this application, the Inquiry is provided with clean, unredacted, copies of all documents responsive to the Notice, in the possession of the Cabinet Office, and which have not previously been provided in clean form. The Cabinet Office has thereby complied with its obligations under the Notice.
12. The only redactions – which we understand to be accepted so that a separate, appropriately secure, process can be used in relation to them – are for national security sensitive information.
13. As the Chair is aware from the existing redacted versions, the Cabinet Office considers that a considerable proportion of what is requested under the Notice is unambiguously irrelevant to the Terms of Reference of the Inquiry and can be determined to be so at this stage. That material can and should be returned in accordance with the Court’s judgment. The Cabinet Office respects that the Chair wishes to see that material to form her own view, and accordingly the unambiguously irrelevant information it has previously redacted is provided on the *de bene esse* / without prejudice basis set out by the Divisional Court.

The Relevance Application

14. As anticipated by the Chair’s Notice of 6 July 2023, and as set out above, the Cabinet Office formally applies under s.21(4) of the 2005 Act for a ruling from the Chair that certain of the material provided by it in response to the Notice is sufficiently clearly irrelevant to the work of the Inquiry that it is not required and can be returned to the Cabinet Office.
15. The Inquiry has, as of 10 July 2023, copies of the responsive documents which are clean (save for national security redactions) and redacted (for both national security and unambiguous irrelevance). The Inquiry is accordingly able to identify all of the material which has been determined by the Cabinet Office, on the advice of counsel, to be unambiguously irrelevant.
16. The reasons for the Cabinet Office’s view of irrelevance will invariably be obvious on the face of the document in question; if it were not obvious, it is unlikely to have been redacted as unambiguously irrelevant. The Cabinet Office has previously provided, with the redacted versions of the responsive documents, general explanations for why the redactions for irrelevance have been made. But any queries the Chair or her team may have as to the meaning or context of a particular aspect of the responsive documents will receive a prompt response from the Cabinet Office’s representatives.

17. The two Notebooks recently identified by Mr Johnson which have not previously been provided in redacted form are being provided in clean form (save for national security redactions, and material which falls outside of the timescale of the Notice), and separately with the proposed redactions for unambiguously irrelevant material marked on them.
18. Where a document, including an individual WhatsApp message, is partially redacted for relevance and that redaction is accepted by the Chair, the Cabinet Office assumes that the document will be retained by the Inquiry only in its redacted form, in accordance with the principles set out by the Divisional Court.
19. For the avoidance of doubt, the Cabinet Office recognises that there will be some parts of the responsive documents which are potentially relevant, or are arguably relevant, and which can be properly retained by the Inquiry for ongoing consideration. These have not sought to be redacted as unambiguously irrelevant, but the Cabinet Office has already made clear that it anticipates seeking further redactions on relevance grounds at the material provider review stage of the documents the Inquiry proposes to disclose to core participants. That reservation of its position will similarly apply to any document in which the Chair declines to accept the Cabinet Office's position on unambiguous irrelevance.
20. The Cabinet Office will continue to seek to assist the Inquiry and welcomes any requests for assistance or clarification from the Inquiry legal team.

Government Legal Department on behalf of the Cabinet Office

10 July 2023