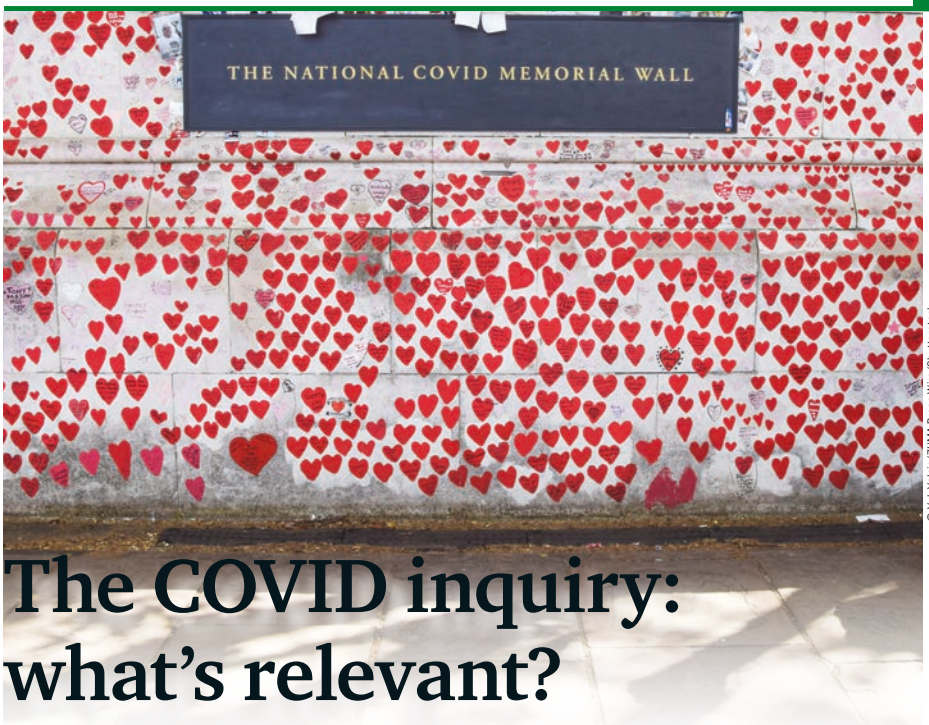

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The COVID inquiry: what's relevant?

Who gets to decide what information the COVID inquiry should see? John Gould suggests that the government, by objecting to handing over material, may have forgotten its proper role in supporting the work of a public inquiry

Nearly as many people have died in the UK from COVID as British military personnel died in the six years of World War II. It is hard to overestimate the importance of establishing the facts of the pandemic, without doubt or spin—not only for the victims, but also so that hindsight may help us when, inevitably, the next pandemic comes.

Few would doubt the wisdom of establishing a public inquiry independent of those who found themselves having to make decisions in the most challenging of circumstances. It was obviously right that the inquiry be established under the Inquiries Act 2005 (IA 2005) so that witnesses could be compelled to attend and documents demanded with the reinforcement of criminal sanctions for non-compliance.

Now, an esoteric dispute has arisen between the inquiry and the government about the disclosure of documents and information. Whether or not the dispute arises from questions of principle, it is certainly important. The technical nature of parts of the debate may, without reasonable legal detail, obscure the simple question of who gets to decide what the inquiry should see. At the level of principle, there is only one answer.

The inquiry's remit

The inquiry, chaired by Baroness Hallett, was formally set up in June 2022, with terms of reference formulated after public consultation in accordance with s 5, IA 2005. The terms of reference require the inquiry to: 'examine, consider and report on preparations and the response to the pandemic' in the UK. As well as an authoritative factual narrative account, the inquiry must identify the lessons to be learned to inform preparations for future pandemics across the UK. The terms include an express requirement that the factual narrative include 'how decisions were made, communicated, recorded and implemented'.

Baroness Hallett is supported by an inquiry team. The inquiry secretary is a senior civil servant whose last job was as a deputy director of the Ministry of Justice. The inquiry solicitor is a veteran of many important inquiries including, from a long list: the death of Diana, Princess of Wales; the 7/7 bombings; Baha Mousa; and Litvinenko. Hugo Keith KC, counsel to the inquiry, is an experienced former Treasury counsel and joint head of chambers at Three Raymond Buildings. These do not appear to be cavalier figures unfamiliar with the public interest.

Section 21, IA 2005 gives the chair of the inquiry the power to compel the production of evidence, including documents:

> '(1) The chairman of an inquiry may by 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.'

A claim by the recipient of a s 21 notice that they are unable to comply, or that it is not reasonable in the circumstances to require them to comply, is to be considered by the chair of the inquiry, who may revoke or vary it in the public interest having regard to the likely importance of the information. By s 22, which is headed 'Privileged Information etc', a person may not be required to produce documents which they could not be required to produce if the inquiry were civil proceedings in the UK.

Information provided to the inquiry is subject to various controls, conditions and safeguards limiting onward dissemination by protocols issued by Baroness Hallett under s 17, IA 2005.

Determining relevance

The dispute which has now arisen relates to four categories of information which Baroness Hallett considered to be potentially relevant to the lines of investigation being pursued by the inquiry. Undoubtedly she is the person who must decide what is to be investigated within her broad terms of reference. The information sought was:

- unredacted WhatsApp communications between 1 January 2020 and 24 February 2024 which are recorded on either Boris Johnson's or Henry Cook's devices (Cook was a special adviser to Johnson, honoured on Johnson's resignation with a CBE), and which relate to the UK government's response to COVID-19 or were exchanged with a list of individuals;
- Johnson's unredacted diaries for the same period; and
- copies of 24 notebooks with contemporaneous notes made by Johnson during the same period unredacted except for reasons of national security sensitivity.

The s 21 notice was issued to the Cabinet Office on 28 April 2023 following two requests for evidence (including documents) under rule 9 of the Inquiry Rules 2006, SI 2006/1838, which were made not only to the Cabinet Office but also to Johnson and Cook. There had also been protracted correspondence and discussions about objections to the disclosures.

On 15 May 2023, the Cabinet Office applied to the chair to revoke the s 21 notice. The application identified three characterisations of material; that which was relevant; that which was plainly irrelevant; and that which was potentially relevant. At that stage it was accepted that the relevant and potentially relevant had to be produced and the difference related only to what was plainly irrelevant. Subsequently it has been suggested on the Cabinet Office's behalf that

About the COVID-19 Inquiry

The independent public inquiry was set up to examine the UK's response to and impact of the COVID-19 pandemic. It was formally established in June 2022, and is chaired by former Court of Appeal judge Baroness Heather Hallett (pictured).

The inquiry has no official deadline, but is due to hold public hearings across the UK until at least 2025.

What will the inquiry investigate?

The inquiry will be splitting its investigations into sections ('modules'), focusing on different subject topics. Four modules have been announced so far:

1. Resilience and preparedness.
2. Core UK decision-making and political governance.
3. Impact of the pandemic on healthcare systems in the four nations of the UK.
4. Vaccines and therapeutics.

The inquiry will announce further modules throughout 2023. These will likely cover both 'system' and 'impact' issues, including:

- the care sector;
- government procurement and PPE;
- testing and tracing;
- the government's business and financial responses;
- Health inequalities and the impact of COVID;
- education, children and young persons; and
- Other public services, including frontline delivery by key workers.

How can the public participate?

The inquiry held its first preliminary hearing for Module 1 on 4 October 2022. Evidential public hearings for this module began in May 2023.

Both preliminary and public hearings will continue to be held for other modules throughout 2023. More details can be found on the inquiry's home page: *www.covid19.public-inquiry.uk*.

Members of the public can share their experience of the pandemic with the inquiry through its listening exercise, Every Story Matters. Further details on how to take part can be found at: *www.covid19.public-inquiry.uk/every-story-matters*.

what they meant by 'plainly irrelevant' was that 'there was a serious issue of relevance', which seems to be the rather different idea of relevance being arguable.

The Cabinet Office sought to reassure the inquiry that it needn't be troubled to look at the documents itself, by describing the 'broad nature' of some of the information it had decided to withhold. It described it as 'references to personal and family information including illness and disciplinary matters', 'comments of a personal nature about identified or identifiable individuals', and 'discussions of entirely separate policy areas with which the inquiry is not concerned'. Even if this is a correct characterisation of the nature of all the redacted information, that does not mean it is 'plainly irrelevant'. In principle, illness, disciplinary matters, personal comments about individuals or policy discussions could all be very relevant. The objection hung by the single thread of the assertion by the Cabinet Office that none of the information related to COVID-19 or the response to it.

Baroness Hallett rejected the application to revoke the notice. She pointed out—it seems to me, with respect, correctly—that an application for revocation was intended to deal with the reasonableness of the requirement, not the lawfulness of the notice. Nevertheless, she sportingly dealt with the application as though it were a judicial review of the lawfulness of her own decision and rejected it.

Her reasons were, in essence, that her terms of reference were very broad and the lines of investigation arising from them were extremely diverse. Information concerning the personal commitments of decision-makers and the attention being given to the pandemic, or disagreements between members of the government, or breaches of regulations within government, may not be relevant to the response to the pandemic, but they were at least potentially relevant to investigations.

In the meantime, Cook's information has been disclosed by the Cabinet Office unredacted. If this was intended as a compromise to continue to withhold other information, it did not succeed. It is not clear why Cook's personal and family information or the other reasons for refusal had ceased to apply.

Legal challenges

Now the Cabinet Office has issued judicial review proceedings against the inquiry naming Johnson and Cook as interested parties. Although Baroness Hallett approached the application to her as a question of irrationality—a high hurdle—it might be better considered as an allegation that she has misdirected herself on the law.

The foundation of the challenge is that the power in s 21 is limited to documents which relate to a matter in question at the inquiry. This is glossed as being documents which are 'relevant'. The words 'related' and 'relevant' do not have the same meaning. Relating to a matter in question is not the same as relevant to a question or issue which has to be decided. Something may be related to a matter but irrelevant to the answer to a related question or issue.

It is said that Parliament would never have intended that irrelevant documents be produced, particularly as this might include information which was sensitive or personal for many different reasons. It might be thought that the reason Parliament would have intended that related (but not necessarily relevant) material would need to be handed over would be to allow the inquiry to consider whether or not it was relevant. The rights of individuals to the protection of their personal information are no more infringed by the inquiry's scrutiny than that of the Cabinet Office.

Thirdly, it is argued that the provision must be interpreted against the background of disclosure in civil proceedings. An adversarial process in which identified issues pleaded by two parties are to be determined by a judge is quite different from a public investigation operating within general terms of reference. Why should a party in civil litigation have the private information of another which is irrelevant to their case? If there were a dispute about relevance, it would be referred to the judge; it would not be decided by one of the parties.

This approach advocated by the Cabinet Office raises an obvious problem. What happens if the recipient of a notice asserts that in their view the information does not relate to the inquiry? The Cabinet Office suggests that the notice might qualify the request by words indicating that compliance is only necessary to the extent that the documents are relevant to the inquiry, which only serves to confirm an invitation to the recipient to exercise their own judgement about what to produce.

While it may be that the Cabinet Office feels that it is in just as good a position to decide what should be of interest to the inquiry as the inquiry itself—which it isn't—few of the recipients of notices could be relied upon to make that judgement, other than in the crudest sense.

The second suggestion is that the inquiry makes its requests in sufficiently narrow terms to ensure that the notice does not cover irrelevant documents. A general narrowing of notices seems likely to mean that some relevant material will fall outside of any chosen narrower wording. It also wrongly assumes that an inquiry will be able to define documents it has not yet seen with lawyerly precision. This would not be a correct balance of the competing public and private interests.

It might be thought that these submissions

suggest that the Cabinet Office has lost sight of the purpose and importance of the inquiry. Even if the Cabinet Office's consideration and judgement in relation to the information was faultless (which Baroness Hallett indicates it has not been), that would still not be good enough for the inquiry to serve its purpose of providing assurance to the public that it has independently established all the relevant facts. While there is no reason to impugn the professional detachment of the lawyers, civil servants and ministers within the Cabinet Office, it was at the centre of the COVID response and can hardly be seen as collectively disinterested in the outcome of the inquiry.

The Cabinet Office position also appears to rest on the incorrect assumption that the delivery of material to the inquiry is the same as general dissemination. If information is clearly not relevant, there is no reason to think it will go beyond the chair and her supporting team. It does not follow that irrelevant material provided to the inquiry is any more likely to be disseminated than if it were considered by a Cabinet Office team alone. Does it really matter to any individual which body of government or inquiry lawyers look at family messages in order to decide that they are clearly unrelated? It should matter a lot to the inquiry.

It is a proper role of government to support the inquiry by assisting it to focus its requests under rule 9. This is necessary to prevent the inquiry using its resources at disproportionate expense in large-scale sifting exercises. In doing this within broad areas of information, the government may, in consultation with the inquiry, exclude information of types which could not be related to the inquiry. This might be expected to be whole categories of documents. The position of individual documents or parts of documents is more problematic, but in principle at the request stage, the inquiry may agree principles of redaction of unrelated information without its own examination. If the inquiry considers that it needs to examine material, it is in principle entitled to do so, even if that is only to confirm that it is not related. If rule 9 requests appear to the inquiry to be proving ineffective, it may use its s 21 power to examine information for itself.

A point of principle?

So why has this dispute arisen involving, as it does, the unfortunate appearance of a turf war between two groups of lawyers both operating at the taxpayers' expense? A significant point of principle is not immediately obvious—this is not an argument about the publication or wide dissemination of confidential but unrelated government material which might inhibit discussions and policy development. If the information is considered irrelevant by the inquiry, it will not be published.

Although the exact government position is hard to pin down, it appears to object to providing not just what is plainly irrelevant, but also material in relation to which there is a 'serious issue' about relevance. Perhaps the concern is that the inquiry may reach a different view on relevance from the Cabinet Office if it is allowed to see the material, and the government does not want to run that risk. If the material is plainly unrelated and irrelevant, it is hard to see why that would be a concern. If it is not, it should be produced.

If there are 'serious issues', the right approach is for the government to point them out to the inquiry who can then decide. What is clear is that it is not for the government to decide such issues itself by the simple expedient of not handing things over. **NLJ**

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