

SCOTTISH HOSPITALS INQUIRY

NOTE of REASONS

in

APPLICATION

on behalf of

THE SCOTTISH MINISTERS

for

a variation of a notice dated 17 September 2021 under section 21 of the Inquiries Act 2005  
("the section 21 Notice")

**Introduction**

1. Section 21 of the Inquiries Act 2005 confers on the chairman of an inquiry powers to require persons to provide various sorts of evidence which relate to a matter in question at the inquiry. In terms of section 21(2)(b) the chairman has power, by notice, to require a person to produce any documents in his custody or under his control that relate to a matter in question to the inquiry within such period as appears to the chairman to be reasonable (a "section 21 notice"). In the event of failure to comply with a section 21 notice, section 36 of the Act provides that in Scotland the chairman may certify the matter to the Court of Session for enforcement. In terms of section 35 of the Act it is an offence to fail, without reasonable excuse, to comply with a section 21 notice. Given its compulsory nature the making of a section 21 notice affords advantage both to the chairman, who has the means of securing the production of documents, and to the person holding the documents who can, if need be, point to his obligation to comply with what may become a legally enforceable order as the reason for disclosing material under his control. This is however only one means by which an inquiry may obtain the documents (and other information) it requires in order to fulfil its terms of reference. Rule 8 of the Inquiries (Scotland) Rules 2007 provides that the chairman may send a written request for a statement of evidence or document or other thing. Where the person to whom the request is addressed is agreeable to comply, nothing further is required.
2. By notice dated 17 September 2021 in terms of section 21(2)(b), I required the Scottish Ministers to provide all documents in their custody or under their control which were listed in Annex 1 attached to the notice, no later than 29 October 2021. Annex 2 to the notice explained how the documents should be provided. This is the notice to which this application at the instance of the Scottish Ministers relates.
3. The making of the notice dated 17 September 2021 was a step in a process that had begun no later than 11 February 2021 when a rule 8 request was sent to Scottish Ministers seeking production of a more extensive list of documents than those to which

the section 21 notice of 17 September 2021 related. The date by which documents should be provided under the rule 8 request was 9 April 2021. Following the sending of the rule 8 request there was discussion and correspondence between members of the Inquiry's legal team, on the one hand, and members of the Response Unit established by Scottish Ministers to deal with the production of documents and the provision of information to the Inquiry and legal representatives of Scottish Ministers, on the other, as to what documents were looked for and how they should be provided. On 18 June 2021 those acting for Scottish Ministers and members of the Inquiry team agreed that, with a view to imposing a legal obligation on the Ministers to produce the documents, the Inquiry would proceed by issuing a series of section 21 notices.

4. On 2 July 2021 I issued a section 21 notice requiring Scottish Ministers to produce certain documents no later than 6 August 2021. This notice was complied with timeously.
5. Discussion and correspondence between the inquiry team and the Response Unit and the legal advisers of the Scottish Ministers continued. A draft second section 21 notice was sent to the Response Unit on 30 August 2021 with a view to identifying the material which the Inquiry was looking to have produced. The notice dated 17 September 2021 is a revised version of that draft.
6. Section 21(4) provides that the chairman of the inquiry may revoke or vary a section 21 notice where a person is unable to comply with the notice. On 28 October 2021, Scottish Ministers presented an application for variation by extending the time for production of documents until 26 November 2021. On 29 October 2021, I granted that application to the extent that I required production to be no later than 5 November 2021.
7. Scottish Ministers then made a further application for an extension of time. An extension was sought until 12 November 2021. I appointed counsel to be heard on the application on 10 November 2021 when Ms Davie QC appeared on behalf the Scottish Ministers and Mr McClelland appeared as counsel to the Inquiry.
8. Having heard counsel I granted the application. The respective submissions that I heard and my reasons for granting the application are as follows.

## **Submissions**

### *On behalf of the Scottish Ministers*

9. Ms Davie said she welcomed the opportunity to address me in support of the application. The need for an extension arose from the volume of material which came within the section 21 notice of 17 September 2021. Some of it had not previously existed and had to be generated for the first time (she gave the example of organograms identifying those who held specific positions at given times). Some of it had been archived and had to be recovered from the National Records of Scotland. The extent of the task had only become apparent over time. It potentially involved some 700,000 documents. Communication with the inquiry team had continued. Contrary to what

might be understood from the email correspondence, Scottish Ministers and those acting for them had never proposed a “dump” of uncategorised material, nor would they suggest that were they to have made such a dump that this would have amounted to compliance with the section 21 notice. There was no mal-intent. It was simply that the tasks of identifying documents which might fall within Annex 1, reviewing them in order to determine which did fall within Annex 1, and uploading these in a workable format, had proved too great for the Inquiry Response Team to complete within the time allowed for by the section 21 notice. Scottish Ministers wished to ensure that all material which had been required by the Inquiry was produced. They did not wish to limit the process of providing information to mere “paper compliance”. There had been discussions with officials who held the relevant corporate knowledge in order to ensure that nothing was missed. Consideration had been given to the proper level of resourcing. A dedicated Inquiry Response Team had been formed in order to carry out the tasks with the assistance of Scottish Ministers’ Knowledge Information Management (KIM) team. While it was the case that the KIM team had declined an offer of assistance from the inquiry team in refining the search terms for use in interrogating the Scottish Ministers’ document management system, this was because the view was taken that it was the responsibility of Scottish Ministers to respond to the section 21 notice and that of the Scottish Ministers alone.

10. In response to questions, Ms Davie confirmed that notwithstanding a reference in the written application which might suggest that documents were being reviewed in order to determine whether material was relevant to the terms of reference of the Inquiry, as opposed to simply determining whether it fell within the descriptors in Annex 1, this was not so. Scottish Ministers accepted that, at the stage of production of evidence, it was for the Inquiry to determine what sort of material might be relevant to its terms of reference and not for a person to whom a section 21 is directed to withhold documents which are required to be produced, on the basis that the person considers that they are not relevant to the terms of reference. Ms Davie further explained that where the written application mentioned the time-consuming nature of the task of “formatting the documentation for provision to the Inquiry” this was a reference to a paradoxical complication arising from the fact that the Scottish Ministers and the Inquiry shared the same sort of document management system, eRDM. Because of this, documents which had been renamed in order to meet the Inquiry’s requirements, reverted to their original names when uploaded to the Inquiry’s document management system. Working around this had taken time.
11. Ms Davie emphasised that Scottish Ministers welcomed and wished to pursue a cooperative and collaborative approach in working with the Inquiry. It was considered that there were good lines of communications. Processes had become streamlined as the Inquiry Response Team had become more experienced. Ms Davie reminded me that the section 21 notice of 2 July 2021 had been complied with timeously. A certain amount of material had been provided in response to rule 8 requests. As at the date of the hearing the documents required by the notice of 17 September 2021 had been produced, indeed they had been produced over the weekend of 6/7 November. There had been a concerted effort on the part of Scottish Ministers to comply with the section 21 notice. There was not a pattern of lateness, and it was not anticipated that Scottish

Ministers would find themselves in the position of having to seek an extension of time in respect of future section 21 notices.

*Counsel to the Inquiry*

12. Having explained that he saw his role as a neutral one, Mr McClelland began by reminding me that whether or not the Scottish Ministers, with their recent provision of documents, had indeed complied with the section 21 notice was yet to be seen; what the application was concerned with was whether the extension of time sought should be granted, so rendering the provision of such documents as had been provided timeous. Given the way in which the application had been presented and looking to section 21(4)(a) of the Act, the question was whether the Scottish Ministers had provided a sufficient explanation for why they had been “unable to comply with the notice”. What could not provide a sufficient explanation was something that appeared to be suggested by the terms of the written application: that delay had been caused by the Ministers doing things that they were not required to do by the terms of the notice, such as reviewing the content of documents for relevance to the terms of reference, or changing the formatting of documents. However, counsel for the Scottish Ministers had now made it clear that this is not what had happened, rather, what was relied on were simply the scale of the task and the late stage at which that had become apparent to those charged with responsibility for carrying it out. It followed, submitted Mr McClelland, that what had been put forward by the Scottish Ministers could form a basis upon which I could exercise the discretionary power conferred by section 21(4) of the Act to vary the notice by extending the period within which it was to be complied with.
13. The context for exercise of the section 21(4) power was provided by the Inquiry’s term of reference 13 which required it to report as soon as reasonably practicable, and the terms of section 17 of the Act. If the Inquiry was required to complete its work as soon as reasonably practicable, it followed that persons whose evidence it was necessary for the Inquiry to consider, should provide that evidence as soon as reasonably practicable. Section 17 provided that the chairman, in making any decision as to the procedure or conduct of the inquiry must act with regard to the need to avoid any unnecessary cost, whether to public funds or to others. That pointed to the avoidance of delay, which inevitably had implications for cost, albeit it also pointed to not imposing deadlines on persons having custody or control of documents which were too short, in that attempts to meet unreasonable deadlines could also result in incurring unnecessary costs, either directly or in diverting effort from other important activities. Section 17 also requires the chairman to act with fairness. The notion of fairness includes a willingness to grant some leeway to persons who have been conscientious in responding to requests for documents but who have failed by a small margin to comply with exactly what has been required of them.
14. In Mr McClelland’s submission there were factors which weighed both for and against an exercise of discretion allowing an extension of time. Against an extension of time there were the facts that (1) the material sought in the section 21 notice was substantially what had been included in the rule 8 request which had been made on 11 February 2021; (2) it was the Scottish Ministers who had caused the Inquiry to be held

and therefore may be taken to have anticipated what material it would require to consider; and (3) an extension had already been granted. On the other hand, in favour of an extension there were the facts that (1) the extension sought was very short; (2) some documents had been provided by 5 November and what was said to be the remainder of the material listed in Annex 1 had been provided very shortly thereafter; (3) it had been necessary to present documents in a form which met with the requirements of Annex 2 to the notice; (4) the volume of documents which it had been necessary to search would appear to have been very large; and (5) most important, for the reasons set out in paragraph 14 of the Scottish Ministers' written application, it was not anticipated that a problem of this sort would recur: a dedicated Inquiry Response Team had been formed, the staff within the KIM team had built up a degree of knowledge and experience in document management which would make their work more efficient in future, and additional staff had been recruited when the scale of the task had been appreciated.

15. In summary, Mr McClelland explained that the application addressed the relevant statutory test and had set out a sufficient basis upon which I would be entitled to exercise my discretion in favour of an extension.

#### **Reasons for decision**

16. At risk of stating the very obvious, the expeditious and systematic gathering of relevant evidence is essential to the work of any public inquiry. This investigative process is the responsibility of the inquiry team, as that expression is defined by rule 2 of the 2007 Rules, and ultimately that of the chairman. However, integral to an inquiry under the 2005 Act and the 2007 Rules are the core participants. These are persons who were involved in and have an interest in the matters to which the inquiry relates. They are therefore well placed to assist the inquiry in fulfilling its terms of reference and it is my expectation that that is what the core participants in the Scottish Hospitals Inquiry will wish to do. Accordingly, while it was no more than I anticipated, I was glad to have Ms Davie's assurance that Scottish Ministers welcomed and wished to pursue a cooperative and collaborative approach in their engagement with the Inquiry. That mirrors how I would wish the work of the Inquiry to proceed: an investigation drawing on and benefitting from the collaborative contributions of all the core participants.
17. I appreciate that identifying no more and no less than the evidence requested by the Inquiry, particularly where that evidence is in the form of documents and the number of documents potentially large (as Ms Davie indicated was the case here), is no small task. However, as Mr McClelland reminded me, in setting out the terms of reference the Minister required the Inquiry to complete its work as soon as is reasonably practicable. It follows that there is a need for expedition and a consequent avoidance of unnecessary delay.
18. Where practicable, I would expect the production of evidence to be forthcoming on a voluntary basis, hence the Inquiry's rule 8 request in the case of the documentation which is the subject of the present application. The inquiry team recognises its responsibility to begin the process of identifying the evidence that it considers that it requires as early as possible but, correlative to that, is an expectation that a recipient of

a rule 8 request will immediately begin to do what is necessary to recover, categorise and name the requested material. In the present case the rule 8 request was made on 11 February 2021. That was when the clock began to run.

19. I accept all Mr McClelland's submissions. These included the submission that, having regard to the terms of section 21(4), where a person who is in receipt of a section 21 notice wishes the chairman to revoke or vary the notice that person must persuade the chairman that he is unable to comply with the notice or that it is not reasonable in all the circumstances to require him to do so. That will generally require a detailed explanation presented by way of a written application with the possibility of that being supplemented at a hearing appointed for the purpose, as occurred here.
20. Returning then to the instant case, having had regard to the factors identified by Mr McClelland and as urged by Ms Davie, I have been persuaded that Scottish Ministers can be regarded as having been unable to comply with the notice for the purposes of section 21(4), in so far as relating to the time within the listed documents are to be produced, and that I should grant the extension sought.

Lord P Brodie QC PC  
Chair, Scottish Hospitals Inquiry  
18 November 2021