**IN THE HIGH COURT OF JUSTICE** **Claim No:**

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

**BETWEEN**

**THE KING**

**On the application of the CABINET OFFICE**

***Claimant***

**-and-**

**THE CHAIR OF THE UK COVID-19 INQUIRY**

***Defendant***

**-and-**

**MR HENRY COOK**

**RT HON BORIS JOHNSON MP**

***Interested Parties***

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**STATEMENT OF FACTS AND GROUNDS**

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*References to pp xx below are to the bundle of documents accompanying these Grounds.*

## INTRODUCTION

1. The UK Covid-19 Inquiry issued a notice to the Cabinet Office under s.21 of the Inquiries Act 2005[1] ("**the Notice**") (**pp44-48**). It purported to compel the provision to the Inquiry of an extremely broad category of material. There was no limitation at all on that breadth by reference to the subject matter or content of the material. The Notice required the production of material, whatever its subject matter or content, as long only as it was between named people in a two year period (in the case of the WhatsApp communications); or was an entry in the former Prime Minister's (Boris Johnson MP) diary or notebooks. As such, it was bound to include, and did in fact include, material (and a significant quantity of material) which was entirely irrelevant to the Inquiry; or, to put the point in the language of s.21, which did not on any view "*relate to a matter in question at the inquiry*".

[1] All references to sections are to sections in the 2005 Act unless otherwise stated.

2. In a ruling dated 22 May 2023 ("**the Ruling**") (**pp59-66**), the Chair (the Rt Hon Baroness Hallett DBE) rejected the Cabinet Office's challenge to the Notice (**pp49-58**). The challenge was mounted on the basis that the Inquiry's powers do not extend to requiring the provision of documents that are irrelevant to the Inquiry's work. It was made clear to the Inquiry, that, following careful review by solicitors and Counsel, there was in fact a significant quantity of irrelevant material purportedly covered by the Notice. The broad nature of the material so characterised was described by the Cabinet Office (**p56**): it included '*references to personal and family information, including illness and disciplinary matters*', ' *comments of a personal nature about identified or identifiable individuals which are unrelated to Covid-19 or that individuals' role in connection with the response to it*' and '*discussions of entirely separate policy areas with which the Inquiry is not concerned*'. The Chair, in her Ruling, maintained that the Inquiry was entitled to require the provision of the entirety of those communications/entries.[2]

3. The questions raised by this judicial review accordingly relate to the limits of the powers of the Inquiry to require the provision to them of material. The Cabinet Office submits, for the reasons set out below, that:

   (1) The compulsory powers conferred on inquiries by the 2005 Act do not extend to the compulsion of material that is irrelevant to the work of an inquiry.
   (2) Under s.21, notices must be limited by reference to relevance. If a notice is cast by reference to documents or classes of document, the class must be sufficiently targeted so as to ensure that each such document is relevant to the work of the inquiry. The Notice exceeds that limit and is accordingly *ultra vires*.
   (3) The Chair concluded that the entirety of the material compelled by the Notice was, or might be relevant, to the Inquiry's work. That conclusion was irrational given the breadth of the Notice, and in the light of the material before her (including the fact that she had been told that, following the review already noted, the Notice covered a significant range of irrelevant material).

[2] The Ruling expresses some doubt about whether a jurisdictional challenge of this type was appropriately the subject of an application to the Chair under s.21(4). The Cabinet Office shares those doubts, and pointed them up in correspondence. However, given that the Inquiry specifically invited such an application in the correspondence that preceded the Ruling (see eg page 4 of the Inquiry's letter to the Cabinet Office of 6 April 2023; and see the letter accompanying the Notice dated 28 April 2023); and given that it was not clear whether the Chair had in fact considered the issues herself at the stage at which that correspondence was happening; and given also the evident good sense in ensuring that any avenue that might be considered to be an alternative remedy should first be exhausted, the Cabinet Office made the application and, despite the Chair's expression of doubts on the point, the Ruling was given.

## LEGAL FRAMEWORK

4. The Inquiry is a creature of statute. It has only those powers conferred on it by, or under, the 2005 Act.

5. The Inquiry's terms of reference ("**TOR**") were set pursuant to s.5 on 28 June 2022 (**pp203-207**), following a public consultation. Section 5(5) provides that functions conferred by the 2005 Act on an inquiry are "*exercisable only within the inquiry's terms of reference*". "*Terms of reference*" are in turn defined (in s.5(6)) as '*(a) the matters to which the inquiry relates; (b) any particular matters as to which the inquiry panel is to determine the facts; (c) whether the inquiry panel is to make recommendations;* [and] *(d) any other matters relating to the scope of the inquiry that the Minister may specify*."

6. Section 21 confers a power on the Chair to compel the production of *inter alia* documents (**p146**):

> "*(1) The chairman of an inquiry may be notice require a person to attend at a time and place stated in the notice:*
>
> *(a) to give evidence;*
> *(b) to produce 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.*
>
> *(2) 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.*
>
> *(3) A notice under subjection (1) or (2) must -*
>
> *(a) explain the possible consequences of not complying with the notice;*
> *(b) indicate what the recipient of the notice should do if he wishes to make a claim within subsection (4).*
>
> *(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.*

*(6) For the purposes of this section a thing is under a person's control if it is in his possession or if he has a right to possession of it.*'

7. Section 22 is headed "*Privileged information etc*" and provides:

> *"(1) A person may not under section 21 be required to give, produce or provide any evidence or document if-*
>
> *(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or*
>
> *(b) the requirement would be incompatible with a retained EU obligation.*
>
> *(2) The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom."*

8. The compulsory powers are backed by criminal sanction. Section 35(1) provides that a person is guilty of an offence if '*he fails without reasonable excuse to do anything that he is required to do by a notice under section 21.*' Proceedings in relation to such an offence may be commenced only by the Chair (s.35(3)). The maximum imprisonment for such an offence is, in England and Wales, 51 weeks (ss.35(7)-(8)).

9. Section 36 of the 2005 Act provides that where a person fails to comply with (amongst other things) a s.21 notice, or threatens to do so, the Chair may certify the matter to an appropriate court, and the court (after hearing representations) may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the Court.

10. Section 41 of the 2005 Act provides that the Lord Chancellor may make rules dealing with matters of evidence and procedure in relation to inquiries. The Lord Chancellor has made the Inquiry Rules 2006 (SI 2006/1838) ("**the 2006 Rules**") (**pp176-202)** using that power. Thereunder:

    (1) Rule 9 provides for the making of written requests by the inquiry panel for documents.
    (2) Rule 12 provides for the restriction of the disclosure of evidence or documents pending the determination of an application under s.19 of the 2005 Act or by reference to public interest immunity.

11. Pursuant to her powers under s.17 of the 2005 Act, the Chair has issued certain protocols making provision for the onward dissemination of documents provided to the Inquiry to Core Participants and the public, subject to various controls, conditions and safeguards (**pp208-217**).

**THE FACTS**

12. The Notice was issued on 28 April 2023 (**pp44-47**). It was issued to the Cabinet Office, but in respect of material relating to two named individuals, one of whom was the Rt Hon. Boris Johnson MP. Those individuals have been named and served as interested parties in this claim.

13. The Notice was issued following (i) two Requests for Evidence (including documents) under Rule 9 of the 2006 Rules sent to the Cabinet Office and the Interested Parties ("**the Rule 9 Requests**") (**pp67-76; 77-100**) and (ii) previous correspondence between the Inquiry Legal Team and the Cabinet Office in which the position of irrelevant material and the issues the subject of this judicial review were discussed (**pp101-117**).

14. The Notice compels the Cabinet Office to produce '*all materials*' listed in Annex A(i) and (ii) to the notice. The stated basis was that the Chair considered '*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 UK Covid-19 Inquiry*.'

15. Annex A(i) comprises three categories of documentation, as follows:

> "*1. 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 communicating 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"[3])*
>
> *2. Unredacted WhatsApp communications dated between 1 January 2020 and 24 February 2022 which are recorded on device(s) owned / used by the former Prime Minister, the Rt Hon Boris Johnson MP and which:*
>
> *a. Comprise messages in a group chat established, or used for the purpose of communicating 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").*
>
> *3. Unredacted diaries for the former Prime Minister, The Rt Hon Boris Johnson MP covering the period 1 January 2020 to 24 February 2022."*

16. Annex A(ii) then adds the following further category:

[3] Annex B then lists 41 different individuals. These include the current and past two Prime Ministers, several former and/or current cabinet ministers, and a large number of civil servants, government advisers and others.

"*Copies of the 24 notebooks containing contemporaneous notes made by the former Prime Minister, The Rt Hon Boris Johnson MP during the period 1 January 2020 to 24 February 2022. These notebooks are to be provided in clean unredacted form, save only for any redactions applied for reasons of national security sensitivity.*"

17. On 15 May 2023, the Cabinet Office applied to the Chair under s.21(4) for the revocation of the s.21 Notice (**pp49-58**):

    (1) The Cabinet Office explained that it had already provided, and would provide, any relevant or potentially relevant material falling within the requested categories, and would only omit or redact material where plainly irrelevant. The reference to '*potentially relevant*' material was thus evidently a reference to material, outside the plainly irrelevant, where there was a serious issue as to relevance.
    (2) The Cabinet Office explained that it was conducting a careful process of review of the Cook WhatsApp messages covered by the Notice, involving solicitors and Counsel, for the purpose of ensuring that the irrelevant material was filtered out in that way. It also described the broad nature of the irrelevant material. Such material included (as set out above) '*references to personal and family information, including illness and disciplinary matters*', ' *comments of a personal nature about identified or identifiable individuals which are unrelated to Covid-19 or that individuals' role in connection with the response to it*' and '*discussions of entirely separate policy areas with which the Inquiry is not concerned*'.
    (3) So as to provide the Chair with further assurance, the Cabinet Office indicated that (without prejudice to its position that the Inquiry has no power to compel the provision of irrelevant material and that the s.21 notice was *ultra vires*) it would provide the Chair with unredacted copies of those Cook WhatsApp messages which had at that stage already been provided to the Inquiry in redacted form ("**the Unredacted Copies**").

18. On 22 May 2023, in the Ruling (**pp59-66**), the Chair dismissed the s.21(4) application. The key reasons given are set out at §§16-21 of the Ruling which the Court is invited to read (rather than them being summarised here). The Court is also invited to read §22 which sets out the Chair's conclusions having considered '*a sufficient number*' of the (without prejudice) the Unredacted Copies.

## THE GROUNDS OF CHALLENGE

### Irrelevant documents and the Notice

19. Under s.21 the power of a Chair to compel the provision to an inquiry of documents is limited to documents which are relevant to the inquiry in question.

20. That is clear first from the natural meaning of the key provisions of the 2005 Act:

    (1) s.21(2)(b) of the 2005 Act expressly limits the compulsory power to documents '*that relate to a matter in question at the inquiry*' – i.e. to documents that are relevant to its work. That excludes documents which do not relate to matters in question at the inquiry.
    (2) Moreover, s.5(5) provides that any function conferred by the 2005 Act on the Inquiry is exercisable only within the inquiry's terms of reference. Such functions include the ability to compel the production of documents. So the power is limited to documents that are relevant to the TOR of the Inquiry.

21. Secondly, there is no reason why, as a matter of legislative policy, Parliament would have intended to confer power to compel the provision of material which was irrelevant to an inquiry. On the contrary, there is every reason to suppose that Parliament would have intended the opposite.

    (1) The provision of irrelevant material would not assist the work of the Inquiry. Indeed, such provision and/or insisting that irrelevant material be produced alongside relevant material on the basis of setting broad categories of documents would be likely to be highly inefficient and an unnecessary waste of both time and resource for an inquiry.
    (2) More fundamentally, irrelevant material would be likely to cover material which might be personal or sensitive for a raft of different reasons. Why would Parliament have chosen to impose this intrusive, compulsory provision unless the material, as relevant, would advance the public interests served by an inquiry because it was relevant?

22. Thirdly, when interpreted against the background of the common law, the words of s21(2)(b) of the 2005 Act are limited to disclosure which goes no wider than "train of inquiry" disclosure under the test in *Peruvian Guano* (1882) 11 QBD 55. In that case the order was for an affidavit of all documents '*relating to any matter in question in the action*' (wording which closely mirrors the wording in s21(2)(b) of the 2005 Act). The Court held that the order went as wide as (but no wider than) documents which '*may either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary'*. This included '*a document which may fairly lead him to a train of inquiry, which may have either of these two consequences*'.

Such disclosure is exceptional in modern litigation. As a pre-requisite to the making of any such order, there needs to be clear and rigorous identification of '*what documents are likely to fall within the scope of the order, to what specific issues the relevant documents to be searched on an enhanced basis relate and what the relevant trains of inquiry might be*' (*Qatar v Banque Havilland SA* [2020] EWHC 1248 per Cockerill J at §24).

23. All of this is *a fortiori* where s.35(1) criminalises non-compliance with a s.21 notice. The principle against doubtful penalisation strongly militates against reading the power under s.21 of the 2005 Act in a manner which extends beyond its clear and ordinary meaning.

24. So too do the interests protected by Article 8 ECHR and the UK GDPR, especially in a context where the relevant communications (as set out above) contain '*references to personal and family information, including illness and disciplinary matters*' and '*comments of a personal nature about identified or identifiable individuals which are unrelated to Covid-19 or that individuals' role in connection with the response to it*'. In that regard:

    (1) Article 5(1)(c) of the GDPR imposes the principle of data minimisation, requiring that processing be, amongst other things, '*relevant*'. That principle extends to judicial proceedings, and consideration must therefore always be given 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.
    (2) Article 8 ECHR similarly prohibits unnecessary or disproportionate intrusion into an individual's private and family life: see e.g. *YG v Russia* (Application No 8647/12) at §40 (mere storage of data relating to the private life of an individual) at §42 (protection of personal data, in particular medical data). The protection of personal data is '*of fundamental importance*' to the right under Article 8 ECHR: see e.g. *Mockute v Lithuania* (Application no 66490/09) at §§93-94. Even where a document is relevant, where disclosure of that document would engage or infringe an individual's rights under Article 8 ECHR (e.g. where the material to be disclosed contains sensitive personal information), the Courts will engage in a balancing exercise and may on such a basis exempt, limit or control the relevant disclosure: see e.g. *Durham County Council v D* [2012] EWCA Civ 1654.
    (3) Compelling the provision of material which (i) contains or is likely to contain private or personal information where (ii) such material is unambiguously irrelevant is neither a necessary nor proportionate interference with those rights and principles.

25. It is submitted **that the Inquiry cannot issue (and seek to maintain) a Notice purporting to the compel the production of material which is irrelevant. The notice must be restricted to compelling production only of relevant material.** That can be done in one of two ways:

(1) by reference to a subject matter/contents qualification or limit based on whether the specified documents relate to matters in question at the inquiry (by reference to the TOR), adopting a formulation of "relation to" or "relevance"; or
(2) in a manner which confines the definition of the relevant documents or classes of documents in sufficiently narrow terms so as to ensure that the notice does not cover irrelevant documents.

26. The s.21 Notice is extraordinarily broad and goes well beyond material which is relevant to the Inquiry. It purports, without any qualification by reference to relevance, to compel disclosure:

(1) of all WhatsApp communications between an adviser to the former prime minister (Mr Cook) and 41 different individuals, for a period of over two years, without any qualification at all as regards the contents or subject matter of such communications (Annex A(i) §1(b));
(2) of all WhatsApp communications between the former Prime Minister and each of those 41 individuals, again over more than a two year period, again without any qualification at all as regards the contents or subject matter of such communications (Annex A(i) §2(b));
(3) of all WhatsApp communications between that adviser, or the former Prime Minister, and anyone else at all, over any group chat, wherever that group chat has been used (amongst other things, and however briefly) for the purpose of communicating about the UK Government's response to Covid 19 (Annex A(i) §§1(a) and 2(a)); and
(4) of all of the former Prime Minister's diaries (Annex A(i) §3) and 24 notebooks (Annex A(ii)), again with no qualification as to their subject matter, and again over more than a two year period.

27. There is thus no limit by reference to the subject matter/content of the material at all. It is the content or subject matter that is the essence of relevance.

28. A Notice, without such a limit, requiring the provision of e.g. every WhatsApp message thread over a more than two year period with a large number of named individuals would be bound to cover irrelevant material, and, in all likelihood, a significant volume of such material. That is perhaps particularly so given the 'chat' nature of WhatsApp communications, which are private, encrypted and used informally.

29. Examples of the sort of irrelevant content in question no doubt abound – discussion of matters relating to a person's family or private life (eg a child's music lesson), or about a personal matter such as an illness, or about an entirely unrelated matter of government business (see further below). Such messages would be irrelevant and plainly so. But their provision is being compelled by the Notice, on its face, on pain of criminal sanction.

30. Two final points are to be noted on this aspect. First, it is to be noted that the Notice stands in stark contrast to the Rule 9 Requests which preceded the Notice. The terms of those requests were, as formulated on12 December 2022 and 3 February 2023, unobjectionable; and indeed correctly acknowledged the subject matter limitation on the Inquiry's powers to compel material under the 2005 Act. They 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). Similarly, they sought disclosure of '*Any contemporaneous diary or notes which you made during the specified period relating to your involvement in the UK Government's response to Covid-19*' (emphasis added): see **pp75-76; 99-100**. Those Rule 9 Requests, by that formulation, 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*". The same unobjectionable formulation, so far as documents are concerned, has been used in rule 9 requests issued by the Inquiry to fifteen other individuals in relation to their WhatsApp material (the relevant individuals are listed in the Inquiry's letter dated 28 April 2023 (**p116**) and include numerous current and former cabinet ministers and senior civil servants).

31. Secondly, it is to be noted that the s.21 Notice goes far beyond anything which would be contemplated by the Courts in civil proceedings when making orders for disclosure. In particular:

    (1) Unlike an order for standard disclosure under CPR 31.6, the s.21 Notice is not qualified or limited by reference to relevance at all. As noted, all of the documents falling within the notice must be provided.
    (2) Similarly, the notice bears no relation to an order for Model D extended disclosure under CPR PD 57AD, by reference to (i) defined issues for disclosure and (ii) a reasonable and proportionate search, carried out by the disclosing party, for documents likely to support or adversely affect their position, or the position of any other party, on those issues (see CPR PD 57AD §8.3).
    (3) Nor is the notice concerned with the disclosure of '*particular documents or narrow classes of documents*' as may be ordered under Model C within cases governed by CPR PD 57AD. Such orders will not be granted in '*general terms*' (CPR Notes 2AA-61.2; *Sheeran v Chokri* [2021] EWHC 3553), nor by reference to '*a category of documents that might or might not contain anything of real interest*' (*Pipia v BGEO Group Ltd* [2020] 1 WLR 2582 per Andrew Baker J at §§67-68). By contrast, the s.21 Notice orders disclosure of very large, general classes of documents.
    (4) Nor is the notice framed or limited by reference to any identified "train of inquiry" as is now, exceptionally, deployed under Model E within CPR PD 57AD or *Peruvian Guano*.

(5) At the very outer edges of disclosure in civil proceedings, there is the process of '*massive over-disclosure*' which was (controversially) adopted in *Genius Sports Technologies Ltd v Soft Construct (Malta) Ltd* [2022] EWHC 2637 (Ch) per Marcus Smith J at §§11-22. The process set out therein is (as summarised in §6) '*less the attempt to identify and produce relevant documents to the Receiving Party, and more a process of excluding unequivocally irrelevant and privileged documents from production, whilst providing the rest to the Receiving Party for the Receiving Party itself to review*'. What falls to be excluded, under that process, is documents that are irrelevant under the *Peruvian Guano* test (see §15), before a further review for privileged documents is done.

32. It is therefore submitted that the Notice is *ultra vires* on its face. It is not limited to relevant subject matter/content whether expressly or by sufficiently tightly defined categories. It was bound to cover a significant quantity of documents that are irrelevant – and that is in fact the case.

**The Ruling and the conclusion that the entirety of the documents covered by the Notice are "*potentially relevant*"**

33. The Ruling maintained the Notice and set out the Chair's explanations for its issue in that form. The Chair's core conclusion appears to be that the entirety of the range of documents covered by the Notice (eg every single WhatsApp message) is "*potentially relevant*". It is submitted **that that was an untenable, irrational conclusion** for the following reasons.

34. ***First***, the range of documents required to be provided by the Notice has been described above. Given the breadth of the Notice, and the absence of any subject matter/content limit, it was bound to include documents that were irrelevant; and, unsurprisingly, it did in fact do so.

35. ***Secondly***, the Chair had already been informed that, following the process of review described above, there was a significant quantity of irrelevant material, purportedly covered by the Notice. In fact, within the Cook WhatsApp messages there were over eight hundred and fifty messages which were redacted as unambiguously irrelevant. A brief description of the reasons in each case was provided for that conclusion. The Unredacted Copies were provided so that the Chair could have assurance that a significant quantity of irrelevant material was indeed covered by the Notice. §22.c of the Ruling, at least implicitly, accepts that there are significant quantities of irrelevant material so covered.

36. ***Thirdly***, the Ruling seeks to justify the breadth of the Notice, and its lawfulness, on the basis that it covers documents that are "*potentially relevant*". That is no answer:

(1) The problem with the Notice is that it requires provision of irrelevant material. If it is bound to cover irrelevant material (and *a fortiori* if it is made clear before the Notice is issued that it does in fact do so), it is no answer to say that the Notice might also cover, or would cover, relevant documents. Irrelevant documents do not become "*potentially relevant*" because they are included in a very broad Notice which also covers relevant documents.

(2) As the application by the Cabinet Office and the correspondence that preceded it make clear, there may be documents in relation to which a serious issue arises as to whether they are properly to be characterised as relevant or not. The Cabinet Office has accepted throughout that those documents will be provided to the Inquiry; and that it would then be for the Chair to rule one way or the other on relevance. That narrow category is what is meant, and (as is clear from the correspondence and the application) has always been meant, by the Cabinet Office referring to "*potentially relevant"* documents. That category is of course entirely distinct from irrelevant, *a fortiori* plainly or unambiguously irrelevant, documents. That is the distinction that has been at the heart of the Cabinet Office's objection to the Notice.

(3) The Ruling mischaracterises the Cabinet Office's references to "*potentially relevant*" documents. There is no acceptance, and there has never been an acceptance, by the Cabinet Office that the powers of compulsory provision extend to the provision of irrelevant material.

(4) The Ruling then purports to apply the mischaracterised "*potentially relevant"* category to cover every document covered by the Notice, including the swathe of documents that are irrelevant.

37. ***Fourthly,*** the Chair relied on the '*great breadth*' of the TOR and on the fact that she might need to undertake a large number of extremely diverse lines of investigation, including covering factual matters not specified in or collateral to the TOR or the description of the Inquiry's modules; and stated that she was best placed to judge relevance (and was perhaps the only person to do so). It is of course acknowledged that the Inquiry is a wide ranging one and that it is for the Chair to decide what lines of investigation are required and what issues should be focussed upon. The consequence is that she will have a wide discretion on those matters. However, there are limits which, under the 2005 Act, must be properly respected. The Courts will police an inquiry's terms of reference so as to ensure that its jurisdiction is not exceeded: see e.g. *R (EA) v Chairman of the Manchester Arena Inquiry* [2020] EWHC 2053 (Admin) (inquiry terms of reference extended to those killed, not the circumstances in which survivors were injured).

38. It is necessary to be able to determine, at any particular point in time, whether documents, the provision of which is sought to be compelled, are either relevant or irrelevant. That is a question which must be susceptible of an objective answer on the basis of publicly available materials. Relevance/irrelevance would ultimately be for a Court to determine in the event of a challenge to the exercise of the compulsory powers or in the context of

criminal proceedings. The 2005 Act makes relevance a precondition to the exercise of the compulsory powers. The compulsory powers must be lawfully exercised; and they are not lawfully exercised if they require the provision of irrelevant material. The Chair does not have *kompetenz kompetenz* – ie the power to decide the limits of her own jurisdiction or powers. She cannot adopt a position that simply asserts that she knows best and is the only judge of relevance/irrelevance. Thus, where a Chair certifies non-compliance with a s.21 notice, for the purposes of seeking enforcement of that notice in a Court under s.36 of the 2005 Act, it is for the Court itself to determine non-compliance, according such weight to the view of the Chair as is appropriate: *The Chairman of the Manchester Arena Inquiry v Taghdi* [2021] EWHC 2878 per Jacobs J at §§8-11.

39. Nor can the Chair lawfully adopt a position to the effect that she cannot say at a particular point in time that a document or category of documents is relevant to the Inquiry's work but that it may become so. No doubt, the issues that will be considered by the Inquiry may shift and alter as time goes on. But if a Notice is issued compelling provision of documents, relevance has to be judged, explained and established at that time. So it is not permissible to take the course taken in §22.c which is, in effect, to accept that the vast majority of the redacted material is indeed irrelevant; but that the Chair will keep the material just in case it might become relevant at some unspecified point in the future and by reference to issues that have not yet emerged.

40. The question here is whether the breadth of the TOR and the potential scope of the lines of investigation can justify, or are sufficient to support, a conclusion that the entirety of the documents covered by the Notice are relevant, even acknowledging the breadth of the Inquiry questions. The only rational answer is: "Plainly not". Because there is no subject matter/content limit, the Notice calls for eg every communication whatever its content between named individuals over a two year period. Reference to and reliance on the breadth of the TOR etc would not empower that Inquiry to issue a Notice to Cabinet Office, the former Prime Minister or Mr Cook requiring the provision of every letter, email, WhatsApp or other form of communication over a two year period. No more can it do so in relation to the Notice here, which in relevant part simply refers to eg WhatsApp and adds lists of people with whom such communications might have occurred.

41. At §19-20 of the Ruling, the Chair gives examples of matters she may consider that she needs to investigate. As to that:

    (1) It is not suggested by the Chair that these examples in fact render all the redactions relevant or anything approaching that. On the contrary, on the unredacted samples reviewed by the Chair and her Counsel (see Ruling, §22, especially §22.c), the irrelevance of the redacted material is, in large part, essentially unchallenged.
    (2) It does not appear to be suggested, and nor could it sensibly be suggested, that the Inquiry would be entitled to call for all communications between all Ministers over the two year period on the basis that the Chair might be interested at some point in seeing whether they were focusing inappropriately on other policy areas. The

concept of relevance simply cannot cover all Government business and all the policy areas that were live over the two year period. That would be absurd. It would also mean that the Inquiry would be utterly swamped with material of no value to its work. If there really is a concern about inappropriate focus within Government, no doubt there will be (or come to be) specific concerns about a particular period of time or in the context of particular decisions by Government; and properly targeted requests for information or documents can then be made. That possibility provides no justification for a requirement to provide the entirety of a set of communications over a two year period.

(3) Likewise in relation to personal matters and commitments, there could be no justification, in terms of relevance, for requiring the provision of every such communication on the off chance that they might contain something of that ilk. The logic is massively broad and potentially very disturbing. At most, and possibly, some highly specific targeted request might be justified as relevant. That is not what the Notice does.

42. ***Fifthly,*** the Chair stated at §21 of the Ruling that the Cabinet Office's position was that an Inquiry will be acting *ultra vires* if it requires provision of material which the recipient of a Notice has stated is unambiguously irrelevant. That inaccurately characterises what is being said.

(1) The first point is that it is incumbent on the Inquiry when issuing a Notice to ensure that it requires the provision only of relevant material. That can be done in the manner considered above; and (unlike the Rule 9 request) was not done here in the Notice.

(2) The Cabinet Office has always accepted that if there is a serious issue as to whether a document is relevant or irrelevant, then it will need to be produced and the Chair will need to rule (if so invited) on the side of the line on which it falls.

(3) There is nothing invidious or contrary to the statutory scheme in participants in an inquiry having to respond to properly formulated requests or Notices in which relevance is built in to those requests/Notices. The participants will have to make judgements about relevance; and will then provide, and provide only, those documents that they consider (no doubt with the benefit of careful consideration and if appropriate legal advice) to be relevant. That is what happens in civil litigation; and it is inherent in the scheme of the 2005 Act.

(4) If there is some reason for considering that they have not provided all the relevant documents that they hold, further requests can be made and the matter may ultimately have to be determined (by the Chair) in relation to what specific issues there are.

(5) Precisely the same applies in relation to irrelevant documents. It is for the participant to make that judgement, on advice if necessary. If there is a serious issue about that categorisation (ie the document is potentially relevant in this sense, which is the sense used by Cabinet Office throughout), it can be resolved by the Chair.

(6) But none of that entitles an Inquiry to require the provision of irrelevant documents or of categories of documents that are so broadly framed as to be bound to require such provision. §21 of the Ruling confuses the power to decide issues as to relevance where they actually arise, with an assertion in effect of an unlimited power to require the provision of irrelevant documents.

(7) There is accordingly nothing in the Cabinet Office's approach which would subvert or would risk subverting the statutory scheme as is suggested.

43. ***Sixthly***, the Chair concluded that the lawfulness of the Notice, and her conclusions about its breadth, were supported by the matters dealt with at §22 of the Ruling (**pp64-65**).

44. The first point to emphasise about §22 of the Ruling is that, far from providing such support and as already noted, the Chair has accepted (in relation to her review of the unredacted/redacted Cook WhatsApp messages) that the vast majority of the redactions made on grounds of unambiguous irrelevance were indeed redactions of irrelevant material.

45. The Chair makes the point at §22.a that the recent unredaction of a previously redacted message was "*not a promising start"*. The fact that a further review was undertaken shows if anything the care with which the exercise has been undertaken by Cabinet Office. If the Chair's point is that there might have been some over-redaction which might not have been picked up, that is of course always a possibility however carefully a process is undertaken. However, that fact provides no support for the more general proposition that an inquiry is entitled to compel the provision of a wide range of documents, including significant numbers of irrelevant documents, in order to be able to check whether irrelevance has been correctly applied.

46. The Chair then indicates that she considers that there are some redactions of what she would consider to be relevant material: see §22.b of the Ruling. As to that:

(1) It is impossible to tell from the identification of the two categories of "*the way in which WhatsApp messages should be used in policy formulation and …. relations between the UK and Scottish governments"* which actual messages are being referred to in order to enable any judgement to be made about relevance/irrelevance.

(2) However, the core point remains that the Inquiry has no power to ask for all communications over a two year period just in case they might cover areas that might at some point be in issue. There is nothing to prevent properly targeted requests/Notices (at currently relevant material); and then other such requests/Notices at later dates.

(3) Even if there is a potential debate about these two areas, the position is still that swathes of plainly irrelevant material were required to be provided by the Notices.

## CONCLUSION AND RELIEF

47. It is emphasised, in conclusion, that the Cabinet Office well understands the Chair's evident concern to ensure that she has all the material and documents she needs to reach soundly based conclusions on the matters she is inquiring into. The Cabinet Office shares that concern and has sought, and will continue to seek, to assist the Inquiry including by the provision of relevant documents. This application for judicial review is brought because there are real concerns that individuals, junior officials, current and former Ministers and Departments should not be required to provide material that is irrelevant to the Inquiry's work. That concern, to ensure that a proper line between relevant and irrelevant material, is a legitimate concern in principle and in its own right, especially given that these are compulsory powers. It is sharpened by the fact that irrelevant material contains '*references to personal and family information, including illness and disciplinary matters*' and ' *comments of a personal nature about identified or identifiable individuals which are unrelated to Covid-19 or that individuals' role in connection with the response to it*', and may well be sensitive for a whole variety of reasons – for example to do with personal privacy, to do with other aspects of the work of government, or simply to do with the informal nature of the sort of communication that occurs on WhatsApp.

48. If Notices are properly restricted to relevant material, and if the door is not open for an exercise of powers of compulsion in very widely formulated Notices on the basis that almost anything is to be characterised as potentially relevant, the Inquiry's work will not be impeded a jot in practical terms. They will receive, and the public can be entirely confident that they will receive, every scrap of relevant material. In purely practical terms, there are far greater risks attached to the sort of approach that has been taken here by the Inquiry – risks of the Inquiry being swamped with material, much irrelevant; risks of their resources being sidetracked into reviewing exercises that they should not be, and do not need to be, undertaking; and risks accordingly that their speed and efficiency put at risk.

49. In these circumstances, the Cabinet Office seeks an order quashing the Ruling and the s.21 Notice; and such further or alternative relief as the Court considers appropriate.

## DIRECTIONS

### Divisional Court

50. This claim raises issues of general public importance, in particular given that it raises (i) a general issue as to the limits of an inquiry's statutory power under s.21 of the 2005 Act; (ii) in the context of the UK Covid-19 Inquiry, and ministerial communications. The Cabinet Office accordingly seeks a direction that the claim be allocated to the Divisional Court.

**Expedition with a rolled-up hearing**

51. The Cabinet Office is very concerned that the issues raised are dealt with as expeditiously as possible. No doubt, that is a concern that would be shared by the Inquiry. Module 2 of the Inquiry (Core UK decision-making and political governance) opened on 31 August 2022, and is looking firstly at core political and administrative governance and decision making for the UK[4]. The second preliminary hearing for Module 2 is scheduled to commence next week, with oral evidence hearings scheduled for Summer 2023.

52. The Court is accordingly invited to order expedition with a rolled up hearing listed for the first convenient date (to accommodate, if reasonably possible, both the Inquiry's and the Cabinet Office's Counsel).

53. The Cabinet Office will as a matter of urgency canvass with the Chair a proposed timetable addressing directions for the management of the case in the run up to a rolled up hearing and will revert to the Court with the parties' proposals as soon as possible.

**Protections in relation to the Unredacted Copies**

54. The Cabinet Office wishes, for the purposes of certain of the arguments outlined above, to rely upon and make reference to the contents of the Unredacted Copies (see §17(3) above) which have been provided to the Inquiry on the terms explained in §32 of the Cabinet Office's s21(4) challenge (**pp57-58**), without prejudice to the Cabinet Office's position that there is no power to order their provision (unredacted) and to which the Ruling makes reference at §22.

55. If the Cabinet Office were to make reference to such materials in open court, the purpose of this claim (in relation to that material) would be defeated and its outcome would be pre-empted. The Cabinet Office accordingly seeks directions which would enable the Court to review, and the Chair and the Cabinet Office to refer to, the Unredacted Copies in private, as a confidential annex. To that end, the Cabinet Office applies for directions that:

    (1) the Unredacted Copies be hereafter added to the claim bundle as a confidential annex ("**the Confidential Annex**") and served on the Chair;

    (2) that any part of a hearing in these proceedings to which reference is made to the contents of the Confidential Annex be held in private, as necessary to the interests of justice, pursuant to CPR 39.2(3)(a) and/or (g);

    (3) that any non-party who wishes to inspect or receive a copy of the Confidential Annex must obtain the Court's permission per CPR 5.4C(2), and must serve any

[4] https://covid19.public-inquiry.uk/modules/core-uk-decision-making-and-political-governance-module-2/

application for such permission upon the Cabinet Office pursuant to CPR 5.4D(2), with three clear days' notice; and

(4) that any party to whom the Confidential Annex is disclosed in the course of these proceedings be prohibited from disclosing its contents to any non-party (pursuant to CPR 31.22(2)).

**SIR JAMES EADIE KC**
**SHANE SIBBEL**

**1 June 2023**