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Case Reference: FT/EA/2024/0136

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision Notice IC-209220-V1R7**

**Heard at: Alfred Place
Heard on: 12-13 February,
Deliberations 14 February
Decision given on: 11 March 2025**

Before

**JUDGE HUGHES
MEMBER SAUNDERS
MEMBER SHAW**

Between

CABINET OFFICE

Appellant

And

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Christopher Knight, Christian Davies (instructed by -Louise Marriott, Oliver Towle, Margaret McNally, Frazer Halcrow, and Bobbie Barlow (GLD))

For the Respondent: Eric Metcalfe (instructed by Sonia Taylor)

Decision: The appeal is Allowed

Cases and Materials

Conway v Rimmer [1968] AC 910

Attorney-General v Jonathan Cape Ltd [1976] QB 752

**R v Chair of the UK Covid 19 Inquiry, Cook and Johnson ex p Cabinet Office
CO/2012/2023 [2023] EWHC 1702 (Admin)**

London Borough of Camden v Information Commissioner & YV [2012] UKUT

190 (AAC)

Public Health England Covid-19 Related Deaths Time Series 2020

House of Commons Hansard volume 708 31 January 2022

House of Commons Committee of Privileges Fifth Report - Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report

REASONS

The context of the information request

1. The virus which caused the Covid-19 pandemic was first detected in people at the end of 2019 in the city of Wuhan in the People's Republic of China. The secrecy of the totalitarian state meant that information spread less quickly than the virus, however by early 2020 it was in Europe. On 24 January the Lancet published a study indicating the possibility that the virus could result in a pandemic equivalent to the 1918 Spanish flu pandemic which killed many millions. The UK Government's Cabinet Committee "Cobra" met that day for its first discussion of the virus and concluded the risk was "low". On 30 January the WHO declared a Public Health Emergency of International Concern to alert the world to the dangers of COVID19. Following a rapid rise in cases in Northern Italy a number of municipalities were placed under quarantine in February and restrictions were extended to the whole of Italy in early March with further restrictions enacted culminating on 21 March with the closure of all non-essential businesses and the imposition of movement restrictions.
2. In the light of the harrowing scenes from Milan shown on UK television some people in the UK started to restrict their social contacts; while others appear to have sought to enjoy socialising before the anticipated restrictions. On 23 March the Prime Minister of the UK announced a range of restrictions which became known as lockdown. Public Health England's data indicates that on that date 173 people died in England who were later confirmed to have Covid-19. The daily death toll continued to rise until the restrictions started to take effect with 975 deaths recorded for 8 April. The reported deaths on 2 June were 220 given a total of laboratory confirmed Covid-19 deaths in England to that date of 36028.
3. Her Majesty's Government were concerned to raise the restrictions on everyday activity as the daily death toll reduced. On 4 June 2020 the Transport Secretary (Mr Grant Shapps) announced (bundle pages A239 -243 - a government press release) a measure intended to enable more use of public transport by making the wearing of face coverings on public transport mandatory from 15 June with operators able to refuse service or issue a penalty notice on those members of the public refusing to comply. British Transport Police were instructed to support the implementation of this policy. Mr Shapps stated:

“People should continue to avoid public transport whenever possible. But, as restrictions are carefully eased when it is safe to do so, it’s likely that we will see more people needing to use public transport.

So while respecting social distancing and maintaining good hand hygiene remains the most important steps we can all take to stay safe wearing a face covering can play a role in helping us to protect each other

This is about the small changes we can take to help control the virus, which is why I would urge everyone using transport to use a face covering to help keep us all safe.”

4. A further announcement was made by the Secretary of State for Health to the House of Commons on 14 July when, confirming that the number of cases continued to fall and asserting that the latest daily total of Covid-19 deaths for the whole UK was 11. he listed various actions taken to reduce the transmission of the disease and stated:

“We have therefore come to the decision that face coverings should be mandatory in shops and supermarkets. Last month we made face coverings mandatory on public transport and in NHS settings. This has been successful in giving people more confidence to go on public transport and to hospital setting when they need to

...

Providing people with additional protection when they are not able to keep 2 metres from others, particularly people they do not normally come into contact with. Under the new rules, people who do not wear a face covering will face a fine of up to £100, in line with the sanction on public transport.”

5. The PHE time series data does indicate a relatively small number of deaths at the end of June and in early July 2020. The death toll rose markedly as autumn progressed and significant restrictions on activities and social contacts were re-imposed towards the end of the year which were known as “lockdown 2”. The widespread and rapid deployment of vaccines at the start of 2021 caused the virus to be brought under a degree of control.
6. In May 2021 the Prime Minister announced that there would be an independent public inquiry into the UK response to the pandemic. The Chair was announced in November 2021, a consultation on the terms of reference was conducted in Spring 2022 and the finalised terms of reference published on 28 June 2022:

“The Inquiry will examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the Inquiry’s formal setting-up date, 28 June 2022.”

7. The detailed terms of reference include

“1. Examine the COVID-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account, including:

a) *The public health response across the whole of the UK, including*

...

viii) *the use of lockdowns and other 'non-pharmaceutical' interventions such as social distancing and the use of face coverings;"*

The Chronology of the Request

8. The following day Mr Michael Conway made a request for information from the Cabinet Office:

"The minutes of the meetings on which the two policy decisions to make face masks compulsory in shops and public transport were finalised.

Clarification: Therefore, for the decision regarding compulsory face coverings on transport, I am seeking the specific minutes of the meeting in which that policy was finalised and agreed by the government, and likewise for the policy decision to make face coverings compulsory in shops. The time frame for these two meetings would presumably be within the same months the policies were implemented (June 2020 and July 2020).

Justification: The request is being made in the interest of accountability for decisions that affected the entire country throughout the pandemic period."

9. On 26 August the Cabinet Office replied:

"I can confirm that the Cabinet Office holds information relevant to your request but I must advise you that I must extend the time limit for responding to your request."

10. On 26 September the Cabinet Office stated:

"I am writing to advise you that following a search of our paper and electronic records, I have established that the information is not held by the Cabinet Office. "

11. The Cabinet Office directed him to public sources of information and the two government departments centrally involved. Unsurprisingly Mr Conway challenged this and sought an internal review of that response, pointing out that if this was the case the Cabinet Office could have told him when they first replied and further a suggestion that he approach the DHSC was inappropriate since he had originally asked the Department of Health and Social Care which had suggested he ask the Cabinet Office. On 24 January 2023 the Cabinet Office upheld the decision of 26 September to refuse the request.

12. One unfortunate consequence of this bizarre failure by the Cabinet Office to keep track of the Minutes which are integral to its key function is that the responses of Mr Conway are focused on the failure to find the Minutes, rather than the reason they should be disclosed. This meant that the IC, in carrying out the balancing exercise had no more detailed input in favour of disclosure from Mr Conway than his initial

justification “accountability for decisions that affected the entire country throughout the pandemic period”.

13. The IC wrote a detailed letter to the Cabinet Office on 7 August 2023 requiring it to re-consider its handling of the request. The Cabinet Office replied promptly 179 days later on 2 February 2024 suggesting the value of an update of the common law doctrine **Nullum tempus occurrit regi** “Time does not run against the Crown” to “Time is of no account to a Government Department”. It summarised the Cabinet Office position:

“As part of our consideration of your letter (and of the request's handling generally) we consulted with relevant colleagues, including the Cabinet Secretariat, and concluded that the Cabinet Office does hold information in scope of the request.”

14. It then addressed the public interest in disclosure in the following terms:

“It is acknowledged that there is a public interest in there being a greater understanding of the deliberations of Ministers in Cabinet committees, together with a public interest in there being better public knowledge of the factors which motivated the decision to extend the mandatory use of face coverings during the COVID-19 pandemic. However, we consider that the public interest factors against disclosure are much stronger and we endeavour to demonstrate this below.”

15. The letter then expended more than two pages of text discussing the working of cabinet government quoting from the Cabinet Manual and the Ministerial Code and then addressing the specific context:

“The Commissioner observes in his guidance on section 35 of the Act that the provision at section 35(1)(b) of the Act concerning Ministerial communications:

‘...should not be used simply to protect Ministers from embarrassment, or from being held accountable for their decisions.’

We consider that it is primarily the role of Parliament to hold Ministers to account for the decisions that they make. We also consider that, in respect of the decisions made by the Government in handling the COVID-19 pandemic, the COVID-19 Inquiry has a statutory responsibility to examine those decisions. Being chaired by Baroness Hallett, a former Court of Appeal judge, it is well qualified to consider such matters, including the basis of it having introduced measures in respect of face coverings.

We note that in submitting his request, the requester stated:

‘Justification: This request is being made in interest of accountability for decisions that affected the entire country throughout the pandemic period.’

While we note that the Act is an important means by which to bring to light the internal workings of government (and we noted above the public interest factors in favour of disclosure), we consider that in these circumstances, the COVID-19 Inquiry is a more appropriate means by which Cabinet minutes should be examined than by their general

disclosure via a request made under the Act. Indeed, we consider that the public interest is in favour of the Inquiry carrying out its functions without confidential evidence (which it may currently be examining) being drip fed into the public domain. We also note that, being the subject of an ongoing public inquiry, the information within the scope of the request is still very much live and its subject matter a contentious one. We consider that its disclosure is still very much against the public interest as a consequence.

Concerning the COVID-19 Inquiry, Government established the Inquiry to examine how decisions were made, communicated, recorded and implemented. In doing so the Government recognised, in the unprecedented and wholly exceptional circumstances of the COVID-19 pandemic, the importance of examining the actions of the state concerning the pandemic as rigorously as possible, in order to learn lessons for the future. The disclosure of Cabinet and Cabinet committee material by the Inquiry therefore takes place in an exceptional context and does not set a precedent for the release of this information in other contexts. We are satisfied that, in all the circumstances of this case, the public interest in favour of withholding the information within the scope of the request is much stronger than those factors weighing in favour of disclosure."

The Decision and Appeal

16. It would have been of some value to Mr Conway if the Cabinet Office had managed its records effectively and responded to his request accurately within a reasonable timescale; giving him cogent reasons for the refusal in September 2022, 3 months after the request, rather than sending them to the IC 19 months after it received his request. In his complaint to the IC on 6 January 2023 Mr Conway had stated:

"I simply don't believe the cabinet office don't hold the information I'm asking for. They acknowledged they did hold it by talking about 'public interest' and then claimed they don't hold it. The other institution that the Cabinet Office claimed held the information (Department of Health and Social Care) already confirmed to me that that they do not and recommended the Cabinet Office as the public body that holds the information. I've been messed around by the cabinet office and their uneasiness about releasing the information justifies exactly why they should be releasing it. They've avoided being transparent."

17. While such sentiments may be unfair, in the circumstances they are unsurprising.
18. The IC issued his decision notice IC-209220-V1R7 on 26 March 2024. He agreed with the Cabinet Office that the exemption from disclosure in FOIA s35(1)(b) (Ministerial communications) applied to the information under consideration. In weighing the public interest he acknowledged the importance of a safe space for discussions and of preserving collective cabinet responsibility noting:

"as there were widely differing views about the use of face coverings during the pandemic, it was important that Ministers discussing their mandatory use should have been able to do so without being concerned about public reaction to their individual opinion on this highly debated topic."

19. He further recognised that the Covid 19 Inquiry would address these issues and could provide a more appropriate means of scrutiny rather than (possibly)

interfering with that by premature disclosure. However (DN paragraph 26) such considerations were outweighed:

“The subject matter and content of the withheld information is key here. This concerns discussion on measures taken to mitigate the impact of the COVID-19 pandemic. In terms of immediate impact upon the daily lives of the entire population, these discussions were exceptional. The date of the withheld information is also significant: June and July 2020, a time when the pandemic was dominating the national discourse. The Commissioner’s view is that the subject matter and content of the withheld information leads to an exceptionally weighty public interest in disclosure, in order to serve transparency about the discussions within Cabinet on the pandemic at that time.”

20. In addressing the issue that the request was made two years after the events in question and the restraints imposed during the height of the pandemic no longer applied he argued that the public interest in understanding the Cabinet discussions remained very high.

21. In its appeal the Cabinet Office detailed the significance for the public interest of the convention of collective responsibility by reference to the Cabinet Manual and also challenged the weight given to the specific information sought given the circumstances at the time of the meetings:

“1.3 The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life. They are expected to observe the Seven Principles of Public Life, set out at Annex A, and the following principles of Ministerial conduct:

a. The principle of collective responsibility applies to all Government Ministers;

...

2.1 The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.

...

2.3 The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Neither should the individual views of Ministers or advice provided by civil servants as part of that internal process be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government.”

It also questioned the significance of the minutes in the context of a lessening of the disease burden of Covid-19

(1) Whilst it is certainly true that the mandating of face coverings in certain public spaces (such as on public transport and in shops) was an exceptional step and applied generally across England, the DN fails to reflect that these were public health measures intended to strike a balance enabling the removal and limiting of restrictions on the freedom of the population to exit the initial period of lockdown. Prior to this period, the vast majority of the public had been prevented from using public transport or entering a shop for non-essential purposes, with or without a face covering. The period of June and July 2020, it will be recalled, were towards the end of the first major surge of Covid-19 in the United Kingdom, and well before the availability of vaccines. The decisions in question therefore represent an easing of much more restrictive non pharmaceutical interventions.

(2) There is no dispute that Government policy in response to the pandemic, and the public health balances being struck, were central to the national discourse and that there was a contentious debate about the appropriateness and effectiveness of mandating the use of face coverings (and in what circumstances). But, conversely to the position of the DN, these are factors which emphasise how important the maintenance of collective Cabinet responsibility, and a protected space for Ministerial discussion of how that balance is best struck, are. It is in contentious areas that those principles are most valuable and most significant, given the constitutional duty of Ministers to promote and defend collectively agreed policy to Parliament and the public.

22. The Cabinet Office identified a number of issues which it considered enhanced the importance of maintaining the exemption:

- the request was for material two years old – the minutes would not be transferred to the National Archive and publicly available for another 18 years
- the request was during the course of the same Parliament with Ministers remaining in office and as MPs
- the decisions were collective decisions of the whole of Government

23. In resisting the appeal the IC maintained his view that there was exceptional weight in favour of disclosure and noted the considerable changes in government personnel since the relevant meetings which lessened the weight to be given to maintaining confidentiality. In his skeleton argument he re-affirmed that he had given proper weight to the convention of cabinet collective responsibility, that there was very great public interest in the disclosure and asserted that the rules around mask wearing were:

“of immense public importance. They were the most sweeping public health measure ever adopted in this country”

Evidence

24. Mark Davies the Director of Strategy and Legislation within the Economic and Domestic Affairs Secretariat of the Cabinet Secretariat has worked in the civil service since 2010 and the Cabinet Office since 2018 gave evidence describing the working

of Cabinet government, the role of cabinet committees and the transfer of records to the National Archive. He emphasised the continuity of the Conservative Government with many Ministers remaining in the Government between 2020 and the refusal of the request in 2023. He emphasised the importance of the Covid-19 Inquiry, that the Government had disclosed all cabinet papers to the Inquiry and the statement to the Inquiry made by Counsel for the Cabinet Office:

“Can I turn to the issue of Cabinet collective responsibility? In establishing this Inquiry, the government recognised the unprecedented and wholly exceptional circumstances of the pandemic and the importance of examining as rigorously as possible the actions the state took in response in order to learn all possible lessons for the future. The Government is not currently withholding any information from the Inquiry on the basis of Cabinet collective responsibility and, given the purpose of this Inquiry, the government does not expect to seek any redactions to relevant information due to be disclosed to core participants.”

25. (In parentheses it may be noted that the decision in *R v Chair of the UK Covid 19 Inquiry, Cook and Johnson ex p Cabinet Office* did not relate to formal cabinet Office records but rather the access to and destruction of informal records of the Prime Minister of the day).

26. In closed session issues raised by the contents of the minutes were explored including

- (i) The extent to which the June 2020 minute might be said to indicate any disagreements or frank exchange of views;
- (ii) The extent to which the June 2020 minute might be said to disclose the personal views of Cabinet members as opposed to the views of their respective departments;
- (iii) The nature and quality of Cabinet minutes as a summary as opposed to a verbatim transcript;
- (iv) The nature of the July 2020 discussion in light of the fact that the measures in question had already been publicly announced;
- (v) The extent to which the unattributed views contained in the July 2020 minute were consistent or inconsistent with one another;

27. Sir David Lidington gave evidence as a former Minister for the Cabinet Office and Lord Chancellor who was an MP from 1992-2019 and a Minister from 2010 to July 2019. He had not seen the disputed material (which post-dated his Ministerial service) and spoke from his experience as a Minister specifically addressing the behaviour and expectations of Ministers. He emphasised the value of collective responsibility in that all ministers are bound by and accountable for government decisions. Therefore all ministers are accountable as a single unit to Parliament and the public. He commented that:

Otherwise, ministers may be put in the impossible position of having their comments that they made about the policy in confidence at a Cabinet or Cabinet committee meeting put to

them when defending or promoting that policy to Parliament and the public. It could easily be presented as hypocritical for ministers to advocate policies they had been shown to oppose privately in Cabinet or Cabinet committee discussions. Ministers would therefore find it more difficult to maintain a united front when promoting and explaining policy,

28. With respect to the period when cabinet divisions were regularly leaked to certain newspapers he commented:

As Chancellor of the Duchy of Lancaster during the Rt Hon Theresa May's premiership I saw first-hand the damaging impact of actual or perceived breaches of these principles. The issue of Britain's membership of the European Union divided the Cabinet and the country. The government had a duty to establish a policy that, in the aftermath of the 2016 referendum, it judged to be best for the national interest. Frequent media reports of disagreements amongst ministers, often including what were claimed to be near-verbatim accounts of Cabinet or committee discussions, deepened mistrust among ministers and between the Government and Parliament and made it ever more difficult to secure a collective position around the Cabinet table.

He argued:

if we want to ensure that decisions taken by the Government are well-informed and have been scrutinised and tested in argument, we need ministers to feel confident about expressing their views candidly in Cabinet and committee, challenging their colleagues' case vigorously if they think that right. In my experience collective discussion helps ministers to spot unintended consequences of a policy proposal, identify solutions to potential problems and work out a compromise that allows every minister to feel comfortable about supporting a policy.

8. In order to ensure the highest quality decisions are made, ministers need to be able to express their views fully; debate should be frank and candid. This promotes decision-making that is likely to yield the best outcome in terms of Government policy. That quality is reliant on the candour of ministers' views and on the 'safe space' that is necessary for such candour. That, as I see it, is an important reason for the protection provided by section 35 of the Freedom of Information Act 2000 ("FOIA").

29. He considered that the release of Cabinet Minutes would undermine collective responsibility, Ministerial behaviour would change, Ministers would become more cautious about challenging a colleague's position with rigour as they considered how their contributions might be viewed by outside audiences, contributions would become recitals of prepared positions for public consumption and the quality of deliberation and recorded decisions would deteriorate. Given the recent nature of these minutes:

"it is entirely reasonable for ministers to draw further conclusions from release that disclosure of their candid contributions to cabinet and Cabinet committees could take place within a small fraction of that time period. If upheld by the Tribunal, this would significantly undermine ministers' confidence in the safe space they need to speak frankly in Cabinet and Cabinet committee meetings. That would, in my view, be contrary to the wider public interest in effective and responsible Government."

30. In response to questions he confirmed that he held confidentiality as essential to good policy making. If minutes were released Ministers would be doorstepped by press and tv. He agreed there was an overwhelming public interest in facemasks however since the Inquiry had a broad remit this disclosure would be an unnecessary duplication. His experience of the routine disclosure of material akin to cabinet Minutes during Mrs May's minority administration when the agendas and minutes of meetings with the Democratic Unionist Party (with which there was a confidence and supply arrangement) resulted in the drafting of documents which were very opaque. The expectation that there could be disclosure of cabinet Minutes would reduce the clarity of decision-making by causing a similar change in the style of minutes.
31. In discussing his experience of chairing Cabinet committees where he had summed up the discussion to produce what was recorded as the decision, he would be presented with various drafts in advance, however on occasions the discussion would reveal where a workable compromise might exist, which he would then adopt. He had many times put forward publicly a government view which did not necessarily accord with his own views.
32. He emphasised the importance of accountability to Parliament and the Speaker's practice of upbraiding Minister for briefing policy prior to the presentation of an oral or written statement to the House.
33. He acknowledged that after leaving Parliament his engagement with politics had decreased, however like much of the population he had watched the Downing St press briefings during the course of the pandemic. He discussed the Government press releases in the bundle (pages 239-248) which were links sent to Mr Conway in the 24 January 2023 letter refusing to disclose the minutes and were statements of the relevant Secretaries of State; the Health Secretary in Parliament and the Transport Secretary at a Downing St press conference. The statement by Mr Shapps made reference to earlier statements on face masks so there was clearly sufficient public information and an understanding of a need for changes to the regime of restrictions. Both announcements focus on the economic and social impacts and detail the lower rates of infection. He commented that "we clearly don't know whether previous press conferences by Professor Whitty and Sir Patrick Vallance (the Government's Chief Medical Officer and Chief Scientific Adviser) had discussed the health issues raised by the announcements. He considered that Mr Hancock's statement gave a flavour of what Ministers thought in coming to their conclusions but it was not a blow-by-blow account of the decision making. It would have been wrong for a Minister to acknowledge if there was dissent. Although the statement was made to Parliament before the date of the formal Cabinet minutes the Health Secretary would not make an oral statement to Parliament without a process authorising it.

Consideration

34. Qualifications to the FOIA **Part I Access to information held by public authorities** are contained in **Part 2 Exempt Information** which provides (inter alia):

35 Formulation of government policy, etc.

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

....

(5) In this section—

....

“Ministerial communications” means any communications—

(a) between Ministers of the Crown,

...

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet...;

35. The exemptions from disclosure are subject to the test laid down by s2 of FOIA:

2 Effect of the exemptions in Part II.

....

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

If accountability is a factor, any other forms of accountability will be relevant. The tribunal must assess the nature and extent of their significance. That assessment can only be made in the context of the case.

36. A starting point for the consideration of the significance of the release of the minutes of cabinet meetings is informed by the decision of Lord Widgery CJ in *AG v Jonathan Cape Ltd* (the Crossman Diaries).

“...the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.

There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.”

37. The Cabinet Office, in resisting the disclosure (relying on *Conway v Rimmer* – probably a different Michael Conway, in which the Judicial Committee of the House of Lords considered the validity of a claim of Crown privilege made on the instructions of one of Richard Crossman’s cabinet colleagues Roy Jenkins - the Home Secretary) argued:

“The constitutional importance of the maintenance of confidentiality of Cabinet proceedings, as an aspect of the convention of collective Cabinet responsibility, has long been recognised by the courts, including as a basis for the withholding of such documents from disclosure on a public interest immunity basis.”

38. The Information Commissioner in his decision and before the tribunal argued:

“...An exceptionally weighty public interest in disclosure, in order to serve transparency about discussions within cabinet on the pandemic at that time (DN29)

...given the truly exceptional nature of the subject matter of the withheld information (DN29)”

39. The long title of FOIA begins **“An Act to make provision for the disclosure of information”** and is a major constitutional provision supporting transparency and accountability of government. However it is not the sole means of accountability and transparency. As the Cabinet Office argued the primary accountability of Government is to Parliament. In considering the actions of government the primary questions are what has been done, why has it been done and what are the consequences of its actions. Cabinet Collective responsibility exists to underpin consistent, coherent government. Within that framework it is a subsidiary part of accountability to consider which individuals within government took part in the decision and how did their views shape the decision. The principle is that governments should hang together lest they hang apart.

40. The Ministerial Code as a preamble to its detailed discussion states:

The Ministerial Code should be read against the overarching duty on Ministers to comply with the law and to protect the integrity of public life.

41. While in constitutional theory effective accountability of the Executive is primarily to the Legislature; in democratic theory such accountability is part of a wider

accountability to the electorate at large; mediated by the transmission of information through press, broadcasters and the various streams of digital information (and misinformation); shaping a public understanding which is given expression at the ballot box. President Obama memorably observed that the average American pays attention to politics for approximately 8 minutes a week. In those halcyon days that may have been true; in these troubled times rather more attention should be paid.

42. In *Camden v IC and YV* Judge Jacob stated:

If accountability is a factor, any other forms of accountability will be relevant. The tribunal must assess the nature and extent of their significance. That assessment can only be made in the context of the case.

43. In 2020 as the pandemic progressed and the death toll rose, because the increasing social isolation cut off many alternative activities and sources of distraction public engagement with and knowledge of government actions rose to levels which had had no precedent for many decades. The No 10 briefing was repeatedly the most watched programme on television. Professors Valance and Whitty became nationally known celebrities and the public gave a level of attention to the words and actions of the politicians appearing on the podium which few Ministers had had in living memory.

44. Since public understanding of the choices, actions and inactions of Government was of necessity at a high level, democratic accountability, the giving of truthful and largely accurate explanations on a day-by-day basis to both the legislature and the electorate was at the core of national life during 2020.

45. The factual material upon which government based its decisions and accounts of the advice it received, whether from SAGE or from non-governmental groups advocating different courses of action was widely known. Unlike the sorry period Sir David described (when the factional, tendentious and partial reporting of cabinet meetings in the Daily Telegraph and Daily Mail hampered effective cabinet government), the transparency provided by the briefings (and the public attention paid to them) was essential to effective government.

46. During this period information on many aspects of policy lockdown, mortality rates, PPE shortages, attempts to commission emergency hospitals, closing of borders, quarantining of arrivals, movement restrictions, “steel/protective rings” round care homes, closing of workplaces, closing of schools to all but the most deprived, the commissioning of vaccines and many other things were all reported to the general public. Similarly the Government’s decisions about steps to remove restrictions, the easing of controls on gatherings, the reopening of workplaces “eat out to help out” were all (as the first wave ebbed), explained and accessible to the public.

47. Mr Conway’s justification “*this request is being made in the interest of accountability for decisions that affected the entire country throughout the pandemic period*” is a sound argument in general terms for the release of information. The Information Commissioner’s claim (DN 26) “*The subject matter and content of the withheld information is key here*” is also correct – as far as it goes. However the conclusion he

then drew *“the subject matter and content of the withheld information leads to an exceptionally weighty public interest in disclosure, in order to serve transparency about the discussions within Cabinet on the pandemic at that time”*, is inappropriate.

48. There will have been numerous cabinet discussions on each of the matters listed in the preceding paragraph. Each one shaped the context in which subsequent discussions took place and shaped the stage and understanding of the pandemic against which future decisions were made.
49. Two decisions taken during a period of relatively low mortality figures to loosen controls on social interaction were thrown into reverse some months later. They are a step of relatively little public interest without the contextual analysis of the broader circumstances. The IC's claim that these were *“the most sweeping public health measure ever adopted in this country”* is hyperbole given that they were part of the process of winding down the far more restrictive rules in place since the end of March.
50. In the information regime of daily briefings (widely watched) the Minutes might shed some small light on individual Ministerial concerns, however the key information was already in the public domain, the legislation and the reasons for it as explained by Mr Shapps and Mr Hancock. In the context of the unfolding tragedy of the pandemic such Minutes add little. On the other side the significant constitutional conventions around cabinet government and the deleterious impact which a weakening of those conventions would cause, as indicated by Mr Davies and Sir David are clearly of considerable substance and outweigh the interest in disclosure.
51. The timing of the request is also of significance. It was made as the Hallett Inquiry got under way with the publication of the terms of reference indicating the structured approach to elucidating the appropriateness and effectiveness of the Government response, including non-pharmaceutical actions such as face coverings. That Inquiry will go a significant way towards answering Mr Conway's concerns far more effectively than his information request and without the harm to the working of a significant constitutional convention reasonably apprehended by Mr Davies and Sir David.
52. The broader issue of accountability of the Government at large was significantly addressed by the arrangements in place at the time by which Parliament and the public could understand the reasons for decisions. The Covid-19 Inquiry will deliver a strategic consideration of the choices and decisions made before and during the pandemic.
53. However in many requests for information there is an underlying claim of misconduct and an expectation that disclosure of information will contribute to accountability for that misconduct. Given the handling of the request by the Cabinet Office there was no effective opportunity during the course of the request for Mr Conway to raise any specific concerns he may have had and he did not participate in the appeal. However questions of individual conduct and behaviour have figured largely during the pandemic and its aftermath, particularly at the date of the request.

By the time that the Cabinet Office refused the request in September 2022 there had been significant Ministerial accountability for misconduct in relation to the pandemic. The Health Secretary resigned in June 2021.

54. On 31 January the Cabinet Office published a report from Sue Gray (the Second Permanent Secretary of the Cabinet Office) **Investigation into alleged gatherings on Government premises during covid – restrictions – update**. In response to this on the floor of the House of Commons the Rt Hon Theresa May formulated the question of Ministerial accountability for public health restrictions imposed on the whole nation which they did not themselves follow when she asked the Prime Minister:

“The covid regulations imposed significant restrictions on the freedoms of members of the public. They had a right to expect their Prime Minister to have read the rules, to understand the meaning of the rules – and, indeed, those around them him to have done so, too – and to set an example in following those rules. What the Gray report does show is that No. 10 Downing Street was not observing the regulations they had imposed on members of the public, so either my right hon. Friend had not read the rules, or did not understand what they meant – and others around him – or they did not think the rules applied to No. 10. Which was it?”

55. The Prime Minister and Chancellor were fined for breach of the regulations on 13 April 2022. The House of Commons referred the Prime Minister’s conduct to the Committee on Privileges on 21 April 2022. On 25 May 2022 the **“Findings of the Second Permanent Secretary’s Investigation into alleged gatherings on government premises during Covid restrictions”** was published by the Cabinet Office. On 6 June 2022 54 letters of no confidence by Conservative MPs had been received and a vote was held of Conservative MPs in which a majority supported the Prime Minister. The Committee of Privileges began its deliberations on 29 June; the day of the request from Mr Conway. On 5 July the Chancellor and Health Secretary resigned saying they no longer had confidence in the Prime Minister: the Chancellor stating *“the public rightly expect government to be conducted properly, competently and seriously. I recognise this may be my last ministerial job, but I believe these standards are worth fighting for and that is why I am resigning.”* 36 Further MPs resigned from ministerial positions in the next hours and the Prime Minister indicated that he would step down on 7 July, formally surrendering his office to Her Majesty on 6 September. On 15 June 2023 The Committee of Privileges (chaired by Rt Hon Harriet Harman) produced **Fifth Report Matter referred on 21 April 2022 (conduct of Rt Hon Boris Johnson): Final Report** which found

188 (a) Mr Johnson misled the House when he said on 1 December 2021 that all Guidance was followed completely in No. 10, when he said on 8 December 2021 that the Rules and Guidance were followed at all times, on 12 January 2022 when he said that events at No. 10 were within the Rules and Guidance, and on 25 May 2022 when he said that the Rules and Guidance had been followed at all times when he was present at gatherings to wish staff farewell. See paragraph 117.

202. *We conclude that in deliberately misleading the House Mr Johnson committed a serious contempt.*

56. FOIA sets in place a statutory right of access to information held by public bodies. However much of that information will already be in the public domain – hence such exemption provisions as **s21 Information accessible to applicant by other means**. The request is framed by the justification stating that it “*is being made in the interest of accountability for decisions*”. While minutes vary in detail and content (as was explored by the witnesses) minutes of meetings usually record who was present, the points made in discussion and the reason for the decisions. Within the constitutional framework of the UK those reasons should be supplied to Parliament through ministerial statements. It is rare for the physical form or the structure in which the information is held, as distinct from the information content, to be significant. Further the tribunal must have in mind Judge Jacobs’ dictum “*If accountability is a factor, any other forms of accountability will be relevant. The tribunal must assess the nature and extent of their significance. That assessment can only be made in the context of the case.*”
57. In considering the context of this request there is a stark contrast between the salience and effectiveness of other multiple forms of accountability explored above and the value of the information sought – in contrast with the risk of harm to the functioning of government caused by its release disproportionate to any benefit.
58. In this case effective accountability both for the policy and of Ministers has been provided by statements to Parliament, public briefings, prosecutions, Forced Ministerial resignations resulting from Parliamentary, and Ministerial pressure, the reports by the Second Permanent Secretary, by the Committee of Privileges and the future report by the Covid-19 Inquiry.
59. Accordingly the tribunal is satisfied that the interest in maintaining the exemption outweighs the interest in disclosure and the appeal is allowed.

Coda

60. The nature of the information and the disproportion in the public interest mean that there is no necessity for a closed decision addressing the specific content of the withheld material.
61. It is a matter of concern that the Cabinet Office seemed to have such difficulty in locating the relevant minutes.
62. The material requested was “*minutes of the meetings on which the two policy decisions to make face masks compulsory in shops and public transport were finalised*”. Clearly in any meeting there may be a number of different items on the agenda and in such cases some agenda items are simply not relevant to the information request and should be excluded. However a rather more restrictive approach was agreed between the parties and summarised: “*Having reviewed the withheld information, the Commissioner has identified content relating to face coverings within the minutes which falls within the scope of the request. The Commissioner does not consider the content within the minutes*

which does not relate to face coverings to be within the scope of the request, therefore that content is not covered in the analysis below." This seems to be unduly restrictive – in essence a minute of a discussion related to the policy issue of managing the covid pandemic with the assistance of face coverings would be considered on a paragraph by paragraph basis and only be disclosable if the paragraph contained the term "face coverings". A request under FOIA should be treated as a serious request for information. It appears in this case to be trivialised to the level of a child's word search. In this case as no disclosure has been ordered no harm was done; in other cases citizens could be denied the full information to which they are entitled.

Signed

Date:

Hughes

7 March 2025