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ARTICLES

WHO OWNS STATE PAPERS?

RODNEY BRAZIER*

THE sale by the Churchill trustees of Sir Winston Churchill's pre-1945 personal papers to Churchill College, Cambridge early in 1995 caused much controversy. Over £12 million, generated by the National Lottery, was used by the National Heritage Memorial Fund to make the purchase, producing the jibe that the Trust's beneficiaries (notably the great man's grandson, Winston Churchill, MP) had won the Lottery without having to buy a ticket.¹ This little drama brought into focus a number of constitutional questions about state papers. Those questions turn around two interlocked issues. The first concerns the physical control of such papers. The state must have the use of documents generated in its service, which should therefore remain available within government after particular Ministers have left office. Against that must be balanced a competing claim by the ministerial authors of state papers: they will want, at the least, to be able to refresh their memories of their official papers after resignation, to help them in composing autobiographical and other accounts of their periods in office, or they may even (and more boldly) claim the right to sell their papers. The second issue relates to the control of government information: to what extent are the rules which purport to reinforce the state's rights to physical possession of millions of pieces of paper actually used more as a means of restricting the information which may be made public, rather than merely as a means to keep state archives intact? In addressing those issues, this article will range well beyond the crude question of ownership of state papers. The restrictions which are placed on how existing and former Ministers and civil servants may deal with papers written or received while in office will be examined. The manner in which Ministers may dispose

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¹ The papers were bought on behalf of the specially-constituted Sir Winston Churchill Archive Trust. The papers can now be resold only with the consent of the trustees of the National Heritage Memorial Fund and of the Charity Commissioners or the courts. See the Prime Minister's explanation at 261 H.C. Deb. col 24 w (6 June 1995).

of their official papers after their resignations will be explained. And the circumstances in which former Crown servants can properly publish confidential official information, and how improper publication of it can be restrained, will be explored. All this will require an analysis of both conventional and legal rules, together with the means through which compliance with those rules may be obtained.

I. THE PROBLEM OF CLASSIFICATION

Plainly, a central question is: what is a state paper? That was at the heart of the dispute over the Churchill archive. According to the Churchill trustees, the 1.5 million pieces of paper in the pre-1945 collection would take 20 people 20 years to separate out into state and personal papers. That claim was disputed by the Attorney-General during the action which was abandoned when agreement was reached with the National Heritage Memorial Fund.² When the sale was announced the general perception was that taxpayers' money was being used to buy what already belonged to the public. This was vigorously denied by the Prime Minister. In particular, Mr. Major tried at Prime Minister's Questions to set out the factual background.³ What had been purchased, he said, were the personal papers of Sir Winston Churchill, a collection which could have been freely sold to the highest bidder. The Prime Minister explained that the pre-1945 archive included "state papers and personal papers, many of which have no connection whatsoever with Sir Winston's time in Government".⁴ The purchase of the personal papers had been funded by the National Heritage Memorial Fund, and then given to Churchill College; the Government had decided at the same time to transfer to the College all the state papers in that archive. In that way, he said, the integrity of the pre-1945 set of Churchill papers would be preserved for the nation. The Prime Minister denied that any purchase had been made of papers that were already the property of the state. He was subsequently pressed further on the distinction between the two types of document. In a written answer he reiterated that the National Heritage Memorial Fund had purchased only "non-state papers" which "are not normally to be found in the Public Records Office in either original or duplicate form".⁵

² The action had been started in 1993 between the Government and the Churchill Trustees. The Attorney-General sought a declaration that the "relevant state papers" in the archive were the property of the Crown and should be delivered up.

³ 258 H.C. Deb. col. 978 (27 April 1995).

⁴ *Ibid.*

⁵ 259 H.C. Deb. col. 283 w (4 May 1995).

What these explanations do not purport to provide is any test for distinguishing between the two types of paper. Clearly, a Prime Minister or Minister will handle a wide range of documents during his or her tenure of office.⁶ These will include agendas, minutes, and supporting papers prepared for the Cabinet and for Ministerial Committees.⁷ Ministers will also deal with memoranda and letters sent to them by their ministerial colleagues and by civil servants and others. They will oversee various drafts of papers which are eventually published, such as consultation documents and White Papers. Ministers will correspond with their counterparts and officials in other governments and with officials and others in international organisations, such as the European Union. They will correspond about departmental concerns with people outside government. Ministers will write to and receive letters from MPs and peers, constituents and other members of the public. They will handle drafts of speeches delivered in Parliament, and outside Parliament to their party or more widely. But a person who happens to be a Minister will also write and receive documents which have absolutely no relevance to official duties: obviously, such texts should not be included within any definition of a state paper. Where is the line to be drawn between the two groups?

Before the Churchill papers interlude, there had been no attempt to arrive at an official definition of what constitutes a state paper. The search for a definition can begin with legal sources. Some statutes might promise to be relevant, especially the Public Records Act 1958, and the Official Secrets Acts 1911 and 1989, but in fact they do not take the quest very far. The Public Records Act 1958 establishes the régime for the preservation of public records.⁸ The term “public records” is defined⁹ as including the administrative and departmental records belonging to Her Majesty’s Government, and in particular records of, or held in, any department of Her Majesty’s Government, or records of any office, commission or other body or establishment whatsoever under Her Majesty’s Government.¹⁰ The drafter of that Act used the term which is to be defined (“records”) in the definition

⁶ Mr. Tony Benn has told me that he received 1,800 different Cabinet and Cabinet committee documents in one year alone as a Cabinet Minister in the late 1970s.

⁷ These were previously referred to as Cabinet committees, the change in nomenclature having been made officially to underline the fact that non-Cabinet Ministers are regularly full members of such committees.

⁸ There is nothing in the description of the administrative system as set out in the Act which itself throws light on the type of document which is to be preserved. For a description of current practice within departments in relation to transferring records to the Public Record Office, see *Open Government*, Cm. 2290 (1993), ch. 9.

⁹ Section 10(1) and First Schedule.

¹⁰ “Records” includes not only written records, but records conveying information by any other means whatsoever: 1958 Act, s. 10(1). The Public Records Act 1967 amends the 1958 statute, but in no sense that is material here.

of that term, no doubt on the optimistic assumption that it is clear what makes up a record. But we cannot assume that all state papers fall ineluctably within that notion of a public record. For example, is the text of a ministerial speech (which perhaps should be called a state paper) unambiguously a public record? The Official Secrets Act 1911, s. 2, would not have helped, either.¹¹ The replacement statutory scheme in the Official Secrets Act 1989 seeks to protect information more selectively than did the catch-all section 2, and places obligations on (among others) Crown servants (a term in the Act which includes Ministers and civil servants¹²)—but only in relation to specified classes of information. In doing so, the disclosure of “any information, document or other article” within those classes is prohibited, but those terms are (understandably) not defined.¹³ It could be said that documents containing such protected information are, *prima facie*, state papers, although that would only constitute part of the total corpus of such documents. Again, a leading case like *Attorney-General v. Jonathan Cape Ltd.*¹⁴ (the Crossman Diaries case) might be assumed necessarily to grapple with the concept of official papers. The case turned on the restrictions, if any, which the courts would place on the divulging of information about the workings of the Cabinet, and in his judgment Lord Widgery C.J. referred in some detail to the practices surrounding access to and control of Cabinet papers.¹⁵ He took it for granted, however, that everyone understood what was meant by the term Cabinet papers, without needing him to spell it out. He did, however, quote with approval from a speech made to the House of Lords by a former Lord Chancellor in 1932¹⁶ in which Viscount Hailsham, in asserting that an obligation of secrecy was owed by Ministers, specifically listed documents which fell within that obligation, namely, Cabinet minutes, and memoranda, telegrams and despatches and documents circulated from one Cabinet Minister to his colleagues in order to bring before them a particular problem and to discuss possible courses of action to deal with it.¹⁷ Although that is no more than a list, clearly such documents do constitute state papers.

¹¹ The section notoriously created 2,324 offences (see *Report of the Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104 (1972), vol. 2, p. 262). It protected notes and documents made or obtained in contravention of the Act, or which had been entrusted in confidence to the defendant by any person holding office under the Crown or which had been obtained owing to the defendant's position as a person who holds or had held office under the Crown. But the phrase “notes or documents” was not defined. Section 2 of the 1911 Act was repealed by the Official Secrets Act 1989, s. 16(4).

¹² 1989 Act, s. 12(1).

¹³ In any case, Ministers are permitted under the 1989 Act to provide lawful authority for disclosure of such information in accordance with their official duty: *ibid.*, s. 7(1). That point will be returned to later when considering that Act more generally: see below, section V.

¹⁴ [1976] Q.B. 752.

¹⁵ See especially *ibid.* at 764–765, 767–768.

¹⁶ 86 H.L. Deb. col. 527 (21 December 1932).

¹⁷ [1976] Q.B. 752 at 766.

And so, as happens so often in British constitutional affairs, we are forced to fall back on extra-legal sources for official guidance. As will be seen later, the document *Questions of Procedure for Ministers*¹⁸ refers to conventional rules in relation to ministerial papers, and speaks variously of “Cabinet documents”, “Cabinet papers”, “memoranda for Cabinet and Ministerial Committees” and to “Cabinet Conclusions or Committee minutes”.¹⁹ Yet *Questions of Procedure for Ministers* lacks a comprehensive definition of a state or official paper, although again no one could argue against placing all the documents to which it refers within any sensible definition. It was the Churchill papers episode itself which forced the Government to define terms. The Parliamentary Secretary, Lord Chancellor’s Department, was asked in the House of Commons for the official definition of a state paper. In a written answer,²⁰ the Minister replied:

I understand the expression “State Papers” to signify those papers which are created or acquired by Ministers, officials or other Crown servants by virtue of the office they hold under, or their service to, the Crown. Whether or not the Crown can claim ownership of any wider class of papers will depend on the circumstances of the case.²¹

That is a useful working definition. A paper created by a Minister by virtue of that office must be within any notion of a state paper. Such documents would not have been created (or the Minister would not have caused them to be created²²) but for his or her ministerial office under the Crown. The Minister would not acquire most of the papers which arrive in the department but for the fact of holding a ministerial post. That definition embraces Cabinet, Ministerial Committee, and Official Committee²³ papers; documents sent to and received from other Ministers, and to and from civil servants; correspondence with other governments and international organisations; departmental correspondence with MPs, peers, and constituents which touch on the Minister’s work; and the Minister’s drafts of all such documents. The Parliamentary Secretary, Lord Chancellor’s Department, left open²⁴ whether other papers of a wider class would be within the definition

¹⁸ Cabinet Office, 1992. Each Prime Minister issues that document, revised as he or she wishes, to new Ministers, and it amounts to a rule book for Ministers.

¹⁹ *Op. cit.*, respectively paras. 14, 15, 6, 10, 12.

²⁰ 259 H.C. Deb. col. 566 w (11 May 1995).

²¹ The very next question asked the Parliamentary Secretary, Lord Chancellor’s Department, in what circumstances state papers may be held in private hands. He replied that such papers were normally held by the Crown, although in very rare circumstances they might be held in private hands, normally only when permission exceptionally had been given to a former Minister or public servant to retain possession of them.

²² A document written by officials for a Minister for use in his or her official duties must be within the notion of a state paper, just as if the Minister had written it personally.

²³ An Official Committee is made up entirely of civil servants.

²⁴ See the last sentence of his answer, given above at the text associated with note 20.

which he had supplied to the House of Commons; but it is not easy to think of other types which should. It is nevertheless understandable that official caution added that qualification to the Minister's answer.

What, then, are the rules touching the custody of state papers, and what are the purposes which those rules are designed to further? It is convenient to analyse first non-legal rules.

II. THE CONVENTIONAL FRAMEWORK

A. The Historical Background

In the history of British government, there has been a strong tendency to rely on the honour of those at the centre of the executive to uphold acceptable standards within government. The Queen's government is taken to be carried on by gentlemen, who do not need legally-binding rules to ensure that they behave with propriety.²⁵ In that spirit, those rules which are of the greatest practical importance in relation to state papers are conventional in character.²⁶ But, as is the case occasionally with some conventional rules, when some gentlemen act like players there is a reluctance or an inability to do very much to bring them back within the rules of the game. In order to put the current conventional rules concerning state papers into context, there must first be a glance back in time.

Britain and the Empire were ruled in an amateur fashion before the Great War turned the world upside down.²⁷ The Cabinet met without a written agenda; no minutes were kept (and indeed Ministers were forbidden in some Cabinets to make notes during meetings in an attempt to maintain secrecy). Only in the Prime Minister's letter to the Sovereign after each Cabinet meeting was there any official account of what had happened in it. In that same rather relaxed atmosphere, there were no restrictions on what Ministers could do with their official papers once they had left office. They could—and many did—take away on resignation their copies of Cabinet papers and official files.²⁸ The First World War, however, generated a vast amount of official paper in accompaniment to the slaughter, and greater order was needed to control it. This was done through the creation of the Cabinet Office and Secretariat by Lloyd George in 1916; and as a precursor an

²⁵ That approach has been reinforced by the recommendations of the Nolan Committee, which recommends that reliance should continue to be placed on non-statutory requirements to uphold official good conduct: see *First Report of the Committee on Standards in Public Life*, Cm. 2850 (1995), *passim*.

²⁶ There are, however, legal rules as well: they will be examined below in sections III and V.

²⁷ See generally Lord Hankey, *Diplomacy by Conference: Studies in Public Affairs 1920–1946* (1946), pp. 52, 62–69.

²⁸ Sir Ivor Jennings, *Cabinet Government* (3rd ed., 1959), p. 273.

attempt was made in the previous year to prevent departing Ministers from spiriting away their papers with them through the Cabinet resolving that its papers were Government property. Armed with that decision, it would have been open to the Cabinet Office, with the Prime Minister's support, to get back papers which had already been taken away: but in 1918 the post-war Cabinet decided that no such step should be taken.²⁹ These matters rested until 1934, when the National Government decided that Ministers should return their papers on relinquishing office, and also asked all former Ministers to return theirs.³⁰ Accordingly, the Secretary of the Cabinet, Sir Maurice Hankey, issued a memorandum which stated that any official papers arising from affairs of state were owned by the Crown, and that therefore all such papers (written since 1914) should be returned to the Cabinet Office, immediately by ex-Ministers, and on resignation by present and future Ministers. Many former Ministers fully complied, but there were notable and significant exceptions. Lloyd George and Winston Churchill flatly refused to comply.³¹ Both wanted to keep their papers, to help with their memoirs and other writings, and probably to use as a saleable commodity at some future time.³² No effective steps were taken against either man. Indeed, when Churchill was in a position to change the rulings, he did so. In a Cabinet minute of 30 April 1945 (two months before the general election which was to evict him from power) he issued the following instruction.³³

Ministers are entitled to keep all telegrams, minutes or documents circulated to the Cabinet which they wrote and signed themselves. Many of the Ministers have copies of these documents, of which usually a good many were struck. These must be regarded as their personal property, except that they will be bound by the rules governing the use of official papers, which are well established. To these should be added, in the case of the Prime Minister, correspondence with heads of Governments. . . . Ministers below Cabinet rank must return all their papers. . . .

By "Ministers" Churchill clearly meant former Ministers; and, of course, he wanted to keep all his prime ministerial papers for use in writing his monumental memoirs of the Second World War. Churchill's decision was, however, controversial, and indeed his successor promptly reversed it as soon as he became Prime Minister.³⁴ Attlee

²⁹ Lloyd George's wish to use his papers eventually to write lucrative war memoirs must have been a factor in that decision.

³⁰ Jennings, *op. cit.*, p. 273.

³¹ Churchill told the Cabinet Office that he had executed a deed governing the custody of his papers after his death.

³² It should be recalled that Churchill was in poor financial shape for most of his life, and had to be bailed out by well-wishers from time to time: see David Cannadine, *Aspects of Aristocracy: Grandeur and Decline in Modern Britain* (1994), pp. 143-150.

³³ Sir Winston Churchill, *The Second World War* (1951), vol. vi, p. 644.

³⁴ "Cabinet Procedure", C.P. (45) 99 (8 August 1945).

subscribed to the more generally-accepted view that exiting Ministers must return all their documents to the Cabinet Office, save for any which were required for current administration in their departments and which were therefore to be handed over to their successors. Early in his peacetime Government, Churchill fell into line.³⁵ In essence, he then stressed that, on leaving office, Ministers should leave all papers required for current administration in departments, and that all other papers should be returned to the Cabinet Office. He went on to note that, on a change of government, the outgoing Prime Minister would issue instructions about the disposal of the papers of his Administration. This volte-face may be explained partly by the fact that the seventy-seven year old Churchill had, at least tacitly, given up further literary aspirations.³⁶

B. The Current Conventions

Only one conventional rule governing what Ministers, on leaving office, should do with state papers is given in the current version of *Questions of Procedure for Ministers*. That rule states:³⁷

Ministers relinquishing office without a change of Government should hand over to their successors those Cabinet documents required for current administration and should ensure that all others have been destroyed. . . .³⁸

Thus a Minister who resigns, leaving his or her colleagues in office, should leave current papers in the department so that the business of government within it can continue efficiently: all other Cabinet papers must be destroyed: none should be taken away. Presumably the injunction to destroy Cabinet papers not needed for current business reflects the fact that, thanks to the photocopier, multiple copies will exist and so the individual Minister's copies are not needed for archival purposes. It was noted earlier that the phrase "Cabinet documents" used in *Questions of Procedure for Ministers* is not defined. It could be argued that the expression "Cabinet documents" is narrower than the phrase "state paper" as defined by the Government in the aftermath of the Churchill papers affair. Thus a resigning Minister might take the view that, for example, correspondence exchanged directly with other Ministers, papers prepared for the Minister by officials, and correspondence with MPs and peers and with people outside the Government and Parliament, are not Cabinet papers, and are accord-

³⁵ See Peter Hennessy, *Cabinet* (1986), p. 11. Hennessy sets out the 1952 version of *Questions of Procedure for Ministers*, of which paragraph 18 is relevant here.

³⁶ He wrote no account of his 1951 Government.

³⁷ *Op. cit.*, note 18 above, para. 14. Because the document is written for the guidance of Ministers, there is nothing in it about civil servants' obligations in relation to state papers.

³⁸ The rest of para. 14 will be considered below: see note 54 and associated text.

ingly exempt from the conventional rule and so can be taken away. The Secretary of the Cabinet has defined the phrases "Cabinet papers" and "Cabinet documents" as used in *Questions of Procedure for Ministers* as referring to documents of the Cabinet and its committees, being of two kinds. The first and main type consists of memoranda and minutes; the second and subsidiary kind includes notices relating to meetings, agenda, corrigenda and addenda notices, schedules and indexes. The phrases "Cabinet papers" and "Cabinet documents" do not, in the Cabinet Secretary's view, embrace other documents created or received by Ministers, such as official correspondence.³⁹ Nevertheless, he does not think that, because certain documents do not fall within the definition of Cabinet papers or Cabinet documents, they could be taken away, because the vast majority of documents dealt with by Ministers are public records.⁴⁰ In any dispute the Government might argue that the words "Cabinet papers" are synonymous with "state papers"; or alternatively that all state papers are, in any case, the property of the Crown and could not be removed anyway. If the purpose of the conventional rule is to ensure that departing Ministers are left in no doubt about what they should do with *all* their documents, the current wording in *Questions of Procedure for Ministers* does not unambiguously do that. One reason for this conventional rule has been given by a former Secretary of the Cabinet, Lord Hunt of Tanworth.⁴¹ He wrote over a decade ago that Ministers may normally see the papers of former Ministers of the same party, provided that the need to do so arises in the course of their current ministerial duties.⁴² Obviously, such current Ministers would not be able to see those documents, and administration would be hampered, if their party colleagues were able to take the only copies of papers away with them on resignation.

It became known publicly in 1995 for the first time, however, that this conventional rule does not apply to departing Prime Ministers. Mr. Major had to confirm this in yet another parliamentary answer to a question following the sale of the Churchill papers. In a written reply the Prime Minister began by saying:⁴³

By convention, Prime Ministers, on leaving office, have taken with them copies of certain documents which they dealt with while in office. These include some documents originated or

³⁹ Letter to me from Sir Robin Butler of 3 July 1995.

⁴⁰ Letter to me from Sir Robin Butler of 2 August 1995.

⁴¹ See his "Access to a Previous Government's Papers" [1982] P.L. 514.

⁴² *Ibid.*, p. 517. For access to the papers of a Government of another party, see below note 55 and associated text.

⁴³ 259 H.C. Deb. col. 281 w (4 May 1995).

acquired by them in the course of their official duties. This convention has not applied to Ministers other than former Prime Ministers. . . .

The Secretary of the Cabinet has confirmed to me that outgoing Prime Ministers take only copies of documents: the top, or official, copies of such material remain in official hands.⁴⁴ There is no mention of this convention in *Questions of Procedure for Ministers*, nor in any other published source, nor has it been referred to before in Parliament. The convention is an acceptance of the actions of most former Prime Ministers.⁴⁵ But in the rest of his parliamentary answer Mr. Major indicated an attempt to change the “rule” for Prime Ministers yet to resign. He went on:⁴⁶

It is my policy that in future material removed from official custody at the end of an Administration should contain no official material other than that which is already in the public domain.

This statement of intention reads as an attempt to put resigning Prime Ministers in the same position as other resigning Ministers, and to make them subject to the same conventional rule. Mr. Major will, no doubt, comply with his own new rule when he leaves Downing Street, but it will be interesting to see in due course whether his successors are content to fall in with it, rather than to do as most others have done before. The incentive to remove van-loads of papers from Number 10 at the end of a Government should not arise from a concern that, if papers were left, the writing of profitable memoirs would be more difficult,⁴⁷ with resort only to fallible memories: for, as will be seen shortly, former Prime Ministers (and, indeed, all other Ministers) can see their official papers after resignation, although under controlled conditions. Rather, the incentive consists in having physical possession of the actual papers, so that they can be donated to a library,⁴⁸ or be kept for financial gain,⁴⁹ or even perhaps to keep them from inquisitive researchers.⁵⁰ It may take more than a statement

⁴⁴ Letter to me from Sir Robin Butler of 3 July 1995.

⁴⁵ Lady Thatcher did as most of her predecessors had done and removed copies of her prime ministerial papers when she left No. 10 in 1990. They would undoubtedly be worth millions of pounds on the open market, if she were at liberty to sell them—on which see below sections III and V.

⁴⁶ 259 H.C. Deb. col. 281 w (4 May 1995).

⁴⁷ Since 1918 all 14 retired Prime Ministers have published autobiographical accounts except Bonar Law and Chamberlain (who both died soon after their resignations), Baldwin, MacDonald, Attlee, and Sir Edward Heath (who is still working on his).

⁴⁸ As did, e.g., Clement Attlee (to University College, Oxford), Winston Churchill (post-1945, to Churchill College), Sir Anthony Eden (to the University of Birmingham), and Harold Wilson (to the Bodleian Library, Oxford).

⁴⁹ As with Churchill's pre-1945 papers, and Lloyd George (some of whose papers were sold by his widow in 1951 to Lord Beaverbrook, who donated them to the House of Lords Library).

⁵⁰ The most notorious example comes from the United States, in Richard Nixon's attempts to keep his presidential papers (including the notorious tapes) secret after his resignation.

of intent from a Prime Minister to achieve what formal resolutions of Cabinets and the efforts of the Cabinet Office have failed to do.

The position regarding the disposal of papers when the whole Government is to leave office is governed by an unhelpful statement in *Questions of Procedure for Ministers*.⁵¹ On that event, the document states that “the outgoing Prime Minister issues special instructions about the disposal of Cabinet papers of the outgoing Administration.” There is, again, ambiguity in the use of the phrase “Cabinet papers”.

The only other guidance about surrendering papers which can be obtained from *Questions of Procedure for Ministers* is the comment⁵² that some Ministers have thought it wise to make provision in their wills against the improper disposal of any official or government documents which they might have retained “by oversight”. Again, that comment presumably was not aimed at former Prime Ministers (or no such convention as Mr. Major referred to could have existed). But the comment underlines the hope that no state papers will be in the possession of ex-Ministers or their estates.

Former Ministers will often wish to see state papers when writing their memoirs.⁵³ To help them, *Questions of Procedure for Ministers* states:⁵⁴

Former Ministers may at any time have access in the Cabinet Office to copies of Cabinet or Ministerial Committee papers issued to them while in office.

This access is enjoyed “in the Cabinet Office”: according to that conventional rule, such papers cannot be removed from there. Yet exceptions have been made. Two former Prime Ministers, Sir Edward Heath and Lady Thatcher, have been allowed to take such papers home for consultation while writing their memoirs, and to return them in due course. In Lady Thatcher’s case (and possibly in Sir Edward’s) the papers were mainly those issued while a Minister, rather than while as Prime Minister. She took her prime ministerial papers with her when she resigned in November 1990, under the practice identified publicly five years later by her successor.

Separate conventional rules protect the papers of previous Governments from the prying eyes of their successors.⁵⁵ None of these rules

⁵¹ *Op. cit.*, note 18 above, para. 15.

⁵² *Op. cit.*, para. 16.

⁵³ The limitations, or purported limitations, on the publication of ministerial memoirs are not of direct relevance here. The guidelines in the Radcliffe report (*Report of the Committee of Privy Counsellors on Ministerial Memoirs*, Cmnd. 6386 (1976)) do, however, impose restrictions on the information which former Ministers may properly publish: see below, section V.

⁵⁴ *Op. cit.*, note 18 above, para. 14.

⁵⁵ They were explained by Lord Hunt of Tanworth (see above, note 41).

is contained in *Questions of Procedure for Ministers*. They are not directly relevant here, but they may be shortly summarised in this way. (a) Ministers may not see the Cabinet papers of an earlier Government of a different party (thus preventing the use of them to make party capital); (b) Ministers may normally see the papers of a previous Government of the same party, provided that the need arises from normal ministerial duties; and (c) in any case the Prime Minister seeks the approval of the former Prime Minister concerned (or, if he is not available, the current leader of the relevant party) for access to such papers. No definition is available of exactly what is encompassed in the expression "Cabinet papers".⁵⁶ Clearly, for such a scheme to work, the papers must be within official possession, and must not have been taken away by departing Ministers.

III. THE LEGAL FRAMEWORK

I want now to leave conventional rules aside and to consider two matters of law which are relevant to the control of state papers, namely, copyright and ownership. Matters of enforcement of those, and other, legal rights will be examined later.⁵⁷

A. Copyright

Because the law of copyright has not remained static, when considering the copyright rules in relation to a given state paper it is necessary to apply the copyright law which applied when it was written.⁵⁸ A document written in, say, 1910 will be subject to different copyright rules than one written in 1960; and, of course, copyright does not in any case last indefinitely. I am going to consider the law as it exists now, and which is contained in the Copyright, Designs and Patents Act 1988.

Section 163 of that Act provides that where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties, then the work qualifies for copyright protection, and Her Majesty is the first owner of any copyright in the work. The resulting protection, Crown copyright,⁵⁹ continues to subsist for 125 years after the work was made.⁶⁰ Crown copyright covers all the state papers

⁵⁶ Some specified types of paper are excluded from the rules, and may be seen freely, such as papers which are in the public domain: see Lord Hunt, *op. cit.*, p. 516.

⁵⁷ See below, section V.

⁵⁸ Copyright has been protected by legislation which went back to the eighteenth century, most of which was consolidated in the Copyright Act 1911. In its turn that Act was replaced by the Copyright Act 1956; the governing statute is now the Copyright, Designs and Patents Act 1988.

⁵⁹ 1988 Act, s. 163(2). Crown copyright was enshrined in statute long before that Act, which altered, and indeed cut down, the scope of such copyright.

⁶⁰ 1988 Act, s. 163(3)(a).

which a Minister is likely to create as a consequence of office during his or her tenure.⁶¹ The word “work” is defined in the 1988 Act;⁶² and all of a Minister’s writings fall within the scope of a literary work as recognised by the statute, which in this context simply means any work which is written.⁶³ Thus, for instance, a letter, memorandum or parliamentary speech written by or for a Minister is plainly a literary work.⁶⁴ Anyone holding ministerial office, from the Prime Minister down to the least important Parliamentary Under-Secretary of State, is a servant of the Crown, and indeed holds appointment at the pleasure of the Crown.⁶⁵ All civil servants in the Minister’s department, being Crown servants, are within the scope of section 163. The state papers which a Minister or official will create are obviously created within the course of his or her duties. Section 163 displaces the ordinary copyright rule which vests copyright in the person who (for example) writes a document; but it applies the rule that copyright in work created in the course of a person’s employment vests, in the absence of any agreement to the contrary, in that person’s employer.⁶⁶ When a Minister’s creativity results in a parliamentary Bill, however, that Bill (along with documents created by or under the direction of either House) attracts parliamentary copyright, to which a different copyright period applies,⁶⁷ and Crown copyright does not subsist in it.⁶⁸ Nevertheless, preparatory work done by a Minister on, for example, what becomes a Government Bill or a House of Commons or House of Lords Paper, remains covered by Crown copyright.

As a result, the subsisting Crown copyright in any state paper can be enforced by the Crown, regardless of whether the paper is in a particular Minister’s possession, or is stored in the Cabinet Office or other government depository, or is in the custody of an ex-Minister who has deliberately or inadvertently removed it contrary to the conventional rules, or wherever else the paper may be.⁶⁹ Copyright, in other words, is separate from ownership or possession. That fact allowed the Crown to retain its copyright in the state papers which it

⁶¹ Using the term state papers as defined by the Government: see above, note 20 and associated text.

⁶² See especially the 1988 Act, s. 3(1).

⁶³ 1988 Act, s. 3(1); the expression can also apply to a table or compilation, and to a computer program: *ibid.*

⁶⁴ See, e.g., *British Oxygen Co. Ltd. v. Liquid Air Ltd.* [1925] Ch. 383.

⁶⁵ For the purposes of the 1988 Act, the Crown includes the Crown in right of Her Majesty’s Government in Northern Ireland or in any country outside the United Kingdom to which the Crown copyright provisions of the Act applies, and to the Channel Islands, the Isle of Man, and any colony, if those provisions are extended to any of them by Order in Council: 1988 Act, s. 157.

⁶⁶ See, e.g., 1988 Act, s. 11(2) (employer is the first owner of work made by an employee in the course of employment).

⁶⁷ 1988 Act, ss. 165, 166.

⁶⁸ 1988 Act, s. 163(6).

⁶⁹ The methods of enforcement are all considered together below, in section V.

gave to Churchill College in 1995.⁷⁰ As with any copyright owner, the Crown can license reproduction of copyright material, as provided in the Copyright, Designs and Patents Act 1988.⁷¹

Part of the accumulation of documents which a Minister makes while in office will consist of documents sent to him or her in the course of his or her duties. Copyright in them follows the normal rule, that is, that copyright remains with the creator of the work. So a letter or other document sent to a Minister in such circumstances is protected by copyright owned by the writer.⁷²

B. Ownership

A connected legal issue concerns the ownership of state papers. As a general principle, the owner of a document (as with any other thing) remains the owner of it unless he or she disposes of it, or unless there is an agreement to the contrary. So, for example, a person who writes a letter owns it, but is taken to dispose of it by passing the property in it to the receiver of the letter⁷³ (although the writer retains copyright in it). So (in the inadequate title of this article), who *owns* state papers?

There is no reason to depart from the general rule about the ownership of the medium on which information is recorded by an employee, namely, that as that medium will generally be supplied by the employer at his or her expense, that medium (paper, for example) remains the property of the employer. So the Crown remains the owner of the physical medium on which a Minister or civil servant records information during the course of official duties. It is unlikely that any agreement could be inferred from the relationship between the Crown and Ministers or civil servants which would transfer ownership of paper, used in their work, to individual Ministers or officials, and indeed there is clear evidence to the contrary which will be referred to shortly. Of course, as owner the Crown can sell or give away its property, as it did, for instance, when it gave the state papers in the Churchill archive to Churchill College. In the absence of any sale, gift, or other agreement, the Crown as owner of the paper could pursue an action to protect its rights as against Ministers and others.⁷⁴ Of course, if a Minister or civil servant uses his or her own paper or

⁷⁰ See the reply by the Secretary of State for National Heritage at 259 H.C. Deb. col. 169–170 w (2 May 1995). Copyright in the personal papers in that archive remains in the Churchill trustees: see the same Secretary of State at 259 H.C. Deb. col. 327 w (5 May 1995).

⁷¹ The owners of the copyright in the personal papers in the Churchill archive have granted such a licence, as has the Crown in relation to the state papers in it: see the answer by the Secretary of State for National Heritage at 259 H.C. Deb. col. 326 w (5 May 1995), and by the Prime Minister at 259 H.C. Deb. col. 283 w (4 May 1995).

⁷² See also section 48 of the 1988 Act, which allows the Crown to issue copies of works communicated to the Crown (which includes a Minister) in the course of public business, by or with the licence of the copyright owner.

⁷³ See, e.g., *Oliver v. Oliver* (1861) 11 C.B. (N.S.) 139.

⁷⁴ On that, see section V below.

other means for the production of a document in the course of official duties, ownership of that paper would remain vested in the writer (although the copyright would vest in the Crown).

It is clear from the parliamentary answer, examined earlier, which set out a definition of state papers that the Government is firmly (and rightly) of the view that the Crown owns state papers.⁷⁵ That has been reinforced by the Prime Minister, who was asked⁷⁶ to make a statement about the ownership of top copies of his speeches,⁷⁷ and of treaty agreements signed by him as Prime Minister, and also of the original copies of (i) letters received by him from the Queen, (ii) correspondence or other communications received by him from heads of government, and (iii) correspondence, minutes, records of meetings or other documents and communications with or in relation to or from Ministers or public bodies. Mr. Major replied that papers in all those categories belonged to the Crown, with the exception of top copies of his speeches made in a personal capacity or as a Member of Parliament, and correspondence of a purely personal nature. In giving that answer, Mr. Major confirmed the Government's view that state papers are the Crown's property, and implicitly rejected Churchill's own view expressed at the end of the wartime coalition that some such papers were the personal property of the authors.⁷⁸ That state papers are the property of the Crown is a view which has been taken consistently by senior officials down the years. It was held by, for instance, Sir Maurice Sankey in 1934;⁷⁹ it was also subscribed to publicly by Lord Hunt of Tanworth when he wrote that "In law, all Government records past and present are the property of the Crown: . . .".⁸⁰

IV. SOME TECHNOLOGICAL MATTERS

Before the invention of the typewriter, Ministers wrote their papers in their own hand, or papers were written on their instruction by secretaries. If a copy was wanted, it had to be made by hand. The typewriter made life rather easier: Winston Churchill, for instance, dictated his papers to a shorthand-typist, and then revised the typescript which was presented to him; a few carbon copies could be made as the original was typed.⁸¹ Other Ministers have written some

⁷⁵ It will be recalled that, having set out the Government's view of what constitutes a state paper, the Parliamentary Secretary, Lord Chancellor's Department, went on to query whether "the Crown could claim ownership of any other class of papers", so making it clear that the Crown owns state papers: see above, note 20 and associated text.

⁷⁶ 259 H.C. Deb. col. 128 w (2 May 1995).

⁷⁷ That specific query was no doubt prompted by the presence in the Churchill papers of top copies of Churchill's famous wartime speeches.

⁷⁸ See above, note 33 and associated text.

⁷⁹ See above, note 30 and associated text.

⁸⁰ "Access to a Previous Government's Papers" [1982] P.L. 514 at 515.

⁸¹ Martin Gilbert, *Road to Victory: Winston S. Churchill 1941-1945* (1986), p. 372.

drafts of papers themselves in their own hand, leaving it to secretaries to transcribe them; more recently, some Ministers have used dictation machines. A few Ministers now write on to a personal computer, and nearly all ministerial papers (other than handwritten notes or drafts) are now generated through computers. And for decades the photocopier has made reproduction of documents very easy. What effect have these developing means of recording and reproducing information had on the control of state papers?

When the sale of the Churchill archive was announced some commentators queried whether extensive use of state-of-the-art photocopiers could have saved the taxpayer a large sum. The argument ran that, provided that a comprehensive and accurate photocopy was made of all the papers in the Churchill archive, and provided that the photocopy (or photocopies of it) were kept safe and available for consultation, the originals could have been sold to the highest bidder, whether from the United Kingdom or overseas. To that suggestion there were, however, objections. Some people advanced the cultural or heritage argument: would not generations of people in this country want to be able to see the originals of really significant material, such as the texts from which Churchill addressed the nation at its finest hour? Others advanced the cautious historian's objection: could we be sure that everything had been copied without selection? And others (including the Churchill trustees) pointed out practical difficulties: how long would it take to photocopy 1.5 million pieces of paper, weighing 15 tons? Of course, Churchill and his papers were unique, but technological change is increasingly relevant to the custody and control of contemporary state papers. Obviously, multiple copies can be made of every document which a Minister or civil servant creates and receives, including those that are handwritten, and assuming that comprehensive departmental files are kept of them a complete official archive will exist when the writer leaves a department. It is also true that any Minister could photocopy (or cause to be photocopied) every document which came into his or her possession and, while obeying the letter of the conventional rules about the disposition of the originals on departing from office, could take away a complete set of papers. When documents are created on computer, information so recorded is stored on the computer's hard disk from which an infinite number of copies can be made, both on floppy disks and as hard copies printed from the disks. Indeed, through the use of a scanner, a paper—of which only one typewritten copy may exist—can be read into a computer memory, so that multiple copies can be printed at will, and so that the computer version can be indexed and linked to other documents to which the computer memory has access. Access to that paper, or desired parts of it, and cross-referencing to other documents,

is then very easy.⁸² Yet although matters have come a very long way since the use of a manual typewriter, the conventional and legal régime governing the safe-keeping of state papers is still constructed by reference to that long-gone age. There is little sign of obligations about the control of official documents being cast on Ministers in modern technological terms. The first officially-published version of *Questions of Procedure for Ministers* was released only three years ago, and yet the inference from it is that official papers will exist only as typewritten or printed hard copies, and perhaps photocopies, which is not the case. Indeed, the injunction in *Questions of Procedure for Ministers* that Ministers should destroy certain papers on resignation (rather than, as formerly, return them to the Cabinet Office) may stem from the confidence that multiple copies exist safely in official hands.

In purely practical terms it cannot matter today whether ex-Ministers take away state papers which were in their possession when they leave office. Provided that wholly accurate photocopies are left behind, or the “originals” are left and only photocopies of them are removed, or the documents remain on departmental computer files, what does the state or nation lose? The files are intact for Ministers’ successors, and later on for researchers and interested members of the public.⁸³ The reason for the conventional rule which originally required Ministers to leave behind in their departments papers needed for current administration, and to ensure that all the rest went to the Cabinet Office,⁸⁴ at least in part must have sprung from the need to maintain a complete archive. But that reason withers away as technology advances. That Ministers are constrained by conventional rules approved by the Prime Minister of the day and by rules of law (such as Crown copyright) is explicable no longer only in terms of securing the safety of state documents, but also as a manifestation of the culture of secrecy which still permeates Whitehall. Those rules must now exist primarily to ensure confidentiality of information recorded in state papers. The rules, and the legal remedies which are available to ensure compliance with them, may be said to have more to do with preventing former Crown servants from disseminating official information than with ensuring the completeness of state archives.

⁸² At the moment this technique cannot be used reliably with handwritten documents because of the variation in the characters, even when written by the same person.

⁸³ Admittedly this would not meet the aesthetic or heritage point that there might be an interest in having access to the “original” version, although what is the original version, apart from anything in handwriting, may be a moot point these days.

⁸⁴ Later (and currently) to make sure that non-current papers are destroyed: see above, note 37 and associated text.

V. REMEDIES

Civil servants owe their duty to the Crown as represented by current Ministers. Their obligation of confidence stems from that duty: they are required not to misuse information which they acquire in the course of their duties or to disclose information which is held in confidence within government.⁸⁵ Confidentiality could also be an implied term of any contract of their employment.⁸⁶ Legal action has been taken against former civil servants, notably Clive Ponting⁸⁷ and Peter Wright,⁸⁸ and was contemplated against Cathy Massiter⁸⁹ for alleged misuse of official information. But there has been a marked reluctance to pursue former Ministers. (The remedy for misbehaviour of Ministers while in office is dismissal or resignation—a very potent deterrent and penalty for the politically ambitious.) With the exception of the unsuccessful attempt to stop the publication of the uncensored Crossman Diaries, ex-Ministers have in effect been immune from attempts to use the law to keep them within conventional and legal rules which are designed to prevent publication of information obtained while they were in office.⁹⁰ One reason for this ministerial immunity may flow from the tacit condonation of the routine leaking which all Ministers carry out for their own purposes while in office; for it would be a bit rich for Ministers to try to prevent further leaking after ministerial colleagues had left office while they themselves practise it daily while in government.⁹¹ Another reason may be that the conventional regime has lacked teeth, as the Crossman Diaries saga, and the publication of some former Ministers' memoirs in defiance of the Radcliffe guidelines,⁹² have shown. And the former convention⁹³

⁸⁵ *Civil Service Management Code* (1993), principle 4.1.3.

⁸⁶ As to whether such contracts exist, see Sandra Fredman and Gillian Morris, "Civil Servants: A Contract of Employment?" [1988] P.L. 58 and "Judicial Review and Civil Servants: Contracts of Employment Declared to Exist" [1991] P.L. 485.

⁸⁷ *R. v. Ponting* [1985] Crim. L.R. 318.

⁸⁸ *Attorney-General v. Guardian Newspapers Ltd.* [1990] 1 A.C. 109.

⁸⁹ Her revelations about some (arguably unlawful) activities of MI5 were made in breach of the Official Secrets Act 1911, s. 2, but her motive was to see proper systems of accountability re-established in the Security Service. The Attorney-General decided not to launch a prosecution.

⁹⁰ Prosecutions of Ministers for any offence, other than for motoring offences, have been rare. But a recent example was the prosecution in 1995 of Alan Stewart, a junior Scottish Office Minister, for causing a breach of the peace; he resigned from the Government, and was later fined. Edgar Lansbury, the son of George Lansbury (who had been a Minister in the 1929 Labour Cabinet) was prosecuted in 1934 under the Official Secrets Act 1911, s. 2 for publishing memoranda which his father had submitted to the Cabinet. George Lansbury was not charged: see Sir William Anson, *The Law and the Constitution* (4th ed., 1935), vol. 2, p. 122.

⁹¹ See Rodney Brazier, "Post-Resignation Explanations" [1990] P.L. 300 at 302–303.

⁹² Tony Benn, Barbara Castle and Hugh Jenkins refused to submit the manuscripts of their books. James Prior and Francis Pym did not submit their manuscripts for vetting because they believed that their books were outside the Radcliffe guidelines (despite Lord Prior's book being a revealing account of the Thatcher Government). See further Brazier, *op. cit.*, at 305.

⁹³ It is set out by Jennings, *op. cit.*, note 28 above p. 267.

that ex-Ministers must seek the Prime Minister's permission before referring in public to Cabinet discussions in order to explain their resignations has disappeared, simply because too many ex-Ministers have not followed it.⁹⁴ A Minister can take papers away on resignation in breach of the conventions, confident that no legal action will follow. Former Ministers might also think, with some justification, that their former ministerial colleagues, and their successors, will prefer to take no action of any kind, for fear of inviting accusations of hypocrisy, or of trying to keep the lid on the workings of Westminster and Whitehall despite living in an officially-proclaimed era of open government.⁹⁵ The only alternative would be to resort to the law (or to threaten to do so): and it is easy to appreciate that Ministers would much prefer, for those same reasons, not to do so against former colleagues unless it was unavoidable. And yet a battery of legal remedies is in place which could circumscribe what ex-Ministers, as well as former civil servants, do with state papers which have been removed improperly, and with information which they acquired while in Crown service.

Given that the Crown owns state papers, the unauthorised removal of any such papers could amount to theft.⁹⁶ Much would turn on whether dishonesty could be proved, and in considering that question a jury⁹⁷ might be swayed by the ex-Minister's or ex-civil servant's motive in removing the material. A jury might be more prepared to find dishonesty in an ex-Minister who took documents in order to make money, and perhaps might be less prepared to do so if he or she wished to use them in order to whistleblow on wrongdoing. A prosecution could also result from any breach of the Official Secrets Act 1989 by a former Minister or civil servant. Suppose that a resigning Minister or official took files away which contained information the disclosure of which the Act seeks to prevent.⁹⁸ Now the Act (so far as relevant here) permits disclosure of such information by a Crown servant "if, and only if, it is made in accordance with his official duty", and such disclosure constitutes a defence under the Act.⁹⁹ Those provisions, however, apply to a Minister or civil servant *in office*.¹⁰⁰ A former Minister or official is no longer a Crown servant and has no

⁹⁴ Such ex-Ministers include Michael Heseltine and Nigel Lawson: see Brazier, *op. cit.*, p. 302. There is no reference to the convention in *Questions of Procedure for Ministers*.

⁹⁵ See the White Paper, *Open Government*, Cm. 2290 (1993).

⁹⁶ Theft Act 1968, s. 1—the dishonest appropriation of property belonging to another, with the intention of depriving that other of it.

⁹⁷ For the decision on whether an accused was dishonest is a question of fact for the jury: see, e.g., *R. v. Ghosh* [1982] Q.B. 1053.

⁹⁸ Information so protected is described in the Act, ss. 1–4, and concerns security and intelligence, defence, international relations, and crime.

⁹⁹ 1989 Act, ss. 7(1), 12(1).

¹⁰⁰ While in office it would be a bold (but possibly correct) argument that "briefing" by Ministers (the respectable form of leaking) is done in accordance with their official duty, because it is the routine practice of governments of both political parties.

official duty by virtue of which he or she could lawfully disclose information acquired while in government. Indeed, the Act refers in places¹⁰¹ to disclosure by a person "who is or has been a Crown servant", and where it does so an ex-Minister or former official would clearly be at risk of prosecution for disclosure in appropriate cases. So if a former Minister or official were to publish the papers which he or she had removed, or were to publish the information contained in them, when disclosure was prohibited by the Official Secrets Act 1989, he or she would be liable to prosecution.¹⁰² Moreover, the Act creates offences relating to the safeguarding of information.¹⁰³ For example, a Minister or civil servant who has in his or her possession any document or other article which it would be an offence to disclose commits an offence if he or she retains it contrary to his or her official duty.¹⁰⁴ The essence of that is what is meant by retention contrary to official duty: but it seems clear on the face of it that a resigning Minister who takes away documents containing protected information commits this offence.¹⁰⁵ That is a powerful incentive not to remove state papers which contain information protected by the Official Secrets Act 1989, and the Act may provide an indirect way of ensuring compliance with official rules about state papers. Any prosecution under the Official Secrets Act 1989 has to be conducted by the Attorney-General or with his consent.¹⁰⁶

What of the civil law? The Crown could enforce its rights to ownership of a state paper which had been taken away by a resigning Minister or civil servant through an action in conversion.¹⁰⁷ Crown copyright could be protected by using the remedies provided by the Copyright, Designs and Patents Act 1988,¹⁰⁸ provided, of course, that the paper was published wrongfully rather than just retained privately. Breach of copyright would be more difficult (though not impossible) to prove if the former Crown servant incorporated the gist of Crown copyright documents indirectly in published memoirs rather than publishing verbatim extracts. An action based on breach of confidence

¹⁰¹ See 1989 Act, ss. 2(1), 3(1), 4(1).

¹⁰² Indeed, that Act could have a linked effect: any former Minister who published a manuscript without submitting it to the Secretary of the Cabinet for vetting in accordance with the Radcliffe guidelines would risk committing an offence if he or she were to make a disclosure which the Act forbade. If a draft were submitted the Secretary would insist that any such information be deleted.

¹⁰³ 1989 Act, s. 8.

¹⁰⁴ *ibid.*, s. 8(1)(a).

¹⁰⁵ It is a defence for the Crown servant to prove that he believed that he was acting in accordance with his official duty and had no reasonable cause to believe otherwise: *ibid.*, s. 8(2).

¹⁰⁶ 1989 Act, s. 9.

¹⁰⁷ Torts (Interference with Goods) Act 1977, ss. 1, 3.

¹⁰⁸ These remedies are set out in ss. 96–115. The Act confirms that actions for damages, injunctions, and accounts are available (s. 96), and specifies how enforcement may be sought (ss. 99–100). Criminal offences exist of dealing for gain contrary to copyright (s. 107).

(to which breach of copyright may also be relevant) requires fuller consideration.¹⁰⁹

The Crossman Diaries and *Spycatcher* cases proved to be unsuccessful endeavours by the Crown to stop publication of official information by, respectively, a former Minister (and later his literary executors) and a former civil servant, Peter Wright. The books *Diaries of a Cabinet Minister* and *Spycatcher* were published unabridged, despite the Attorney-General's best efforts to prevent this happening.¹¹⁰ And yet those cases did fashion remedies which, in certain circumstances, could be used against a former Minister or former civil servant who declined on leaving office to follow instructions about the disposal of state papers which were in his or her possession. It is not necessary to analyse in any detail *Attorney-General v. Jonathan Cape Ltd.*¹¹¹ or *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*.¹¹² Those cases establish the rule that an action based on breach of confidence could lie against an ex-Minister or ex-civil servant to restrain the publication of state papers, or information from them, which had been obtained in the course of official duties. To succeed, the Government would have to prove both that the former Minister's or civil servant's conduct in relation to the papers was in breach of confidence, *and* that the publication was contrary to the public interest. The information contained in the papers must be confidential—as much unpublished material contained in state papers would be—and the court would have to be satisfied in addition that it would be in the public interest to restrain publication of those secrets. The Government failed in both the Crossman Diaries and *Spycatcher* cases because the confidential nature of the material had ceased to exist by the time a final remedy was sought.¹¹³ If all possible damage to the Crown's interests has already taken place through publication, no restraining injunction will be imposed. The Crown will not obtain a remedy for breach of confidence just in order to further official secrecy. In an action between

¹⁰⁹ See generally Francis Gurry, *Breach of Confidence* (1984); Raymond Wacks, *Personal Information: Privacy and the Law* (1989); David Feldman, *Civil Liberties and Human Rights in England and Wales* (1993), pp. 642–666.

¹¹⁰ After the *Spycatcher* case the law was changed to make it an offence for a member or former member of the security and intelligence services to disclose information relating to security or intelligence: Official Secrets Act 1989, s. 1.

¹¹¹ [1976] Q.B. 752. On that case, see Hugo Young, *The Crossman Affair* (1976).

¹¹² [1990] 1 A.C. 109; (1991) 14 E.H.R.R. 153. On this case, see D.G.T. Williams, "Spycatcher" [1989] C.L.J. 1; Yvonne Cripps, "Breaches of Copyright and Confidence: The Spycatcher Effect" [1989] P.L. 13; Eric Barendt, "Spycatcher and Freedom of Speech" [1989] P.L. 204; Ian Leigh, "Spycatcher in Europe" [1992] P.L. 200; Peter Birks, "A Lifelong Obligation of Confidence" (1989) 105 L.Q.R. 501.

¹¹³ The events described in the Crossman Diaries had taken place 10 years earlier, and no issue of national security arose; in *Spycatcher*, the book had already been published around the world, and the contents were no longer confidential—although the House of Lords held that the *Sunday Times* must account for profits in relation to an article which it had published before the book became widely available and which was based on information from Peter Wright which had not been published before.

private parties proof of a publication in breach of confidence is enough. But, as Lord Keith put it in the *Spycatcher* case,¹¹⁴ “The Crown . . . as representing the nation as a whole, has no private life or feelings capable of being hurt by the disclosure of confidential information.”¹¹⁵ The Crown would have to show that, for example, publication in breach of confidence of information not already published would harm the public interest because it would prejudice national security, or because it might endanger the life of a serving intelligence officer. By contrast, if the papers, for instance, merely traced the way in which a policy idea developed within a department, and then went through a Ministerial Committee and then through the Cabinet, an action for breach of confidence would probably not, without more, lie. Such a “public domain” defence does not, however, defeat an action for breach of copyright. In the *Spycatcher* case Lords Keith, Brightman and Griffiths were of the opinion that neither Peter Wright nor his publishers had an *enforceable* copyright in the book because of Wright’s wrongdoing, but that Wright held any copyright on constructive trust for the Crown.¹¹⁶ If that is correct,¹¹⁷ an ex-Minister or ex-civil servant who reproduced state papers improperly might be pursued through an action for breach of copyright in which the public domain defence would be of no avail. His or her only defence in such an action would be that it was in the public interest that the documents be published.¹¹⁸ Clearly, the disseminator’s motive would be material: genuine whistleblowing to expose iniquity would be one thing, removal and publication purely for gain quite another.¹¹⁹ The Crown might also wish to prevent a former Minister or civil servant from profiting from the improper use of state papers. As in the *Spycatcher* case, this could be done by seeking an account of profits flowing from the breach of confidence, and it is clear that such a remedy could be obtained if, for instance, the papers were sold to the highest bidder, or were reproduced in breach of confidence or copyright.¹²⁰

It would be objectionable if these legal remedies were to be used like a blunderbuss to protect the state’s papers and intellectual property

¹¹⁴ [1990] 1 A.C. 109 at 256.

¹¹⁵ See also *Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485: “It is unacceptable, in our democratic society, that there should be restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action”: *per* Mason J. at 492–493.

¹¹⁶ [1990] 1 A.C. 109 at 262–263, 266, 275–276, 288; and see Cripps, *op. cit.*, at 14–15.

¹¹⁷ The Crown had disclaimed any intention of relying on copyright during the hearings, and so the point was not fully argued. In any case, where the publication complained of was of an original literary work made by a former Crown servant, it would be more difficult to trace Crown copyright to it.

¹¹⁸ *Lion Laboratories v. Evans* [1985] Q.B. 526.

¹¹⁹ Of course, it might not necessarily be easy to distinguish the two in a particular case.

¹²⁰ This follows from the *Spycatcher* case, and is a recognised form of remedy: see, e.g., *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96.

against any alleged misuse. The courts are now alive to the issues of free speech and freedom of information in cases like *Spycatcher*; and indeed the Government has now burned its fingers twice in high-profile cases while trying to prevent official information from being published. Perhaps resort may be had to the law in future only in extreme circumstances. A major restraint on a Government which contemplated going to law ought to be the derision which it would invite if the information which it was seeking to keep secret was innocuous, or was already in the public domain, although an action for an account of profits might be justifiable if it were the principal remedy sought to recover for the Crown its financial due. It should also be borne in mind that most (though certainly not all) Ministers and ex-Ministers keep within official guidelines about state papers, and do so not through fear of court action against them, but through a desire to do the “right” thing, and through loyalty to their colleagues and former colleagues. In cases in which those restraints give way, however, the law provides a range of remedies the use of which will be tempered only by the political repercussions of using them. Ministers might form the view in a given case that legal rights should not be pursued—and the Attorney-General may properly take account of any such view.¹²¹ Ministers might even change the non-legal rules: the framework of conventional rules can be changed at will and at any time by the Prime Minister, as, in relation to state papers, both Winston Churchill and John Major have shown.

VI. CONCLUSION

On leaving office each President of the United States is now legally obliged to donate his presidential papers to the nation. No payment is made, and indeed no public money is used to build a library in which to house them (although they can be stored without charge in the National Archives in Washington). The public has the right of access to such presidential papers, and of course more generally to information under the Freedom of Information Act. Things are ordered very differently in this country. Outgoing Prime Ministers have been able to remove copies of all the documents they wish, and to dispose of them as they please—even for private profit without any compensation to the state in whose service the papers were generated. (Whether this will stop after Mr. Major’s recent initiative¹²² we can

¹²¹ See J. Ll. J. Edwards, *The Law Officers of the Crown* (1964), chapters 10, 11, and *The Attorney-General: Politics and the Public Interest* (1984), chapter 11. The Attorney-General did not take the opinion of other Ministers when deciding whether to initiate a prosecution against Clive Ponting in 1985: see 73 H.C. Deb. cols. 737–830 (18 February 1985).

¹²² See above, note 43 and associated text.

only wait and see.) Former Ministers are enjoined not to remove any state papers, most of which will be kept hidden away in official custody until they are released decades later under the Public Records Acts. Attempts are made to ensure that literary accounts of government service are published only after they have been censored. And those attempts can now be reinforced by the implicit threat of prosecution, in certain circumstances, under the Official Secrets Act 1989, a development which has not been generally recognised so far.

What can the state legitimately demand of its former servants in their treatment of state papers and the publication of information? Continuity of efficient government certainly requires the maintenance of complete official records, which developing technology will easily provide almost without the need for controls on what an individual does with state papers on leaving public service. Frank exchanges of views and advice within government might be said to require restraint on the publication of accounts of such exchanges, but given the many detailed descriptions which have been published within very short times of them taking place, and without the heavens falling as a result, perhaps rather too much has been made of that justification for censorship. Of course, essential secrets about vital matters must be kept secret. What, then, can citizens legitimately expect of their former servants? Perhaps accountability is the wrong word, but at least interested citizens will want to read *accounts* of public service. Although some dissimulation is inevitable in political memoirs, that is no reason to dismiss such accounts as being of no public importance; and authors should be enabled to get their *facts* right—which requires access by them to information which they had while they were in public service. More fundamentally, citizens have a *prima facie* right to information acquired on their behalf by Crown servants, and that means both that censorship must be kept to a minimum and that as many state papers as possible should be put in the public domain as soon as possible. The conventional and legal rules governing all those matters do not incontrovertibly recognise the legitimate demands of the state and the nation.