

CAB 103 / 816

Part 2 of 2



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20 July 1995

*Dear Jim*

**COPYRIGHT MATERIAL IN THE CHURCHILL ARCHIVE**

Thank you for sending me a copy of your note of our meeting with the Keeper of the Archive Centre, Churchill College, on 7 July 1995.

30

What we have in mind is to provide Dr Piers Brendon with a letter setting out what we consider to be the material in which Crown Copyright subsists which he can show to anyone, including the Churchill family, if and when the Archive Centre is asked for access to the material for commercial copying purposes.

I have this in hand and shall be clearing it with Michael Carpenter when he returns from leave the week after next.

I wondered if it might be a good thing to start the letter off, or at least include in it, an explanation of the various periods of protection. I seem to recall that Dr Brendon was somewhat bewildered when the many and various periods which may apply were mentioned in discussion. It would probably be useful to him to have something down on paper.

Michael Carpenter would probably do this but as he is away and as I rashly undertook to try to let Dr Brendon have the letter by the end of the month or shortly afterwards, I wondered if you could supply something! What I had in mind was something along the lines of your paragraph 3 but expanded into a sort of "child's guide". Would it be possible for you to draft something along those lines for me to include in the letter?

If this is not practicable and/or you wish to discuss, please do not hesitate to get in touch.

*Yours ever*  
*Pat*  
MISS P M ANDREWS

*Jim rang 21/7 &  
said he will produce  
something by Thurs next  
21/7.*

Faculty of Law

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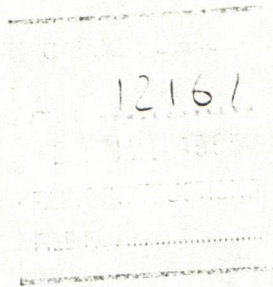


THE UNIVERSITY  
of MANCHESTER



18 July 1995

Sir Robin Butler, GCB, CVO  
Cabinet Office  
70 Whitehall  
LONDON SW1A 2AS



*Revision 1a*

Dear Sir Robin

I am very grateful to you for your letter of 3 July 1995, which was most helpful. As requested, I enclose a copy of the latest version of the draft article.

Yours sincerely

*Rodney Brazier*

## 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.<sup>1</sup> 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, especially so that they 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 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 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 twenty people twenty years to separate out into state and personal papers. That claim was disputed by the Attorney-General during the friendly action which was abandoned when agreement was reached with the National Heritage Memorial Fund.<sup>2</sup> 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.<sup>3</sup> 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."<sup>4</sup> 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".<sup>5</sup>

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.<sup>6</sup> These will include agendas, minutes, and supporting papers prepared for the Cabinet and for Ministerial Committees.<sup>7</sup> 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 organizations, 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 during his or her ministerial career 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.<sup>8</sup> The term "public records" is defined<sup>9</sup> 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.<sup>10</sup> The drafter of that Act used the term which is to be defined ("records") in the definition 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, section 2, would not have helped, either.<sup>11</sup> 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 servants<sup>12</sup>) - 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.<sup>13</sup> 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.*<sup>14</sup> (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 judgement the Lord Chief Justice referred in some detail to the practices surrounding access to and control of Cabinet papers.<sup>15</sup> He took it for granted, however, that everyone understood what is 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 1932<sup>16</sup> 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.<sup>17</sup> Although that is no more than a list, there could be no argument but that documents within it do constitute state papers.

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*<sup>18</sup> 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".<sup>19</sup> 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 of 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,<sup>20</sup> 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.<sup>21</sup>

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. Most documents would not have been created (or the Minister would not have caused

them to be created<sup>22</sup>) 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 Committee<sup>23</sup> papers; documents sent to and received from other Ministers, and to and from civil servants; correspondence with other Governments and international organizations; departmental correspondence with MPs, peers, and constituents which touch on the Minister's work; party documents which concern his ministerial work; texts of speeches delivered as a Minister; and the Minister's drafts of all such documents. The Parliamentary Secretary, Lord Chancellor's Department, left open<sup>24</sup> whether other papers of a wider class would be within the definition 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 keep them on the straight and narrow.<sup>25</sup> In that spirit, those rules which are of the greatest practical importance in relation to state papers are conventional in character.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The First World War, however, generated a vast amount of 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 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.<sup>29</sup> 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.<sup>30</sup> Accordingly, the Secretary to 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 for 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> Attlee 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.<sup>35</sup> 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.<sup>36</sup>

#### *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:<sup>37</sup>

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 ....<sup>38</sup>

Thus a Minister who resigns, leaving his or her Government 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, 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. That may leave a significant lacuna in the rule. 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 M.P.s and peers and with people outside the Government and Parliament,

are not Cabinet papers, and are accordingly exempt from the conventional rule and so can be taken away. The Secretary to 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, and which are 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 Secretary's view, embrace other documents created or received by Ministers, such as official correspondence.<sup>39</sup> On that basis, it would seem that an outgoing Minister could take away many documents. 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<sup>40</sup> and could not be removed anyway. That second submission would be more compelling than the first, but 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 to the Cabinet, Lord Hunt of Tamworth.<sup>41</sup> 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.<sup>42</sup> 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 that 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:<sup>43</sup>

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

The Secretary to the Cabinet has confirmed to me that outgoing Prime Ministers take only copy documents: the top, or official, copies of such material remain in official hands.<sup>44</sup> 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.<sup>45</sup> 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:<sup>46</sup>

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.

That 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 as such Ministers. 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 cart off removal van loads of papers from Number 10 at the end of a Government should not arise from a worry that, if papers were left, the writing of profitable memoirs would be more difficult,<sup>47</sup> 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,<sup>48</sup> or be kept for financial gain,<sup>49</sup> or even perhaps to keep them from inquisitive researchers.<sup>50</sup> It will take more than a statement 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*.<sup>51</sup> 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 over 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 comment<sup>52</sup> 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.<sup>53</sup> To help them, *Questions of Procedure for Ministers* states:<sup>54</sup>

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.<sup>55</sup> None of these rules is contained in *Questions of Procedure for Ministers*. They are not directly relevant here, but they may be shortly summarized 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".<sup>56</sup> Clearly, for such a scheme to work, the papers must be within official possession, and must not have not 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.<sup>57</sup>

### *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.<sup>58</sup> 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,<sup>59</sup> continues to subsist for 125 years after the work was made.<sup>60</sup> Crown copyright covers all the state papers which a Minister is likely to create as a consequence of office during his or her tenure.<sup>61</sup> The word "work" is defined in the 1988 Act;<sup>62</sup> and all of a Minister's writings fall within the scope of a literary work as recognized by the statute, which in this context simply means any work which is written.<sup>63</sup> Thus, for instance, a letter, memorandum or parliamentary speech written by or for a Minister is plainly a literary work.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> When a Minister's creativity gels into 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,<sup>67</sup> and Crown copyright does

not subsist in it.<sup>68</sup> 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.<sup>69</sup> 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 gave to Churchill College in 1995.<sup>70</sup> As with any copyright owner, the Crown can license reproduction of copyright material, as provided for in the Copyright, Designs and Patents Act 1988.<sup>71</sup>

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.<sup>72</sup>

### *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 letter<sup>73</sup> (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.<sup>74</sup> Of course, if a Minister or civil servant uses his or her *own* paper or 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.<sup>75</sup> That has been reinforced by the Prime Minister, who was asked<sup>76</sup> to make a statement about the ownership of top copies of his speeches,<sup>77</sup> and of treaty agreements signed by him as Prime Minister, and 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 belong 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.<sup>78</sup> 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;<sup>79</sup> it was also subscribed to publicly by Lord Hunt of Tamworth when he wrote that "In law, all Government records - past and present - are the property of the Crown: ...".<sup>80</sup>



#### 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.<sup>81</sup> Other Ministers have written some 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 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 comes 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, on both 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.<sup>82</sup> 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 only released three years ago, and yet the inference from it is that official papers will only exist 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 provided that the "originals" are left and only photocopies of them are removed, or provided that 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.<sup>83</sup> 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,<sup>84</sup> 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.

## 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.<sup>85</sup> Confidentiality could also be an implied term of any contract of their employment.<sup>86</sup> Legal action has been taken against former civil servants, notably Clive Ponting<sup>87</sup> and Peter Wright,<sup>88</sup> and was contemplated against Kathy Massiter<sup>89</sup> 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.<sup>90</sup> 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 Ministers have left office while they themselves do it daily while in government.<sup>91</sup> 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,<sup>92</sup> have shown. And the former convention<sup>93</sup> 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.<sup>94</sup> A Minister can take papers away on resignation in breach of the conventions, believing that no legal action was likely. Former Ministers might also think, with some justification, that their former ministerial colleagues, and their successors, might 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.<sup>95</sup> 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 unauthorized removal of any such papers could amount to theft.<sup>96</sup> Much would turn on whether dishonesty could be proved, and in considering that question a jury<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> Those provisions, however, apply to a Minister or civil servant *in office*:<sup>100</sup> a former Minister or official is no longer a Crown servant and has no official duty by virtue of which he or she could lawfully disclose information acquired while in government. Indeed, the Act refers in places<sup>101</sup> 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 open to prosecution.<sup>102</sup> Moreover, the Act creates offences relating to the safeguarding of information.<sup>103</sup> 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.<sup>104</sup> The essence of that is what is meant by retaining the document or article 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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> Crown copyright could be protected by using the remedies provided by the Copyright, Designs and Patents Act 1988,<sup>108</sup> provided, of course, that the paper was published rather than just retained privately. Breach of copyright would be more difficult (though not impossible) to prove if the former Crown servant did not publish verbatim extracts from Crown copyright documents, but incorporated the gist indirectly in published memoirs. An action based in breach of confidence (to which breach of copyright may also be relevant) requires fuller consideration.<sup>109</sup>

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.<sup>110</sup> 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.*<sup>111</sup> or *Attorney-General v. Guardian Newspapers (No. 2) and Others.*<sup>112</sup> Those cases establish 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.<sup>113</sup> 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 private parties proof of a publication in breach of confidence is enough. But, as Lord Keith put it in the *Spycatcher* case,<sup>114</sup> "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."<sup>115</sup> 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.<sup>116</sup> If that is correct,<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> The Crown might also wish to deny 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.<sup>120</sup>

It would be objectionable if these legal remedies were to be used like a blunderbuss to protect the state's papers and intellectual property 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 protect 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. It will be for the Attorney-General - exercising his quasi-judicial rather than his ministerial functions - to decide in a particular case whether to go to law to protect state papers. His discretion could be an important limiting factor on action. There is another, too: that of ministerial advice to the Crown. The Crown does not exercise its rights in a vacuum, but will do so in normal circumstances on the advice of Ministers. Not only might Ministers 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<sup>121</sup> - they might even change the actual rules. Certainly, 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 money must be raised privately 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 obviously 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 initiative<sup>122</sup> we can 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 so far been generally recognized.

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 recognize the legitimate demands of the state and nation.



## Footnotes

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1. The papers were bought on behalf of the specially-constituted Sir Winston Churchill Archive Trust. The papers could now only be resold 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. 24 (written answers 6 June 1995).
  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. 978 (27 April 1995).
  4. *Ibid.*
  5. 259 H.C. Deb. 283 (written answers 4 May 1995).
  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), chapter 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.
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 Lord Widgery C.J., *ibid.*, at 764-765, 767-768.
16. 86 H.L. Deb. 527 (21 December 1932).
17. [1976] Q.B. 752 at 766.
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 paragraphs 14, 15, 6, 10, 12.
20. 259 H.C. Deb. 566 (written answers 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 may be held in private hands, normally only when permission exceptionally has 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.
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.
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).
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.*, paragraph 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 paragraph 14 will be considered below: see note 54 and associated text.
39. Letter to me from Sir Robin Butler.
40. The question of ownership will be looked at below in section III.
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. 281 (written answers 4 May 1995).
44. Letter to me from Sir Robin Butler.
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. 281 (written answers 4 May 1995).
47. Since 1918 all 14 retired Prime Ministers have published autobiographical accounts bar 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), and Sir Anthony Eden (to the University of Birmingham).
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.
51. *Op. cit.*, paragraph 15.
52. *Op. cit.*, paragraph 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.*, paragraph 14.
55. They were explained by Lord Hunt of <sup>W</sup>Tamworth (see above, note 41).
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).
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 programme: *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.
70. See the reply by the Secretary of State for National Heritage at 259 H.C. Deb. 169-170 (written answers 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. 327 (written answers 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. 326 (written answers 5 May 1995), and by the Prime Minister at 259 H.C. Deb. 283 (written answers 4 May 1995).
72. See also s. 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.
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. 128 (written answers 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.
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.
85. *Civil Service Management Code*, 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] Criminal Law Review 318.
88. *Attorney-General v. Guardian Newspapers Ltd and Others* [1990] 1 A.C. 109.
89. Her revelations about some (arguably unlawful) activities of MI5 were in breach of the Official Secrets Act 1911, s. 2, but her motive was to see re-established proper systems of accountability 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. 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 MSS. of their books. James Prior and Francis Pym did not submit their MSS. 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.*, p. 267.
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.
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 MS. without submitting it to the Secretary to 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 for dealing for gain contrary to copyright (s. 107).
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 that 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.

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 criticize 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 recognized form of remedy: see, *e.g.*, *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96.
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. 737-830 (18 February 1985).

122. See above, note 43 and associated text.



NAO 64

FACSIMILE TRANSMISSION ADVICE

National Audit Office  
Buckingham Palace Road  
Victoria  
London SW1W 9SP

DATE: 18/7/95

Telephone 0171 798 7000  
Facsimile 0171 233 6455

TO RECIPIENT:  
If this transmission is  
incomplete, please telephone,  
0171-798-7451 IMMEDIATELY on  
receipt.

TO: Pat Andrews

FAX NO: 0171-270 5828

CC: \_\_\_\_\_

FAX NO: \_\_\_\_\_

FROM Kate Wakeman (Nigel Gale's Secretary)

No. OF FOLLOWING PAGES 1

NOTES



Return to: NIGEL GALE

Room No: C418 Ext: 7483

Time Sent: .....

Please RING/POST\* when ready

\*Delete as appropriate

**PAT ANDREWS**

Thank you for your fax of 17 July 1995, Re: Churchill Papers.

All suggested changes have been incorporated into the Draft letter.

Thanks again

**Kate Wakeman**  
**(Nigel Gale's Secretary)**

*Asked for a copy of the letter as sent  
21/7/95.*



Michael Carpenter, Esq.,  
Treasury Solicitor's Department,  
Queen Anne's Chambers,  
28 Broadway,  
London SW1H 9JS.

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ACT 2000

CABINET OFFICE
95/562
19 JUL 1995
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cc. Miss P.M. Andrews, Cabinet Office  
W.H. Godwin, Esq.

CHURCHILL ARCHIVES : FOLLOW UP

Thank you for the copy of your minute of 10 July to Pat Andrews. I am content that the structure set out in Bill Godwin's draft paper of 7 June should be the basis of the submission to Sir Robin Butler. However, if our objects are to be achieved, I feel we should resolve some of the issues which Bill has set out, or at the very least set out the options and their implications more clearly, before the submission goes to Sir Robin Butler so that he gets clear and firm recommendations for action .

Bill has responded to my comments on that draft and has undertaken to consider some redrafting to take account of them. I hope that he will excuse me if I use this letter to you, copied to him and Pat Andrews, to respond to the points made in his minute to you of 14 June. In doing so I refer again to the paragraphs in his draft.

1. Paragraph 1 :

I take Bill's point. My only doubt is whether the 1917 decision established a new convention in respect of the authority of each administration. In the absence of formal Cabinet records before 1916 it is difficult to know ; though it is true that it was only the inception of regular Cabinet records which rendered it unnecessary for former ministers to retain Cabinet documents. Certainly conventions about the use and retention of Cabinet documents existed before 1917 ; and the autonomy of each administration, or each prime minister, appears to have been recognised. Perhaps the penultimate sentence of the paragraph might read 'The first formal recording of the convention by the Cabinet was in 1917 ; since then the rules have been varied on several occasions.'?

2. Paragraph 2 :

Again I take Bill's point, but it would be risky, in view of the problems encountered in the preparation of the Churchill case and the nature of the Churchill Archives and presumably other collections to deal only with Cabinet papers and not departmental and other official ministerial papers. Secondly, so many Cabinet papers start life as departmental papers that to do so would frustrate the purpose of the exercise. This appears to have been recognised in the case of the Callaghan Papers (Annex B).

### 3. Paragraph 5 :

The trust deed by Lord Randolph Churchill was indeed drawn up on 8 March 1893 in response to a Foreign Office circular of 6 December 1892 seeking to ensure safe keeping of printed papers circulated inter alia to the Cabinet and their safeguarding after the death of a former minister or senior official. The subsequent treatment of Lord Randolph's papers demonstrates the ineffectiveness of such arrangements.

### 4. Paragraph 9 :

I accept Bill's distinction between documents sent out in the course of administration and those retained as records and hence agree that there is little between us on custody and creation, though I think that it follows from that distinction that custody also determines status. The difficulty is the status of Cabinet and other official documents retained by ministers and former ministers. Are they akin to documents sent out in the course of administration or to those held as records in the Cabinet Office and departments - or for that matter in the PRO? This is why I laid such stress on custody of ministerial papers and contractual arrangements to control them, not only for purposes of access, in paragraphs 31-34 of my paper on Control over Ministerial Papers.

### 5. Paragraph 10 :

Bill's comments in paragraph 13 of his minute of 14 June clarify the point, but might usefully be carried forward into the text of the final submission so as to make it clear that these conditions need to form part of the wider conditions accepted by ministers on appointment. If the principle that official documents can only be on loan to ministers can be won, then Bill is probably right that this need not be addressed at this stage. But I believe that this will be difficult to achieve, especially if we go beyond Cabinet documents. It might therefore be safer to leave in some provision for conditional deposit of ministerial papers in institutions, as meeting the legitimate interest of former ministers in preserving publicly a collection of their ministerial papers and discouraging any ideas of future sales of such papers. This would reinforce the Lord Chancellor's role envisaged in Bill Godwin's draft paper.

### 6. Paragraph 17 :

I am not sure that Bill's suggested amendment does not go too far. I think the Northern Ireland Office and PRONI would regard discretion as being overtaken by current practice, which, as in Scotland, effectively adopts administratively the statutory position in England and Wales. The issue is whether there are safeguards for public records in Northern Ireland which go beyond the position in England and Wales. I do not think this is so.

In paragraph 12 of his minute of 14 June Bill asked about the delegation of the Lord Chancellor's statutory powers. The Public Records Act 1958 divides the statutory supervisory duties and powers between the Lord Chancellor and the Keeper. Until recently the view was taken that the Lord Chancellor could delegate his powers, where appropriate, to officers of his own department but not to PRO officers. When the PRO became an executive agency the Lord Chancellor delegated certain powers to the Keeper and these were outlined in Annex B of its framework document, of which I enclose a copy.

It may be helpful to comment on Annex C to your minute of 10 July, which is a note by Bill Godwin on the legislative position. I have already commented on the question of the constitutional conventions referred to in paragraph 1. I am sure that Bill is right in practice in paragraph 2, though I wonder what the Attorney-General would do about an application for a relator action? In paragraph 9 we can be positive about disposal of records otherwise than by permanent preservation or destruction. There are many classes of such records, in addition to those deposited under section 4(1) of the 1958 Act; indeed there were under the provisions of the earlier legislation, which in this respect the 1958 Act continued, with the Lord Chancellor replacing the Master of the Rolls as the presenting authority. Incidentally, the institutions to which they have been presented include institutions in Scotland, Northern Ireland and Commonwealth and foreign countries; and the records extend not only to those of England and Wales but also to those of public record bodies in or exercising functions throughout the United Kingdom and overseas. It might be sensible therefore to remove the reference to the position in England and Wales, particularly when we are concerned primarily with ministerial records which are unlikely to be restricted territorially in their ambit or location.

On the question of copyright (happily your contribution to the submission) doubtless you will have seen discussions of the possible impact of harmonisation of copyright laws, both within the EU and more widely, on the position of documents created in the course of official duties. There seems even to be some question whether the 1988 Copyright Act is in this respect in accord with the international copyright conventions. Either development would threaten Crown copyright which might then require the specific contractual protection that some publishers are increasingly seeking.

I hope that these comments will be of use. If I can be of further assistance please let me know. I hope that you will by then have the benefit of a relaxing holiday.

C.D.Chalmers

**4. CENTRAL MANAGEMENT AND SERVICES**

- 4.1 To manage, co-ordinate and prioritise the activities of the Office.
- 4.2 To provide central support services, including those for accommodation, finance, information technology, internal audit, management support, personnel, planning, purchasing and reprographics.
- 4.3 To attract and keep good staff and to promote their effectiveness by developing their professional expertise and technical competence through appropriate training and career development and good management practice.
- 4.4 To provide the Office's expertise to other organisations and institutions as appropriate.

**Annex B  
Powers delegated by the Lord Chancellor**

The Lord Chancellor has delegated the following powers, conferred on him by the Public Records Act 1958, to the Keeper and her staff.

- 1. The giving of approval for the disposal of records not required for permanent preservation (s.3(6)). To be exercised by an official not below Grade 7 level.
- 2. The appointment of places of deposit of public records (s.4(1)). To be exercised by an official not below Grade 7 level.
- 3. The giving of approval for the transfer of records, in either direction, between the Office and places of deposit (s.4(3)). To be exercised by an official not below HEO level.



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37

**CABINET OFFICE**

***Historical and Records Section***

Hepburn House, Marsham Street, London SW1P 4HW

Telephone 071-217 6050

Facsimile 071-217 6010

(GTN 217)

HO95/484/

Ms Eleri Wones  
Treasury Solicitor's Department  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

17 July 1995

*Dear Eleri*

I am sorry to have to bother you again on the question of the Churchill papers but I know that Michael Carpenter will now have gone on leave.

Michael and I saw Mr Nigel Gale of the National Audit Office on Tuesday 4 July. Mr Gale went away saying that he would draft a letter for the C & AG to sent to Mr Chris Smith MP, Shadow Heritage spokesman, and that he would show us the letter in draft.

The draft letter has now arrived, copy attached. It seems pretty innocuous to me but as Michael was very much involved I thought it best to let you have a look at it. If you are content I shall inform Mr Gale that we have no comments.

I am not sure why it is being done by FAX but it is. Perhaps the C & AG wants to get the letter off before the Summer Recess begins.

*Yours ever*

*Pat*

MISS P M ANDREWS



**CABINET OFFICE**  
Historical and Records Section  
Hepburn House  
Marsham Street  
London SW1P 4HW  
Fax: 071 217 6010

ENQUIRIES:  
071 217 6050



39

URGENT  
YES/NO

### FACSIMILE LEADER

NAME: Nigel Gale

DEPARTMENT: NAO

ADDRESS: Buckingham Palace Road  
FAX No: 0171 233 6455

FROM: Pat Andrews

DOCUMENT REFERENCE/TITLE: CHURCHILL PAPERS

TOTAL NUMBER OF PAGES: 1

DATE: 17 July 1995

MESSAGE: Thank you for copying to me the draft of the letter to Mr Chris Smith MP. I have consulted Treasury Solicitor and we would like to suggest a change to the end of the letter to clarify the situation with regard to the papers bequeathed by Lady Churchill as follows:-  
"The various legal agreements entered into to effect the transfer of the State and non-State papers, and the transfer by Churchill College of the bequest of papers made to it by Baroness Spencer Churchill, will ensure that the archive remains intact at Churchill College and that it is properly maintained and conserved." And, "The Government's legal proceedings instituted in 1993 have been discontinued as they no longer served any purpose following the creation of the new Trust which protects the integrity of the archive."

ACKNOWLEDGEMENT REQUIRED YES/ NO





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**THE TREASURY SOLICITOR**

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 071 210 3029 Direct Fax 071 210 3503

Office of Public Service &amp; Science Legal Adviser

**FACSIMILE**

**To:** Pat Andrews **From:** Eleri Wones  
**Dept:** Cabinet Office **No of pages**  
Historical and Records **incl this page:** 2  
**Fax No:** 217-6010 **Date:** 17 July 1995

---

**Re: Churchill**

I attach the draft letter incorporating a few amendments. I have assumed in amending the letter that there is no need to refer to the copyright position. If I am wrong in this assumption please let me know.

I look forward to hearing from you with any comments you may have on my amendments.

Best wishes,

---

If this fax does not reach you in its entirety, please contact my secretary on 071-210 3006.

/USERS/COM/ANITE\_REPORTS/HERITAGE/LETTERS/95/0701.smith

- DRAFT -

Chris Smith Esq MP  
Shadow Secretary of State for Heritage  
House of Commons  
London SW1A 0AA

PURCHASE OF THE CHURCHILL PAPERS

In my earlier response to your letter of 29 April, I outlined the focus of the National Audit Office audit work on the use of lottery monies. As I explained, the focus of our work is on compliance with legislation and whether the proper processes and procedures have been followed in arriving at decisions to use Lottery monies on particular schemes or purchases.

We have now reviewed the detail of the transfer of the State and non-State papers to the new Sir Winston Churchill Archive Trust and I can confirm that during this review the National Audit Office have not identified any irregularities or legally questionable aspects. The National Heritage Memorial Fund used lottery monies to contribute to the purchase of the non-State papers and to help fund archival work and access to the Archive. The Cabinet Office gifted the State papers to the new Trust thus removing any question of the State papers "being bought". The various legal agreements

~~effecting the transfers of these categories of papers, and the papers bequeathed by Baroness Spencer Churchill, should secure the archive intact at Churchill College.~~ The government's legal proceedings instituted in 1993 have been <sup>discontinued</sup> abandoned as they no longer served any purpose following the creation of the new Trust *protecting the integrity of the archive.*

Please do not hesitate to contact me if I can be of any further assistance.

JOHN BOURN

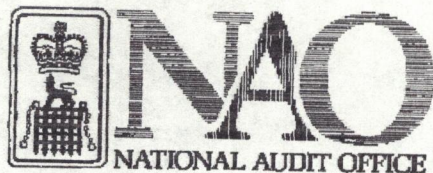
*X entered into to effect the transfer of the State and non-State papers to the new Trust, taken together with the fact Churchill College has been the beneficiary of a bequest of papers made by Baroness Spencer Churchill, should ensure that the archive remains intact at Churchill and is properly created and conserved.*

7-210 3503 P.02

TO

17-JUL-1995 11:45 FROM HRS 0171 217 6010





36  
National Audit Office  
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Francis Carnwath Esq  
Director  
National Heritage Memorial Fund  
10 St James's Street  
LONDON SW1A 1EF

Direct Line 0171-7987483  
Room C418  
Reference  
Date 14 July 1995

*Dear Francis*

**CHURCHILL PAPERS**

Please see attached draft letter for the Comptroller and Auditor General to send to Mr Chris Smith MP. If the content causes you any problem please call me.

I am copying the draft to Margaret O'Mara at the DNH and to Pat Andrews at the Cabinet Office, with the same request.

Regards

**NIGEL GALE**





/USERS/COM1/UNITE\_REPORTS/HERITAGE/LETTERS95/0701smith

- DRAFT -

Chris Smith Esq MP  
Shadow Secretary of State for Heritage  
House of Commons  
London SW1A 0AA

PURCHASE OF THE CHURCHILL PAPERS

In my earlier response to your letter of 29 April, I outlined the focus of the National Audit Office audit work on the use of lottery monies. As I explained, the focus of our work is on compliance with legislation and whether the proper processes and procedures have been followed in arriving at decisions to use Lottery monies on particular schemes or purchases.

We have now reviewed the detail of the transfer of the State and non-State papers to the new Sir Winston Churchill Archive Trust and I can confirm that during this review the National Audit Office have not identified any irregularities or legally questionable aspects. The National Heritage Memorial Fund used lottery monies to contribute to the purchase of the non-State papers and to help fund archival work and access to the Archive. The Cabinet Office gifted the State papers to the new Trust thus removing any question of the State papers being bought. The various legal agreements effecting the transfers of these categories of papers, and the papers bequeathed by Baroness Spencer Churchill, should secure the archive intact at Churchill College. The government's legal proceedings instituted in 1993 have been abandoned as they no longer serve any purpose.

Please do not hesitate to contact me if I can be of any further assistance.

JOHN BOURN

# BREAD AND CIRCUSES, NOT CAKE

*Jacob Rothschild responds to criticism of his choice of good causes for Lottery largesse, and hints at future beneficiaries*

FOR ALL the shocked and puritanical tones of last week's *Spectator* leading article ('Let them eat cake'), a national lottery is by no means a phenomenon new to Britain. Lotteries took place under state auspices on and off between 1569 and 1826. During that time, many of our greatest and most loved monuments and collections were paid for out of proceeds raised by lottery: Westminster Bridge is one example and in 1753 the purchase of the collections which later formed the nucleus of the British Museum and a place to house them is another.

Then there was a rather long gap before my father's 1977 Royal Commission with its principal recommendation of a national lottery for good causes. His Commission made what now seem like some rather conservative forecasts, and its members could hardly have contemplated that in 1995 lottery mania would be uncannily similar to the picture drawn by George Orwell in his book *Nineteen Eighty-Four*. He wrote, in 1949:

The Lottery, with its weekly pay-out of enormous prizes, was the one public event to which the proles paid serious attention. It was probable that there were some millions of proles for whom the Lottery was the principal, if not the only reason for remaining alive. It was their delight, their folly, their anodyne, their intellectual stimulant. Where the Lottery was concerned, even people who could barely read and write seemed capable of intricate calculations and staggering feats of memory. There was a whole tribe of men who made a living simply by selling systems, forecasts and lucky amulets.

In just a few months, the Lottery seems to have established itself as the weekly event of national life, as common a subject as the weather, forming part of our national consciousness like the Last Night of the Proms or the Grand National. No fewer than 30 million people out of an eligible population of 44 million play each week. Turnover is running at £5 billion a year; the five distributors are currently receiving about £30 million a week — £1.5 billion a year compared with the Royal Commission's forecasts of a turnover of £100 million in the first year and a contribution to

good causes of £45 million per annum in the fifth year; and if this phenomenon continues, then our little Heritage Memorial Fund — which started out as a gleam in Hugh Dalton's eye in 1947 when he was Chancellor of the Exchequer — could well become, in grant-making terms, significantly larger than either the Ford or the Getty Foundation.

The opportunity for doing public good is therefore immense; the potential impact as significant as President Mitterrand's 'Grands Projets' of the past decade. In setting up the distributing bodies, the Government followed the recommendations of the Royal Commission: lottery profits should not simply go to swell the Exchequer but rather should be distributed in part to 'good causes'. The distributors would have independent boards and would be immune from government influence. It was hoped that they would demonstrate the virtues of the private sector, free from bureaucracy but willing to take risks, seeking quality and excellence.

We, the trustees of the National Heritage Fund, have to allocate funds between nature conservation, historic houses, cathedrals, churches, archives, manuscripts, maritime and industrial heritage, museums and museum acquisitions. The trustees are not altogether unlike the Roman 'nobles viri' who had to decide between 'bread and circuses'. In the past the trustees of the Fund never sought to define heritage but rather interpreted this 'broad church' by spreading their net across such widely differing heritage assets as a Holbein, a colony of horseshoe bats,



'Would you let your mother marry a Rolling Stone?'

Donald Campbell's Bluebird, a collection of trade union banners and the saving of the house and contents of Kedleston Hall.

J.M. Keynes, in his essay 'Art and the State' deplored the heresy of the utilitarian and economic ideal. He wrote 'the Treasury view has prevailed — we have persuaded ourselves that it is positively wicked for the State to spend a halfpenny on non-economic purposes'. He would surely have been delighted to know that lottery funds would one day be there to save and rescue a threatened stretch of cliff, a reach of the Thames, a slope of a down scheduled for destruction, the collapsing Lincoln Cathedral; or that we could build today's equivalent of the hanging gardens of Babylon, pyramids, parthenons, coliseums, cathedrals, palaces, even opera houses, theatres, colonnades, boulevards and public places, or more popular amenities such as parks, squares, playgrounds, lakes, pleasure gardens, or, as Keynes put it, 'every delight which skill and fancy can devise'.

But *The Spectator*, in unfamiliar alliance with the *Sun* newspaper, objects that the National Lottery will gather money from the poor to spend on amusements of the wealthy. And indeed, evidence about lottery spending does indeed point to low income, less educated players spending a higher proportion of their income on tickets than others.

This debate has been a recurring theme for most of this century. For example, in the House of Commons in 1929, the newly elected Labour government voted on the previous administration's proposed grant of £106,000 to save two of what are now amongst our most cherished treasures of the National Gallery — the Wilton Diptych and 'The Cornaro Family' by Titian — which were to be acquired from the Earl of

## Will of the week



Miss Marjorie PUREY-CUST, of Blenheim Lodge, North Road, Minehead, Somerset, Peggy Purey-Cust, the childhood neighbour of John Betjeman, and known to lovers of Betjeman's poetry through his autobiographical volume *Summoned by Bells*, which recalled his Highgate upbringing and described Peggy as 'my first and purest love', died on 22nd March last, aged 89, leaving estate valued at £627,993 gross, £625,018 net. She left £7,000 to the Fairbridge Society, in memory of her great-grandfather John Hepburn, pioneer of Smeaton, Victoria, Australia, £5,000 to the Parish of Minehead, for parochial purposes, £2,000 to the Mission to Seamen, and £1,000 to the Poor Clergy Relief Corporation.

Pembroke and the Duke of Northumberland respectively. Here is an extract from the debate which eerily prefigures *The Spectator's* philistine approach:

*Mr Buchanan MP:* 'I think that the grant is a scandal. I do not believe that the pictures are of any value as a national purchase. The test I apply is this: Is this expenditure good value for the nation as a whole? It might be good value for a select few who will go and look at the pictures. How many people visit the National Gallery, and how many can tell the difference between two pictures that cost £106,000 and two other pictures that cost 106 pence? I question whether 0.1 per cent of the visitors to the National Gallery can tell the difference. The nation's duty is to spend money in helping the greatest number of people at a given time, and in bringing joy to them. The best works of art are not pictures but living people and children.'

Another MP believed that the problem stemmed from 'a group of rich people with little or nothing to do and with more money than brains [who] have raised the price of these pictures to a fictitious level and now the nation is called upon to spend this large sum on them'.

Happily these two masterpieces were saved for the nation.

The passage of history recently provided my trustees and me with further encouragement on this issue. Last year, after a long saga, Canova's 'Three Graces' was saved for the nation. This work, undoubtedly important, was nevertheless by an Italian sculptor and had belonged to a duke. This was paid for from taxpayers' money, an even more direct form of taxation than the Lottery — but apart from the Getty Museum's rage over the application of our rules on the export of works of art, the acquisition was, on the whole, welcomed.

Perhaps influenced by this success, we felt increasingly confident about the purchase of the Sir Winston Churchill archive, which subsequently so scandalised the tabloid press and *The Spectator*. For more than three years, we had restrained the Churchill family trustees from dispersing the archive by sale at auction but, once lottery monies began to flow, we had, to coin a phrase, to 'put up or shut up'.

We felt that if anything was central to our heritage, then Churchill's papers spanning 20th-century political life would qualify. Couldn't the papers have been copied and made accessible through digital technology? demanded our critics. Yes, but surely there are certain areas of our life, our history and our national memory which are so fundamental that, if the resources are there, should be kept together in this country. For example, we had already saved icons of British history, such as the Wellington Dispatch and Nelson's first letters using his left hand, and we felt strongly that Churchill's speeches, 'This was their finest hour . . .', 'We shall fight on the beaches . . .' and many others, fell into this category. We were asked to pay

significantly less than the open market value, putting aside any value for the contested state papers, and the figures were confirmed by an outside expert.

It is a difficult dilemma and, as I have already pointed out, evidence about lottery spending does point to low-income participants spending a higher proportion of their income on tickets than others. Each lottery distributor, including the NHMF, will have to take this into account in distributing the vast resources the Lottery has made available; if we do not, it is likely that public support could well soon be lost and funds might then be redistributed in different directions, like health and education, under the control of central government. The case, therefore, for a significant share of our resources going to disadvantaged communities in urban areas is a strong one and one we firmly believe in. But we should not respond to applications, however worthy they may be, if they do not meet certain standards of quality. We should not lose our perspective about the purpose of the Heritage lottery fund and our sense of direction. We are not a substitute for government expenditure. Huge as the sums are, £300 million a year for Heritage bears no comparison with overall government expenditure last year of £283 billion. Our revenues are likely to be less than, for example, the annual increase in expenditure of the Health Service alone.

Our purpose is to assist and promote the heritage of this country, and we should do this in a balanced and measured way and with courage if a work of art, historic house or any other object of heritage distinction is there to be saved.

I would question whether there really is the collision of loyalties between 'mass' culture, 'high art', 'popular' or 'elitist heritage' that is claimed by the high-brow utilitarians in the editorial offices of *The Spectator*. Inner city parks, for example, were one of the great Victorian initiatives and many are works of art in themselves. But some of the most distinguished examples, like Sefton Park in Birkenhead and the People's Park in Halifax, are shadows of what they once were, and with 85 per cent of the United Kingdom's population living in towns and an estimated 9 million people visiting parks a day, this would be a splendid area of our heritage to restore and transform.

Lottery money could be spent many times over in restoration, updating and supporting new uses for buildings whose

original purpose has been lost. The government sector alone is withdrawing from its estate on a massive scale, perhaps unprecedented since the Dissolution of the Monasteries: the Ministry of Defence from Greenwich, Woolwich and Plymouth, the Ministry of Health from Westminster Hospital and Bart's, while the Lord Chancellor's office seeks to find alternative uses for distinguished 18th- and 19th-century law-court buildings.

But we would lose a vital opportunity if we did not think beyond restoration and updating. We must escape the negative aspects of heritage, the merely nostalgic, and the feeling of hopelessness and of a bleak future that comes from an over-absorption in our past. We must build, promote and raise the cultural level of our country through the projects that we support and not lose sight of the fact that countries are celebrated for their cultural strength, their poets, their painters, their museums and collections, and indeed we should add to great collections from time to time.

As E.M. Forster wrote in 'Art for Art's Sake', 'Ancient Athens made a mess but the *Antigone* stands up. Renaissance Rome made a mess but the ceiling of the Sistine chapel got painted.' So we should have both circuses and bread.

*Lord Rothschild is chairman of the National Heritage Memorial Fund.*

## Fifty years ago

A SPECTATOR'S NOTEBOOK  
NEWS that reaches me privately from Berlin confirms in all essentials most of what the newspaper correspondents are saying about non-fraternisation — and various other questions. The misunderstandings about the movement of British troops into areas of the capital previously occupied by Russians were not trivial; the Russians, it appears, carried away with them all the beds from the quarters awaiting the British troops, and left the place in a state that cannot be decorously described. However, the best is being made of an unpleasant business. The crux of non-fraternisation is the recourse of British soldiers to German women, who are infecting the B.L.A. with venereal disease on an alarming scale. Language, of course, is no difficulty. A display of ten fingers — meaning 10 p.m. — is a recognised assignation sign, and the places of meeting (in the open air) are well understood. How the relaxation of the non-fraternisation rule is going to improve this serious situation is not clear. *Naturam expellas furca, tamen usque recurret.*

JANUS

*The Spectator* 13 July 1945



'Now Atherton's called for a leadership contest ...'



14.7.95

FACSIMILE TRANSMISSION ADVICE

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TO: Mr PAT ANDREWS

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FROM \_\_\_\_\_

No. OF FOLLOWING PAGES 2

NOTES

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# CHURCHILL ARCHIVES CENTRE

CHURCHILL COLLEGE CAMBRIDGE CB3 0DS

TELEPHONE (01223) 336178 FAX (01223) 336135 E-MAIL jhs1004@cus.cam.ac.uk

KEEPER: PIERS BRENDON, M.A., Ph.D.



**PRIVATE & CONFIDENTIAL**

PB/js/3896

12 July 1995

Miss PM Andrews  
Historical and Records Section  
Cabinet Office  
Hepburn House  
Marsham Street  
London  
SW1P 4HW

Dear Pat

It was a great pleasure to meet you the other day, even though we had to talk about the vexed question of Mr Peregrine Churchill.

I am delighted that the Crown takes such a strong line about this copyright material in the Churchill Archives, and I much look forward to receiving Michael Carpenter's letter on the subject. I need hardly say that the Trustees of the Sir Winston Churchill Archives Trust are extremely exercised about this matter, and I told them very fully what your attitude was. They were as pleased as I am.

Do let us by all means keep in touch, and I shall always be very happy to give you lunch in College at any time that you care to call again.

Yours ever

Piers

Piers Brendon



**Patrons:** THE COUNTESS OF AVON · LADY MARGARET COLVILLE · THE LORD WOLFSON OF MARYLEBONE, F.B.A.  
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THE LORD TODD OF TRUMPINGTON, O.M., F.R.S. · MR PEREGRINE CHURCHILL · MR RANDOLPH CHURCHILL

CHURCHILL COLLEGE ARCHIVES TRUST

REGISTERED CHARITY NO. 273633

TRUSTEES: PROFESSOR ALEC BROERS, F.R.S., *Master of Churchill College* · MR WINSTON CHURCHILL, M.P.  
MR MICHAEL ALLEN, M.A., *Bursar of Churchill College*



FOLIO  
33

**CABINET OFFICE**

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HO95/475/

Dr Piers Brendon MA PhD  
Keeper  
Churchill Archive Centre  
Churchill College  
Cambridge  
CB3 0DS

11 July 1995

*Dear Piers*

This is by way of a postscript to my letter of yesterday. When we met last Friday I mentioned a personal and informal view I had gained of the influence of Mrs P Churchill on matters relating to the Archive. I understand today, from the person I mentioned as the source of this view, that this is now believed to be mistaken. I apologise for having mentioned it and hope that you will disregard it!

I hope the meeting of the new Trust went well and that you will let me know if anything emerged which might be of interest to us.

*Yours ever*

*Pat*

MISS P M ANDREWS

11.7.95

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HO95/454/

NOTE FOR RECORD

**CHURCHILL PAPERS - NAO ENQUIRIES**

Following his meetings at DNH and the NHMF, Mr Nigel Gale, NAO, visited Hepburn House on Tuesday 4 July to see Miss P Andrews, Cabinet Office, and Mr M Carpenter, Treasury Solicitor.

Mr Gale's main interests were:-

- the nature of the decision to terminate the litigation and,
- the extent to which information about the Gift and the reason for the termination of litigation is in the public domain

To a lesser extent Mr Gale was interested in the copyright issue, but he was particularly interested also to establish whether any improper pressure had been brought to bear upon the NHMF (eg from No 10) to purchase the Churchill papers.

Mr Carpenter explained the background to the litigation and said that it had been terminated when the purchase was made; when ownership of the whole Archive passed to the new Sir Winston Churchill Archive Trust, there was no longer a need to establish ownership as between State and non-State papers or to assert such rights as the Crown might have to keep the archive intact. By reason of the transaction, the papers would be preserved as one Archive at Churchill College. The decision to terminate the litigation if the negotiations succeeded was taken some time before they were completed.

Mr Gale said that NHMF's Press Release made no reference to the gift of the official papers and he seemed to feel that therefore the distinction between the purchase of the personal papers and the gift of the official ones had not really got over to the public, even to MPs such as Mr Chris Smith. As I recall, our concern when commenting on the Press Release, was to ensure that it made clear that what was being bought was only the non-official papers. The distinction between official and non-official papers and the fact that ownership of the official papers had been transferred by Deed of Gift was certainly in the public domain as a result of Parliamentary Questions. Whether termination of the litigation and the reasons for this was similarly in the public domain was less clear. Certainly the information had been provided for Qs and As and Lines to Take but it may not have been used simply because the questions had not been asked. We offered to check PQs answered but Mr Gale said he had his own copies.



Mr Carpenter explained the situation with regard to copyright. He said that it might have been possible to seek to reach an agreement under which copyright was transferred as well as the actual documents, but it was very clear that the Churchill family would never have agreed to relinquish their rights in this respect. We were in discussion with Churchill College, together with HMSO, on how Crown copyright was effectively to be asserted. The new Trust has a copyright licence allowing copying for research and library purposes, not for commercial exploitation. If anyone, including the Churchill family, seeks to reproduce the Archive for any purpose which was not licensed, the Crown would be forewarned so that copyright could be asserted.

We assured Mr Gale that no undue pressure had been brought to bear upon the NHMF, from No 10 or elsewhere, to purchase the Archive.

Mr Gale said that he would now prepare a letter for the C & AG to send to Mr Chris Smith, who had written asking for assurances that the NAO would be looking at the legality of the transaction. He would send it to us and to DNH in draft form for comment in the next two to three weeks.

MISS P M ANDREWS

Historical and Records Section  
11 July 1995

11.7.95

POL 31

NOTE FOR RECORD

Michael Carpenter and I visited Churchill College, Cambridge on Friday, 7 July 1995. Jim Wretham, HMSO, was also present. We met Dr Piers Brendon, Keeper of the Churchill Archive Centre and Alan Kucia, Archivist.

The purpose of our visit was to discuss the handling of copyright issues, in particular how the College should deal with requests for access which are known to be for the purpose of commercial exploitation of copyright.

The copyright situation is complex. There are many copyright holders including the Crown and Dr Brendon said that the attitude taken by the Churchill family's agents is to publish and await a claim of infringement. For the most part they will get away with this. The many thousands of copyright holders will either not know or not care that they own copyright in, for example, letters to Sir Winston Churchill. The situation is different so far as Crown copyright is concerned. Although there will doubtless be a difference of opinion between us and the Churchill family we know what we believe to be in Crown copyright and what our rights are.

Dr Brendon asked what our attitude to the further publication proposals would be eg onto CD ROM. Our view, which we told him, is that we are not, in principle, opposed to it but we shall expect to recoup money for HMG and therefore we shall have to negotiate a reasonable copyright fee. This will be a matter for HMSO.

Dr Brendon said that the new Sir Winston Churchill Archive Trust, under its Chairman, Andreas Whittam-Smith, is to meet on Monday, 10 July in the evening. Ms Avril Martindale, Solicitor, is to attend to give legal advice on copyright. Dr Brendon, who is to act as Secretary to the Trust, will let us know if their view on copyright differs from ours and whether anything emerges from the meeting which is likely to be of interest.

Dr Brendon emphasized that the College's priorities will be cataloguing and preservation of the Archive. He is anxious that the Trust does not devote too much of its resources to litigation but is also concerned to ensure that the College fulfils its obligations so far as the Crown is concerned. We agreed that if the College received requests for access to the Archive for the purposes of commercial exploitation they would ask the person or organisation making the request to indicate that they had the permission of the copyright holder. This would force such people or organisations to contact us direct for the necessary authority.

We agreed to draw up a letter to send to Dr Brendon which he could show to applicants indicating what parts of the Archive were considered by us to be in Crown Copyright. This will be drawn up in consultation between Cabinet Office, Treasury Solicitor and HMSO and sent to Dr Brendon by the end of July.

Mr Carpenter said he had heard nothing from Southampton University following his letter to Mr P Churchill about Crown Copyright. Slightly differing stories had been given to Mr Carpenter and Dr Brendon about the intentions of the University. Dr Brendon understood that the Jenny papers were being put onto CD ROM as a preliminary to "doing" the whole archive. The Churchills (Winston and Peregrine) had tried to give Mr Carpenter the impression that they were only "doing" the Jenny papers.

We agreed to exchange information about any developments and/or approaches from the Churchill family.

PSA

MISS P M ANDREWS

11 July 1995

10.7.95



HMSO



With compliments

Pat

My note of our meeting last  
Friday.

Regards,

competing through quality



**Copyright Unit**

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**NOTES OF A MEETING TO DISCUSS CROWN COPYRIGHT MATERIAL  
CONTAINED IN THE CHURCHILL ARCHIVES**

**Date of meeting:** 7 July 1995  
**Time:** 11.00am  
**Venue:** Churchill College, Cambridge

**Present:** Piers Brendon, Keeper of the Archive, Churchill College (and Secretary of the Churchill Trust)  
Alan Kucia, Senior Archivist, Churchill College  
Michael Carpenter, Treasury Solicitors Department  
Pat Andrews, Historical and Records Section, Cabinet Office  
Jim Wretham, Copyright Manager, HMSO

1. Michael Carpenter explained that the Crown would claim copyright ownership in all documents which Winston Churchill produced in his capacity as a government minister. Michael confirmed that this would obviously exclude:

- a. material which was out of copyright;
- b. private correspondence (eg "the Jenny Papers"); and
- c. the correspondence and papers relating to party political aspects.

2. It was agreed that Pat Andrews and Alan Kucia would collaborate on producing a definitive listing of items (or categories of items) in which Crown copyright would subsist.

**ACTION: Pat Andrews and Alan Kucia**

3. There was some discussion as to the duration of Crown copyright. Michael Carpenter and I explained that in general Crown copyright in published material enjoyed a period of protection of 50 years from the end of the calendar year in which the material was first published. For unpublished material, the period of protection could be anything up to 125 years from the time the work was made, depending on whether the material was actually published at some point during that 125 year period. The situation was further complicated by the transitional provisions between the various copyright Acts.

4. Piers Brendon mentioned that he had recently had a visit from staff at the University of Southampton who, working in conjunction with a company in the private sector, were planning to develop a CD-ROM product on the subject of Churchill.

5. I stated that the reproduction of Crown copyright material would be subject to an appropriate copyright licence being in place. I confirmed that there would be no objections in principle to licensing, although I did emphasise, however, that such licences would be granted on "non-exclusive" terms. I added that each licence would be issued by HMSO, in full consultation with the Cabinet Office and the Treasury Solicitor.

6. Michael Carpenter advised that the Museum/Trustees should:
  - a. advise applicants seeking to copy the Archive of the Crown's copyright interest in the material; and
  - b. ~~to~~ notify the Cabinet Office/HMSO of any third party interest in copying or publishing the Archive.

Piers Brendon agreed to advise Andreas Whittam-Smith, Chairman of the Trust (and, incidentally, Editor of "The Independent") and the other Trustees.

7. Michael Carpenter had already written to Professor Newby, Vice Chancellor at the University of Southampton on 27 June about the Crown's copyright interest in the Archive. To date he had not received a reply to his letter, but would send a hastener once a month ~~had~~ elapsed, assuming that he had not received a response in the meantime.

8. Piers Brendon said that the Museum may look to levy a fee to cover access and researcher time if organisations such as the University of Southampton wish to gain access to the records.

9. Outside of the meeting, I mentioned to Alan Kucia that HMSO would be interested to consider any ideas the Museum may have with regard to publication of Churchill material. I suggested that Alan should contact me in the first instance.

JIM WRETHAM  
Copyright Manager  
10 July 1995

Distribution: Pat Andrews, Cabinet Office  
Michael Carpenter, Treasury Solicitor's Department  
Peter Macdonald  
Gordon Robbie  
Stuart McLaren - for item 9  
File CO(A) 13/1



ADLW  
29

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HO95/471/

Dr Piers Brendon MA PhD  
Keeper  
Churchill Archives Centre  
Churchill College  
Cambridge  
CB3 0DS

10 July 1995

*Dear Piers (if I may)*

This is just a note to thank you very much for your kindness to us on Friday last. I shall, as promised and with Michael Carpenter's help, endeavour to put together a letter which it will be possible for you to use to indicate what we consider to be crown copyright material in the Churchill Archive, but I wanted first to thank you for a very pleasant visit; it was good to meet you and your hospitality was much appreciated.

Michael is on leave for a couple of weeks after this and is heavily engaged this week so the letter may not reach you until about the end of the month. I shall hope to prepare it in his absence and clear it with him on his return.

With thanks once again,

*Yours ever Pat*

MISS P M ANDREWS



**THE TREASURY SOLICITOR**  
Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

**MINUTE**

**To:** Miss P Andrews  
Cabinet Office

**From:** Michael Carpenter

**Room:** -

**Date:** 10 July 1995

---

c.c. Mr Godwin  
Mr Chalmers

**Churchill Archive : follow-up**

1. I am afraid I have not been very diligent in pressing on with my contribution to the paper or, indeed, with circulating and commenting on what has been produced by Bill Godwin and Duncan Chalmers. Apologies, therefore, to you and to them.
2. Bill Godwin has produced a first draft of a paper which was attached to his minute to me of 7 June (Annex A). This was followed by notes on the papers of former Prime Ministers (Annex B) and of former Cabinet Ministers (Annex C).
3. I am somewhat pressed on other fronts, and shall be away from 17 until 28 July. I would - if possible prefer to carry out the work of consolidating the various contributions and contributing my passage on copyright on my return. This latter could usefully draw on our recent experience in relation to the handling of copyright in the Churchill Archive.
4. It seems to me that the papers should follow the structure set out in Bill Godwin's note of 7 June with the note of 19 June on papers of former Cabinet Ministers incorporated somewhere in paragraphs 8-9 and the note on papers of former Prime Ministers incorporated in paragraph 16. My contribution on copyright would be incorporated somewhere around paragraph 13.



5. As the consolidated document might be somewhat lengthy, I suggest that it be used as the supporting annex to a rather shorter paper dealing with the topics identified in my minute of 26 May. If this timescale is acceptable, I would suggest this might all be drawn together in the, perhaps quieter, month of August with a view to a submission to Sir Robin Butler in September. Perhaps we could have a quick word about handling.

*M.B.*

ANNEX A

HAND

To Michael Carpenter TSD

Cc ~~XXXXXXXXXXXXXXXXXXXX~~

Pat Andrews Cab Off

Duncan Chalmers

Churchill case-follow-up

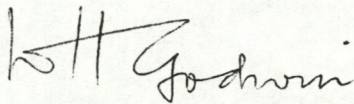
From W H Godwin

50 Gerard Road

S W 13 9 QQ

7 June 1995

1. Herewith a first shot at my contribution to a paper for Sir Robin Butler. It does not deal with ~~XXXXXX~~ the papers of former Prime Ministers—your topic (b) as I need the notes which I believe you are kindly having typed for me. And of course it needs in due course your contribution on copyright.
2. Trying to focus on the outstanding issues, I thought it wiser not to read Duncan Chalmers' draft until I had finished mine, in case I was tempted to do no more than concur with him. As it is, I was led outside your proposed structure, and on a quick skim the 2 efforts may be complementary.
3. I shall be getting in touch with Duncan Chalmers to ask him for the PRO references to their papers on the PR Act, and also to follow up his reference in para 21 of his paper to Parliamentary Counsel—I should be interested to see their advice.
4. You and Pat Andrews may think it would be useful if we could meet next week to discuss how we take this forward from the existing drafts.



W H Godwin

DRAFT 7/6/1995

Paper for Cabinet Secretary on

MATTERS ARISING FROM THE CHURCHILL ARCHIVES LITIGATION

Intro ductory

1. The recent litigation concerning the Churchill Archives has exposed difficulties in the operation of the constitutional convention governing the use of Cabinet papers by Cabinet Ministers after they have left office. This convention enables the Cabinet of the day to decide the rules which should govern custody of such papers, and access to them, and disclosure of their contents, by former members of the Cabinet. <sup>The first formal recording of the Convention by the Cabinet was</sup> ~~Since the convention's inception~~ <sup>in 1917,</sup> the rules have been varied on a number of occasions. Annex 1 briefly summarises the rules in force from time to time. *[Affidavit?]*

(IS SUCH A SUMMARY AVAILABLE? I HAVE NOT SEEN RULES POST ~~XXXX~~ 1945.)

WJ  
9

2. It may be necessary at a later stage to go wider, and, for example, look also at the position of Ministers not in the Cabinet, but the present paper deals only with the Cabinet papers of former <sup>C</sup>abinet Ministers. It does so on the basis that no difference is to be made between a Prime Minister and his Cabinet colleagues in this context.

Some relevant law

3. The legal starting point for a consideration of these matters is that such papers have been prepared for the purpose of discharging <sup>official</sup> ~~legal~~ functions and are therefore the property of the Crown, and public records as defined in the First Schedule to the Public Records Act 1958(c.51).

4. It follows from Crown ownership that a former Minister may not derive a legal interest ~~XXXX~~ in the papers from any other source. His interest might derive from a gift, or a loan, or *[as in the Churchill case]* from possession for a period sufficient to extinguish the Crown's title under the Limitation Act 1980. The *doesn't his privilege litigation?*

view taken by the Law Officers in 1934 was that under the rules then applying, <sup>if he exercised a right to retain Cabinet documents</sup> a Minister obtained a right of possession which was personal to him, so that an action to recover the papers after his death would lie against his estate.

5. The current practice is to <sup>Gift</sup> *[give]* <sup>Prime</sup> the departing Minister <sup>to take away</sup> copies of documents <sub>permit</sub>

comprised in specified categories, subject to requirements as to safe storage, controlled access, assurances as to keeping the papers in the United Kingdom, and so on. The word "requirements" is used because at one stage the Cabinet imposed them through undertakings from the Minister, while the current practice is to draft them as conditions with a contractual foundation. The Treasury Solicitor advised that the undertakings were unenforceable whereas the conditions would be binding. *(Even so, how prevent breach? What remedy for breach?)*

6. It may however be open to doubt whether all the Cabinet Office objectives can be met where ownership passes to the former Minister. The most difficult objective may be to keep the papers in the country, given the possibility of successive transfers of ownership. And it may be that the device of a trust could be used to frustrate the Cabinet Office aims.

#### Loan

7. It is clearly easier both to attach conditions to a loan and to enforce them. A loan would no doubt be less attractive <sup>to Ministers</sup> than an outright transfer of ~~an~~ ownership, but it would not be a complete innovation—rather, a return to the regime which operated in 1934. And it would allow the Cabinet Office a degree of control which would not be possible with a transfer of ownership.

#### Public Records Act 1958

8

8. An incidental advantage of a loan is that the document would retain its status as a public record, which it loses on a transfer of ownership from the Crown. (But it would not come within section 5 Access to Public records, which applies only to such records in the Public Record Office or an appointed place of deposit).

9. A more substantial point arises on section 3 Selection and preservation of public records. Subsection (6) requires that public records which have been rejected as not required for preservation shall be destroyed or (if some person other than the Lord Chancellor is responsible for them), subject to the approval of the Lord Chancellor, be disposed of in any other way. It may be that the arrangements made in pursuance of section 3 are such that the subsection is not apt to cover papers given to former Cabinet Ministers. But the intention of

The Act appears to be that public records should all be dealt with in one of the three specified ways—preservation, destruction, or (excluding records for which the Lord Chancellor is responsible) any other way provided the Lord Chancellor approves. There may be de minimis exceptions (e.g., copies of public records supplied on discovery in litigation to which the Crown is a party—assuming that this form of disposal has not in fact been approved by the Lord Chancellor). But a fairly long-standing practice of handing over public records, being copies of Cabinet papers, is a matter of some gravity. It may be considered appropriate to pursue this question with the Lord Chancellor's Office (and perhaps the Public Record Office).

Paper)  
Gifts lodged with Institutions

10. It is not uncommon for papers in the possession of former Ministers to be lodged with such Institutions as Universities. It is important in such an event to ensure that, if this is acceptable to Government under the relevant arrangements, the terms of lodging are suitable and in particular contain a discretion for the Institution to apply controls over access which mirror those for which section 5 of the Act provides.

XX Questions of Procedure Paragraph 15 of the 1992 version of Questions of Procedure might usefully be amplified in a separate note for Cabinet Ministers.

Private Offices

12. The Private Secretaries of Cabinet Ministers should be fully instructed as to the procedures to be followed in relation to Ministers' papers on their relinquishing office.

Copyright

13. MR CARPENTERS PAPER TO BE INSERTED OR ANNEXED OR PUT IN AS A SEPARATE PAPER

Official Secrets

14. Regard must always be had to the requirements of the Official Secrets legislation. (NEED THIS BE EXPANDED?)

Privy Council oath and Sovereign's consent

15. Much reliance has in the past been placed on the Privy Counsellor's oath as a safeguard for the secrecy of proceedings in Cabinet, the <sup>rationale</sup> ~~theory~~ being that the Cabinet began as a Committee of the Privy Council. As noted in Paragraph 27 of

● Professor Bradley's affirmation in the Churchill proceedings, the present trend sees the value of the oath diminishing in this respect. ~~For what it is worth,~~ Sections 1.1 and 20 of Questions of Procedure treat the Council and the Cabinet as separate entities. The oath may now be more relevant in the case of members of the Court of Appeal than that of Cabinet Ministers. Similarly, the practice of seeking the consent of the Sovereign to disclosure of the proceedings seems to be, if not in abeyance as Professor Bradley suggests (paragraph 28), at least on the wane.

16 Sir Edward Heath and others

A NOTE TO FOLLOW, EITHER AS PART OF THIS PAPER OR SEPARATELY

United Kingdom

17. Scottish law does not permit trading in public records. It is not inconceivable that Northern Irish law is not identical with English law. Consultation with the Scottish and Northern Irish Departments appears to be necessary.

20

Recommendations

TABLE TO FOLLOW

WTTA

**The Papers of:**

**Sir Edward Heath**

**Lord Wilson (deceased)**

**Lord Callaghan**

**Lady Thatcher**

---

1. Although these former Prime Ministers retired in the chronological order shown above, the order in which they approached the Cabinet Secretary about their papers was:

Lord Callaghan  
Lord Wilson  
Sir Edward Heath  
Lady Thatcher.

**A. Lord Callaghan**

2. In 1981, Lord Callaghan took away from No. 10 "personal papers" which were intended to "become his personal property and constitute part of his estate". There was no letter, but a meeting between officials and Lord Callaghan's representatives who no doubt were given a copy of the paper on which the following matters were dealt with. The papers fell into eight categories - briefly:
  - (1) Copies of outgoing personal minutes (i.e. those signed by him), excluding Top Secret.
  - (2) Copies of personal telegrams sent and received from overseas, excluding Top Secret.

- (3) Copies of letters sent to The Queen by Lord Callaghan.
  - (4) Copies of all other letters signed by him.
  - (5) Personal correspondence relating to Ministerial appointments.
  - (6) Speeches and related speech material.
  - (7) The typed daily diary for the whole of his administration.
  - (8) Personal and party political files from Private Office (e.g. those relating to City Freedoms, the file on the Lib/Lab pact).
3. He was also to have access to official files, with provision for copying particular documents (subject to security classification), normally on a "see and return basis".
  4. He was told that secure storage would be necessary.
  5. Provision was also made in respect of the papers in the Departments of which Lord Callaghan had been Ministerial head, Treasury, Home Office and FCO.
  6. It was implicit that Lord Callaghan's research assistant would have access to files which were not highly classified.
  - ✓ 7. In 1990, while Cabinet Office~~s~~ were considering a proposal that Lord Wilson's papers should go to a Canadian University, they learned that Lord Callaghan's papers had been transferred to the House of Lords Library.

The Cabinet Secretary wrote to Lord Callaghan on 16 October 1991, after consultation with TSD (Mr Gregory, ref A81/199). He explained the continuing Government interest in the papers because of the legislation governing access to the original documents, and Official Secrets, and Crown copyright. He asked for assurances that access would be dealt with in the same way as access to the originals; that neither ~~he~~ <sup>Lord Callaghan</sup> nor his heirs would transfer papers out of the country, and that, if Lord Callaghan or his heirs wished to dispose of the papers, corresponding assurances would be sought from the transferee. The Cabinet Secretary also set out the position as regards correspondence with The Queen - briefly, the Palace must be consulted if publication is contemplated.



8. Lord Callaghan replied on 21 November 1991 that he had no intention of transferring the papers out of the country, and that the Cabinet Secretary should speak to his biographer.
9. Cabinet Secretary and the biographer agreed during the following year that Lord Callaghan should be sent the draft of a letter for him to write, giving the desired assurances, but Cabinet Secretary learned in March 1993 that Lord Callaghan refused to sign the letter, and there it rests.

### B. Lord Wilson

10. On 30 July 1987, Lady Thatcher sent Lord Wilson a letter prepared by the Cabinet Secretary in consultation with Lady Thatcher's Private Secretary and the Treasury Solicitor. (I have no TS reference and do not know what the legal thinking was at that stage.) In this letter, Lady Thatcher identified papers to which he was entitled by the same eight categories as were used for Lord Callaghan, and <sup>went</sup> ~~doing~~ on to deal with secure storage, on the basis that the papers were public records, subject to Public Records and Official Secrets legislation, "and would remain so to whomever they might pass after your death".

(Note: A lifetime transfer - by means of gift, sale or trust - was not contemplated). Lord Wilson's biographer would not have access to the papers. *The archive body*

The papers could be drawn on for the purpose of memoirs, which should be cleared in accordance with the Radcliffe Report on Ministerial Memoirs. Lady Thatcher would not object to a role for Lady Falkender, within the limits set out in the letter.

11. The possibility of a transfer out of the country of Lord Wilson's papers led to further consideration by Cabinet Office and TSD. Mr Blythe advised that the papers were not public records, and that, the papers being Lord Wilson's property, the obligations as to storage and so forth were "either inconsistent with full ownership or otherwise unenforceable".
12. In the event, the papers were transferred to the Bodleian Library and further Cabinet Office action was not needed.

### C. Sir Edward Heath

13. On 4 July 1988, having heard from Lord Armstrong that Sir Edward would wish to consult official papers for the purpose of his memoirs, the Cabinet Secretary, *W*, wrote to Sir Edward a letter on the lines of the letter of 30 July 1987 to Lord Wilson.
14. On 8 July 1988, Sir Edward replied with an assurance of "secure storage of those which are official papers and therefore public records", and his understanding that he would be expected to clear his memoirs in accordance with Radcliffe.
15. On 12 May 1992, Sir Edward called on the Cabinet Secretary to discuss arrangements for access to papers.
16. On 19 May 1992, the Cabinet Secretary wrote to Sir Edward, explaining that he was trying to agree with all former Prime Ministers arrangements for papers taken away by them on leaving office. After saying that Sir Edward's papers were largely copies of public records, and while not covered by the Public Records Act were still of interest to the Government, the Cabinet Secretary dealt with access, Official Secrets, transfer of ownership, and correspondence with The Queen. (Secure storage and Radcliffe were dealt with in the letter of 8 July 1988. Neither letter dealt with copyright). *Sir Edward did not reply.*

### D. Lady Thatcher

17. On 27 November 1990, the Cabinet Secretary minuted the outgoing Prime Minister about her papers. The minute was settled in the light of consultation with Mr Nursaw and Mr Blythe, and in particular Mr Blythe's advice that the aim would be to attach conditions the acceptance of which would be binding in contract. He further advised that an undertaking binding on her heirs not to transfer the papers out of this country would bind her estate.
18. The Cabinet Secretary's minute accordingly contained such an undertaking, and what had become the common form provisions about access and so on, except for the Radcliffe provision.
19. Lady Thatcher entered a reservation in respect of her grandson, a US citizen, and there was discussion leading to an exchange of letters in January 1991. The result was

acceptance by Lady Thatcher of the limitations on transfer with a reservation for unforeseen conditions of great hardship.

**W H Godwin**

June 1995

Draft 19.6.1995 (despatched 26.6)

THE PAPERS OF FORMER CABINET MINISTERS

AND PUBLIC RECORDS LEGISLATION

The Victorian legislation (Acts of 1838, 1877 and 1898)

1. For over 40 years, from August 1917 until the end of 1958, former Cabinet Ministers were allowed custody of Cabinet papers on terms laid down in the decisions adopted from time to time by the Cabinets in which they had served. These decisions were not embodied in legislative instruments; they were of the nature of constitutional conventions.

2. In law, Cabinet papers were public records within the meaning of the Public Records legislation, being documents of a public nature belonging to Her Majesty (section 20 of the 1838 Act). There was

no clash between convention and law: those concerned with law enforcement were not likely to challenge Cabinet decisions in the Courts, and even to-day, when recourse to the Courts is incomparably more free than it was between 1917 and 1958, it is doubtful whether a private individual would be able to mount a challenge. That leaves only the authority with responsibility for public records.

3. Under the Victorian legislation, public records were under the charge and superintendence of the Master of the Rolls. It may be that no holder of that high judicial office ever learned of the arrangements sanctioned by Cabinets, but even were it otherwise it is very unlikely that he would have thought it right, in the exercise of the functions conferred on him by the Victorian regime, to challenge them in the Courts.

4. It may be that these arrangements could have been regulated by a prerogative Order in Council, which it seems to me would have precluded any practice inconsistent with it. However, a new Cabinet which found the Order unsatisfactory would have been able to seek revocation and replacement by a new Order, so that there would not have been a permanent regulation; but there would have been greater transparency, which might have been seen as a gain.

Public Records Act 1958

5. The Act of 1958 introduced a new definition of public records. For present purposes, it may be interpreted as covering papers prepared for the purpose of discharging official functions.

6. It also introduced a tighter system of control, and vested general responsibility for public records in the Lord Chancellor, placing on him the duty to supervise their care and preservation (section 1(1)).

7. Section 3 of the Act provided for the ~~entire~~ disposal of public records.

First, there were those <sup>selected</sup>/~~chosen~~ for preservation. Then there was a general provision that those not so selected were to be destroyed.

Finally, in the alternative to destruction, there was provision for records not chosen for preservation to be disposed of in any other way subject to the approval of the Lord Chancellor.

8. Clearly, these provisions are not to be read as inhibiting correspondence between Departments and those outside the public service. So, in the case of a letter from a Department to a member of the public, the top copy is outside the scope of section 3 because there was no intention to retain it among the Department's records, for the purposes of which the necessary copies would be taken and retained. The definition of public records thus excludes papers prepared in the discharge of official functions for transmission to persons outside the public service...

9. There may be in existence classes of documents the disposal of which otherwise than by preservation or destruction, has been approved by the Lord Chancellor since the Act came into force. The present question is whether papers to be retained (whether by loan or gift) by Cabinet

Ministers after they have left office should also be regarded as a class in relation to which the Lord Chancellor's approval is required. 10. It seems desirable as a first step to seek the views of the LCD on the issues raised in this note (which is addressed only to the position in England and Wales).

W H Godwin  
19 June 1995



C.O. 16  
27

**THE TREASURY SOLICITOR**

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

Miss P M Andrews  
Cabinet Office  
Historical and Records Section  
Hepburn House  
Marsham Street  
London SW1P 4HW

Please quote:

Your reference: HO95/455

Date: 6 July 1995

*Dear Pat,*

**CHURCHILL PAPERS - NAO ENQUIRIES**

Thank you for your letter of 5 July. I have marked a few small suggestions on your Note, but otherwise I am in agreement with it.

*Yours sincerely*

*Richard Dunsell*

**MICHAEL CARPENTER**  
for the Treasury Solicitor



NOTE FOR RECORD

CHURCHILL PAPERS - NAO ENQUIRIES

Following his meetings at DNH and the NHMF, Mr Nigel Gale, NAO, visited Hepburn House on Tuesday 4 July to see Miss P Andrews, Cabinet Office, and Mr M Carpenter, Treasury Solicitor.

Mr Gale's main interests were:-

- the nature of the decision to terminate the litigation and,
- the extent to which information about the Gift and the reason for the termination of litigation is in the public domain

To a lesser extent Mr Gale was interested in the copyright situation, but he was particularly interested also to establish whether any improper pressure had been brought to bear upon the NHMF (eg from No 10) to purchase the Churchill papers.

Mr Carpenter explained the background to the litigation and said that it had been terminated when the purchase was made; when ownership of the whole Archive passed to the new Sir Winston Churchill Archive Trust, there was no longer a need to establish ownership as between State and non-State papers ~~which would, as had always been our aim,~~ preserved in one Archive at Churchill College. The decision to terminate the litigation if the negotiations succeeded was taken some time before they were completed.

*assert such rights as the Crown might have to keep the archive intact. By reason of the transactions the papers would.....*

*or to*

Mr Gale said that NHMF's Press Release made no reference to the gift of the official papers and he seemed to feel that therefore the distinction between the purchase of the personal papers and the gift of the official ones had not really got over to the public, even to MPs such as Mr Chris Smith. As I recall, our concern, when commenting on the Press Release, was to ensure that it made clear that what was being bought was only the non-official papers. The distinction between official and non-official papers and the fact that ownership of the official papers had been transferred by Deed of Gift was certainly in the public domain as a result of Parliamentary Questions. Whether termination of the litigation and the reasons for it was similarly in the public domain was less certain. Certainly the information had been provided for Qs and As and Lines to Take but it may not have been used simply because the questions had not been asked. We offered to check PQs answered but Mr Gale said he had his own copies.

*might*

Mr Carpenter explained the situation with regard to copyright. He said that it ~~would~~ have been possible to seek to reach an agreement under which copyright was transferred as well as the actual documents but it was very clear that the Churchill family would never have agreed to relinquish their rights in this respect. We were in discussion with Churchill College, together with HMSO, on how ~~the~~ <sup>Crown</sup> copyright provisions ~~were to be enforced.~~ *was*

*effectively to be asserted*

The new Trust has a copyright licence allowing copying for research and library purposes, not for commercial exploitation. If anyone, including the Churchill family, seeks to ~~exploit papers~~ *reproduce* in Crown copyright we shall need to be forewarned *the Archive for common any* ~~purpose which was not licensed, the Crown would be forewarned so that copyright could be~~ *asserted.*

We assured Mr Gale that no undue pressure had been brought to bear upon the NHMF, from No 10 or elsewhere, to purchase the Archive.

Mr Gale said that he would now prepare a letter for the C & AG to send to Mr Chris Smith, who had written asking for assurances that the NAO would be looking at the legality of the transaction. He would send it to us and to DNH in draft form for comment in the next two to three weeks.

MISS P M ANDREWS

Historical and Records Section  
5 July 1995





**THE TREASURY SOLICITOR**  
**Queen Anne's Chambers**  
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Miss P Andrews  
Cabinet Office  
Historical & Records Section  
Hepburn House  
Marsham Street  
London SW1

With the Compliments of

7b

To Michael Carpenter TSD

Cc Pat Andrews ←

6 July 1995

Churchill follow-up

1. In my minute of 26 June I referred to legal advice that I had seen in the Wilson papers. Last Friday I received a letter from Hilary Fasnidge in response to a request I had sent some time before for copies of TS papers relating to former Prime Ministers generally and specifically to those of Lord Wilson and Lord Callaghan. She enclosed Wilson papers which she had managed to track down but had not managed to find the others. (See the end of her Index of documents in the Churchill litigation dated 7 March 1995.)

2. As the urgency of this matter no longer seems particularly pressing, I put Hilary's letter on one side and have only now read the enclosures to it. They consist of a bundle which is I think identical to the one I ~~had~~ returned to you on 26 June, and also the enclosed loose papers. They include a further copy of the advice of Miss Finn LCD and Mark Blythe's comments on it and also advice by Ms Henderson and notes between Mark Blythe and Sir J Nursaw (all May 1990). I have copied them for myself but should be grateful if you could copy to Pat Andrews with the enclosed copy of this letter. You and she may wish to copy also to Duncan Chalmers.

3. I had not previously seen the May 1990 papers which I should like to think about in conjunction with the others, assuming that they can be tracked down.

4. I do not know what you and Pat Andrews have in mind as the next step. I could manage Wednesday afternoon next week or any time on Thursday but may not be free at other times.

5. I shall be in Westminster to-morrow Friday and shall leave this in your office.

W H Godwin

**CLOSED UNDER THE**

**FREEDOM OF INFORMATION**

**ACT 2000**

CABINET OFFICE
H 95/539
11 JUL 1995
FILING INSTRUCTIONS
FILE NO.

ACT 5000  
FREEDOM OF INFORMATION  
CLOSED UNDER THE

CAS 103/816 letter dated 6 JULY 95



*In Bowser  
mentioned this to you. When  
you see Nicholas Cox's  
views just. 26/1/90 JAC*

CABINET OFFICE

HISTORICAL SECTION

Hepburn House, Marsham Street, London, SW1P 4HW

Telephone: 01-~~xxx~~ 217 6050

Ref: HO 90/21

25 January 1990

Miss J E Court  
Lord Chancellor's Department  
Trevelyan House  
Great Peter Street  
LONDON SW1P 2BY

*Dear Jane*

THE WILSON PAPERS

We spoke about the question which has been raised in relation to the papers which Lord Wilson has in his keeping which relate to his time as Prime Minister. I now attach a copy of a letter sent to Lord Wilson by the Prime Minister in 1987 which shows the categories of papers which comprise a former Prime Minister's "private" collection and the terms on which he was allowed to remove them from No 10 (which I believe he did only last year).

The proposal is that these papers should form part of a collection of Wilson papers (the remainder of the collection would comprise papers from his period as Leader of the Opposition and from his time working for Lord Beveridge etc) and be deposited with a Canadian University - we think the University of Toronto. In return the University would set up a trust, the income of which would go to Lord and Lady Wilson and, after their deaths, used to finance exchanges of students between Canada and the United Kingdom.

The university is naturally very keen that the archive to be deposited should include the papers relating to his Premiership and is understood to be prepared to accept that such inclusion might have to be subject to conditions as to access. Lord Armstrong, former Cabinet Secretary, has approached Sir Robin Butler on Lord Wilson's behalf in this matter and wishes to discuss with Sir Robin whether it would be possible for HMG to agree to the proposal and if so, on what conditions.

I am not aware of any previous proposal of this nature. Former Prime Ministers' papers are deposited with Universities as we know - the Churchill/Chartwell Archive at Churchill College and the Avon papers at Birmingham are two examples - but we have no precedent, so far as I am aware, for such papers being deposited abroad. I should be most grateful for your thoughts and advice on the proposal so that I in turn can advise Sir Robin Butler.

Mulling it over in my own mind I have, as I mentioned to you, an instinctive feeling that such papers should not go abroad. On the other hand, if permission for them to do so was hedged around with requirements to remove classified material and to ensure that anything which would be opened after 30 years was available also in the PRO it is difficult to see what harm would be done - for example there could be no objection to "6 - speeches and related material, 8 - files which are personal rather than official"

14  
(depending upon the definition of "personal"!) or even possibly" 7 - copies  
of the typed daily diary.." being deposited abroad could there? If it would  
help to discuss, together with the PRO, please let me know, otherwise I  
await your reply. I fear I have to press you for a fairly swift response,  
as Sir Robin will not want to delay his reply to Lord Armstrong.

Yours ever

Pat

MISS P M ANDREWS



10 DOWNING STREET  
LONDON SW1A 2AA

THE PRIME MINISTER

30 July 1987

*Dear Lord Wilson,*

Thank you for your letters of 16 and 25 June about your private papers still at No.10. I am sorry I have taken some time to reply, but we have had to arrange for the collection of your "private papers" here to be assembled in proper order for you to inspect and in due course take away.

The convention is that, as a former Prime Minister, you are able to take away papers in the following categories:

1. Copies of outgoing Personal Minutes (those signed by yourself) excluding those marked TOP SECRET.
2. Copies of all personal telegrams and messages sent to or received from overseas, again excluding those marked TOP SECRET.
3. Copies of any letters you sent to The Queen, excluding those marked TOP SECRET.
4. Copies of all other letters signed by you.
5. Personal correspondence relating to Ministerial appointments.
6. Speeches and related material.

7. Copies of the typed daily diary for the whole of your administrations.

8. Files held in the Private Office which are personal rather than official.

Your taking out these papers would be subject to your being able to assure secure storage of those papers which are official papers and therefore public records. Your biographer would not have access to those papers nor to other official papers held at No.10. In so far as the papers taken out were official papers and public records, they would be subject to the Public Records Acts (and of course to the Official Secrets Acts), and would remain so to whomsoever they might pass after your death.

You would of course be able to draw on the papers for the purpose of writing an autobiography, but you would be expected to clear any such autobiography in accordance with the conventions laid down in the Radcliffe Report on Ministerial Memoirs, which the Government accepted when you were Prime Minister.

If you wish to come and inspect the papers, it might be more convenient for you to inspect them in the Cabinet Office rather than in No.10. If you would like to make contact with Robert Armstrong, he will arrange a time when you can come and inspect the papers. I should be content for you to be accompanied by Lady Falkender when you come to inspect the papers that fall within the categories described in the second paragraph of this letter. If you were also minded to inspect other papers which would be retained here - and which would all be public records within the meaning of the Public Records Acts - I should not object to Lady Falkender seeing papers which she saw or can be presumed to have seen at the time when you were Prime Minister; but that would be stretching the normal rule, and it would be

difficult to extend it so as to enable her now to see papers which she did not see at the time.

In your letter of 25 June you say that there is a separate and confidential question which Professor Vincent and Lord Weidenfeld wish to raise. I believe the appropriate person for such a discussion would be the Cabinet Secretary, and I have asked Robert Armstrong to make himself available for that purpose.

Yours sincerely

Raymond Shaitan

The Rt. Hon. The Lord Wilson of Rievaulx, K.G., O.B.E., F.R.S.





CABINET OFFICE

HISTORICAL SECTION

Hepburn House, Marsham Street, London, SW1P 4HW

Telephone: 01-~~233~~ 217 6050

Ms Smith 18  
I would be grateful if  
you would seek advice  
as proposed and advise  
1/4 JAC

Ref: HO 90/115

10 April 1990

Miss J E Court  
Lord Chancellor's Department  
Trevelyan House  
Great Peter Street  
LONDON  
SW1P 2BY

S. Brown  
L.C.D.  
10 April 90

Dear Judge

THE WILSON PAPERS

On the basis of your letter to me dated 5 March 1990 - for which many thanks - and Nicholas Cox's letter to you dated 1 February I advised Sir Robin Butler of our concerns about the proposal that Lord Wilson's papers relating to his Premiership might be deposited with a Canadian University in return for money to be paid into a Trust Fund.

I raised the question of the status of the papers and I have since discussed the matter with Sir Robin. He had assumed, as I think had everyone, that the papers which, by convention, Prime Ministers are allowed to "take away" remain subject to the Public Records Acts, hence the Prime Minister's letter to Lord Wilson dated 30 July 1987 (of which you have a copy) and one couched in almost identical terms which Sir Robin himself wrote to Mr Heath on 4 July 1988.

It is clear from these that the removed papers were regarded as official and that the intention was for them to remain within the ambit of the Public Records Acts, hence the restriction on access to which they refer and the concern about secure storage which is reflected in related correspondence. To answer Nicholas's query, some - a fairly large proportion I should imagine - are indeed copies of material which is also on the official files.

X We have been trying to discover the origins of the "convention" with regard to Prime Minister's papers and whether, and if so, from whom, advice was then sought, but without success. Sir Robin would therefore be grateful if legal advice could now be sought on the status of the papers "taken away" by Prime Ministers. As the key question in this is whether the provisions of the Public Records Acts apply this should, I think, be a matter for your department's Legal Adviser but, given the ominous echoes of the Churchill/Chartwell case (on which I am writing to you separately), it might be as well if he/she touched base with Mark Blythe, Treasury Solicitor.

347 Lord Wilson's advisers are of course pressing for a reply on this matter which they first put to us in mid-January so I should be most grateful for a speedy response if at all possible.

I am sending a copy of this letter to Nicholas Cox, PRO.

Yours ever Pat

MISS P M ANDREWS

17.5.90

Mr Bower

cc Mr Blythe

Papers taken away by former Prime Ministers

1. You have asked for advice as to the status of papers taken away by former Prime Ministers. I have spoken to Mark Blythe, who agrees that the best way to take this forward is to let him have a side copy of this advice, so that he can offer any opposing or supporting comments.

2 Mrs Thatcher's letter of 30 July 1987 lists the categories of papers which, by convention, Prime Ministers have been allowed to take away. However, the source is not known, and it would therefore be wrong to use that list as if its construction could provide definitive answers as to the ownership of such papers. The better approach is to look at how the various papers have come into existence and consider what would happen to them if the Prime Minister chose not to, or had not been permitted by any convention, to remove them

3. Inevitably, the Prime Minister will leave some private papers which are undoubtedly his personal property. We are not concerned with those. He needs no special authority to remove them, although some might fall within listed categories. Neither need we be concerned with category 6, speeches, which are published materials, so that ownership or custody of particular copies is unlikely to be of particular significance, although there might be related materials requiring separate consideration, for instance, if there was background material not for disclosure. Papers in category 5 are probably also a special case, the emphasis being on "personal" and suggesting an acceptance that this correspondence never becomes part of any official records.

4 The remaining papers are *copies* of documents of a nature that the originals (if incoming) or sender's copies (if outgoing) would be on official files, and therefore public records. How, then, do these copies come into existence? Are they copies prepared contemporaneously for the Prime Minister's use, with a view to his eventually taking them away? Or is the Prime Minister in practice expected to come back and go through the official files, taking fresh copies of papers within the permitted categories. Mrs Thatcher's letter implies that the latter may very well be what happens in practice. In either case, were it not for the convention, these copies would probably never come into existence at all, or (if created) would in due course be discarded as unneeded duplicates. The Prime Minister would be prohibited, by official secrets legislation, both from taking away existing copies, and from making fresh copies to take away.

5 We know that there is a convention which removes that obstacle, authorising the otherwise unlawful creation and removal of a special class of papers. I doubt very much whether their status and ownership has been fully worked out. If they are public records, they cannot be the property of the Prime Minister or his estate after his death. If they are his property they cannot be public records. In practice however, they are evidently treated in some ways as if they were his property and in others as if they were public records. They are treated as if they were the Prime Minister's property in that it is clearly envisaged that he will retain them during his life, and be able to pass them on to his heirs, without there being any formally approved deposits or subjection to selection processes. Indeed, because they are duplicates they are not needed for the public archive in any event. On the other hand, they have been described as "therefore public records" subject to the Public Records Acts. His taking of the papers is subject to a condition of assuring secure storage -

but not of allowing public access, or even (at least expressly) of allowing official check or inspection.

6. In my view, the only status/ownership analysis which satisfactorily explains the way in which these papers have been treated, is that they are a special class of copy document which the Prime Minister is permitted to create and take away as his own property subject to an obligation on his part insofar as they are duplicates of documents which are, or are part of public records, to observe equivalent restrictions. Thus, if the public record is still closed, the Prime Minister's copy must be treated as a closed public record. If the public record is not selected for permanent preservation, and is destroyed or otherwise disposed of, the Prime Minister's copy is no longer a duplicate of a public record, and there will be no restrictions on it. Similarly when the public record is opened, the Prime Minister's copy will effectively be released from restrictions. The Act does not apply directly, and provides no enforcement procedure, but the whole essence of the convention is that a former Prime Minister is entitled to a special privilege and will accept the corresponding moral obligation.

or was  
a spare

7. This analysis would not fit where the Prime Minister's taken away copy was not mirrored in the public archive. But would there in fact be cases where the former Prime Minister could take away the *only* copy? It seems to me that that is only likely to happen, with an *official* paper, in the event of the paper being too insignificant to file. Is this an oversimple view?

ICLD  
28 OQS  
210-3533  
17 May 1990

19

MR BLYTHE

#### STATUS OF PAPERS REMOVED BY FORMER PRIME MINISTERS

1. The questions raised by the correspondence on the Wilson papers are the extent to which the categories of papers listed in the Prime Minister's letter of 30 July 1987 are public records within the meaning of the Public Records Act 1958 and the effect of the convention permitting release of papers to former Prime Ministers on the status of the papers.

2. Paragraph 2 of Schedule 1 to the Public Records Act provides that administrative and departmental records belonging to Her Majesty, whether in the UK or elsewhere, in right of Her Majesty's Government in the UK shall be public records. Those papers in category 8 of the Prime Minister's letter are personal. Those in category 6, records of speeches and related material will probably be public records to the extent that they are in No 10 files as administrative records. Those in class 5 may also, as Ms Finn says, be private papers but judging from the subject-matter of the correspondence they may appear on official files. Papers in the other categories will all be public records within the definition in the Act. The status of the documents in categories 1 to 4 and 7 would seem to be unaffected by the fact that they are mainly additional copies, although as such they would be more likely to be discarded and destroyed as surplus to requirements than sent for preservation to the Public Records Office.

3. Were it not for the convention allowing the release of documents under prescribed conditions to former Prime Ministers, those of the documents concerned classifiable as public records would have been subject to selection <sup>under section 3(1) of the 1958 Act</sup> by the person responsible for public records at No 10 to determine whether they should be permanently preserved. Those selected for preservation would have been sent to the Public Record Office or to another place of deposit appointed by the Lord Chancellor;

those rejected would have been destroyed or disposed of in some other way. Preserved documents must <sup>by virtue of section 4(6) of the 1958 Act as amended</sup> be kept in the Public Records Office for 30 years or ~~the~~ such longer or shorter period as may be prescribed in a particular case by the Lord Chancellor before becoming available for public inspection.

4. The Public Records Act makes no provision for the release of public documents by persons responsible for them. It might be possible to argue that the duty imposed on persons responsible for public records under section 3(1) to make arrangements for their safe-keeping was compatible with the release of documents to former Prime Ministers subject to conditions as to secure custody but I think this is a very strained interpretation; if it had been intended that public records could be released to third parties the Act would have so provided in express terms. Nor is it possible to say that the documents are being disposed of pursuant to section 3(6) because they have not been assessed yet for their suitability for permanent preservation. The convention that certain documents may be released to former Prime Ministers is an extra-statutory concession, the effect of which may be to deprive the documents of their status as public records by transferring ownership of them to the former Prime Minister and must be to make the machinery of the Act for the preservation of public records incapable of application in any event. For Ms Finn to say that the convention authorises the otherwise unlawful creation and removal of a special class of documents is somewhat disingenuous as the convention itself has no legal basis.

7  
5. It is not surprising that the status and ownership of the papers which may be removed by former Prime Ministers is not fully worked out, as Ms Finn says, since the convention as evidenced in the Prime Minister's letter purports to treat them as subject to the Public Records Acts while effectively preventing them from being so. The most that can be said is that the documents are released by administrative concession from the application of the Public Records Acts on condition that certain partly equivalent restrictions are applied by the former Prime Minister and his estate. It might be argued that the release and transfer of the documents to the former Prime Minister is on condition

that the restrictions are complied with and that failing to comply would invalidate any legal interest acquired by the former Prime Minister or his estate and place them under a duty to return the documents. However this is not what the Prime Minister's letter says and hence if Lord Wilson or his estate were to fail to abide by the restrictions imposed under the letter they would be breaking a moral but not a legal obligation. An argument might be mounted to the effect that Lord Wilson was estopped from treating the documents otherwise than as provided by the letter if Lord Wilson had given assurances that he would observe particular restrictions in respect of the documents, but mere acquiescence by him in the conditions imposed by the Prime Minister's letter would not seem to be sufficient. It would of course be open in theory, if the necessary evidence were available, for a prosecution to be brought against a former Prime Minister, <sup>who disclosed information in the release of</sup> under the Official Secrets Act 1989 which supplements the Official Secrets Act 1911 and in particular repeals section 2 of that Act. Sections 1 to 4 of the 1989 Act make it an offence for a person who has been a Crown servant to make without lawful authority a damaging disclosure of information or documents relating to security or intelligence, defence, international relations or the prevention and investigation of crime. However it is virtually inconceivable that a prosecution would be brought.

6. The convention as it stands is neither conceptually nor practically satisfactory. It would be interesting to learn of its origins but I see that no information has hitherto been discovered. The convention involves a disregard of the Public Records Acts which is particularly objectionable if it is the case that some of the papers which are removed may be the only copy of official papers. If the conditions of release were to be breached by a former Prime Minister considerable embarrassment would be caused to the Government without any certain means of redress being available. Nevertheless withdrawal of the concession could be politically unacceptable and clearly cannot be done in the case of Lord Wilson. The best way of proceeding for the future would appear to be by amendment of the Public Records Act 1958 to allow for the release of copies of public records to persons approved by the Lord Chancellor on such conditions as to their safe custody and as to

public access as may be prescribed, provided that such conditions would in no circumstances be less onerous than those imposed in respect of the originals of the records in the custody of persons responsible for public records or in the Public Record Office or any place of deposit appointed by the Lord Chancellor under the Act. A less radical alternative might be to reconsider the terms of the concession, perhaps by providing that the papers were to be released on loan to former Prime Ministers subject to recall at any time and that failure to comply with any restrictions imposed concerning custody and access would render all the documents subject to immediate return. The concession could also provide that title to the documents would be transferred to the Minister or his estate when the originals had been rejected as not required for public preservation or, having been transmitted to the Public Record Office, had been made available for public inspection. A variation of the concession in such terms would still be an extra statutory concession but would ensure that title remained with the Government. The release of those Prime Ministerial papers which are not public records would not have to be subject to specific restrictions but a warning that disclosure of the information they contained could be contrary to the Official Secrets Acts would be needed.

7. The immediate task is to decide whether the release of Lord Wilson's official papers to a Canadian university could be effected in conformity with the conditions under which they were made available to him. If the Canadian university can assure secure storage and an embargo on public access until permitted in respect of originals in the Public Record Office release might be acceptable in principle. Classified material would present a particular problem and it may be that an absolute prohibition on their release should be imposed. Release of any documents should probably be conditional upon prior scrutiny and approval by the LCD and be made on condition that the LCD be consulted concerning storage arrangements in Canada and be entitled to inspect storage facilities at any time. If the transfer of documents to the Canadian university is to proceed, in due course a transfer agreement of some sort will be drafted and it would be



essential for LCD to be given sight of any draft documents and be given the opportunity to comment on and approve the terms of the transfer.

*Phineas Henderson*

P F HENDERSON (MISS)

24 May 1990

7

SOLICITOR

cc Miss Henderson

**STATUS OF PAPERS REMOVED BY FORMER PRIME MINISTERS**

In view of its close factual connection with the budding row over the Chartwell papers I thought you should see the attached.

2. LCD, as the department responsible for the Public Records Act 1958, were consulted by the Cabinet Office, Documents Section, about the proposal to let Lord Wilson have copies of certain official papers, with a view to their being deposited with the University of Toronto. I attach the advice given by the LCD lawyer and a helpful note which Miss Henderson has prepared.

3. Overall the position, as I see it on a very quick look through the papers, would appear to add up to this:

(a) We can probably forget about items 5, 6 and 8 in the list set out in the Prime Minister's letter to Lord Wilson since they seem to relate either to the personal property of Lord Wilson or else to ephemeral material which is unlikely to give any problem in practice.

(b) The other items are "copies", presumably made specially for the purpose, and not extra copies that happened to be lying about No 10.

(c) The originals of the copies would appear to be (often classified) public records despite the casual use of the word "personal" in the Prime Minister's letter. See the definition of public records in paragraph 2 of the First Schedule to the 1958 Act.

- (d) The 1958 Act does not authorise "copies" to be made of these public records, even at the request of a former Prime Minister (see section 5(1), (3) and (4)) at any rate during their 30-year or other specified period.
- (e) This said, having been made the copies fall to be treated as public records in just the same way as the original documents, to be preserved (or not) as envisaged by section 3. A fortiori they do not become the ~~(public)~~ property of Lord Wilson.
- (f) The 1958 Act envisages public records being transferred "to a place of deposit" (section 4). On its true construction that section must be territorial in scope.
- (g) Any arrangement, as envisaged, to deposit the papers abroad, must therefore be quite outside the scheme for selection, preservation and deposit of public records prescribed by the 1958 Act.

4. It follows in my view that the convention regarding Prime Ministerial papers is of doubtful legal validity. What would seem to be required is an amendment, such as that suggested by Miss Henderson, to give it a statutory basis.

5. It further follows that, as a matter of law, there can be no tertium quid for official papers comprising copies of former Prime Ministerial papers, being neither public records nor private papers.

6. What, then, is to be done about the Wilson papers - and a further request, in the pipeline, for copies of the Callaghan papers? This must surely go to Ministers. My own inclination would be to point out that the chances of effectively policing any deposit arrangement entered into with an educational or other institution abroad must be significantly less than if the arrangement were entered into with a national body. If, however, the convention has been slavishly followed to date, it may be politically difficult to refuse this particular request, or a revised request limited to a national body. In that case

contractual arrangements for deposit must be negotiated giving the appropriate Minister (who?) the right to terminate the arrangement if specified conditions are not met, pending amendment of the 1958 Act.

7. Do you agree?

*MS*

M A BLYTHE  
25 May 1990

ENC

MR M A BLYTHE

STATUS OF PAPERS REMOVED BY FORMER PRIME MINISTERS

I am grateful for the opportunity to see the attached correspondence and to study the views that have been expressed so far. I have reached no clear conclusions but I think that it would be helpful if I set out my analysis.

I think it helpful to consider first the Official Secrets Acts. The relevant provisions are concerned with the unauthorised disclosure of information. If the disclosure is authorised, those provisions cease to be relevant. The fact that the piece of paper recording the information is still stamped "Confidential", or "Secret", or even "Top Secret" is merely an embarrassment and does not affect the legal considerations. It is, I suppose, possible to give someone a classified document but to forbid him to disclose to anyone the information contained in it. This possibility seems to be contemplated in Mrs Thatcher's letter of 30 July 1987 to Lord Wilson when she lists three categories of copies of documents he may take away but excludes from those categories documents "marked Top Secret". This carries the implication that he may take away copies of documents marked "Secret" or "Confidential". But if the documents are still classified, he does not appear to be authorised to disclose the information contained in them to anyone. This is presumably the reason why on page 2 of the letter Mrs Thatcher reminds Lord Wilson that papers which were official papers and public records remain subject to the Official Secrets Acts. But close analysis of the text of that letter is hardly profitable because the same paragraph contemplates that these official papers and public records would become the property of someone else after Lord Wilson's death but would still remain subject to the Public

- page two -

Records Acts and the Official Secrets Acts. This shows a relaxed attitude to the communication of information which may be classified secret to a category of persons to be selected by someone over whom the Crown has no control. My own view is that there can be no justification for allowing a former Prime Minister to take away and treat as his own property documents which are still properly classified.

I turn now to the Public Records Act. I assume that that Act is concerned with the preservation of official papers for the benefit of posterity and that the corollary of that is that the documents must eventually be available for public inspection. Section 5 of the Act provides that documents which were not available to the public before their transfer to the Public Record Office shall not be available for public inspection until 30 years after the documents came into being or such other period as the Lord Chancellor may prescribe. I see this restraint as part of the process of making official records available to the public and not as imposing any restriction on the Government or public body whose papers are involved. In other words the fact that a document is destined for the Public Record Office in no way restricts publication of it by the responsible Department. Of course, the Department may have to refuse publication in the public interest but my point is that the Department is free to show its papers to any one at any time regardless of the Public Records Act which simply compels the Department to allow access to its papers after a prescribed period. A trivial example may make this clear. Suppose a Member of Parliament writes to a Minister on departmental business and subsequently loses his copy of his own letter. I can see no obstacle whatever to sending him a photocopy even though the original is destined for the

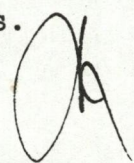
Public Record Office and the photocopy will for a short period before it is posted to the MP come within the definition of a public record.

If I am right so far, I can see no obstacle in the Public Records Act to ~~prevent the copying of any documents which a former Prime Minister claims under the "Convention"~~. My reasoning does not appear to be effected if the proposal is to give the former Prime Minister a copy which is already on the file provided that the original or another copy remains among the papers which will be transferred to the Public Record Office. I know that few of us have the time to "weed" our own files but when we do we tear up or shred duplicates without the slightest hesitation. We know that the Public Record Act does not prevent that. I cannot see that it prevents another way of disposal - handing the copy to someone who wishes to keep it. Of course, there may be many other reasons why that would be an improper step to take but I have to assume that none of those reasons apply to a document of a class which the Prime Minister of the day, advised by the Cabinet Secretary, has decided may be given to a former Prime Minister.

You will have noted that legislation was passed this Session to enable a copy of the Act of Parliament establishing Australia as an independent Member of the Commonwealth to be presented to Australia. It might be worthwhile looking at the Legislation Committee Paper explaining why legislation was necessary (I have a copy somewhere) but my recollection is that the problem was that Australia wanted an "original" copy not just a certified true copy and that the document that they wanted would have gone to the Public Record Office under the ordinary rules.

The next question is whether conditions can be attached to the "gift" of copy documents to a former Prime Minister. I believe that they be imposed on a contractual basis - the consideration being that the documents would not be handed over unless the former Prime Minister undertook to observe the conditions. If he broke the conditions, he would be liable in damages and in appropriate circumstances the Court would issue an injunction to restrain actions in breach of the conditions. The problems begin when the proposal is to deposit the documents abroad. No doubt the former Prime Minister could be required to impose similar conditions on those who will be responsible for the papers there but there can be little hope of enforcing the conditions in a foreign jurisdiction. This does not rule out a condition requiring similar conditions to be attached to any transfer of the documents to the custody of another person. All this seems to me a little unreal because once the former Prime Minister has died there can be little hope of enforcing any conditions.

A final comment. I distinguish this problem from that of the Churchill papers. We are concerned here with papers which will be given to a former Prime Minister; the Churchill papers appear to be papers which the former Prime Minister took without authority and, no doubt because everyone was too frightened to do more, his possession of the papers was regularised by treating as an indefinite loan. Our only argument in relation to the Churchill papers seems to me to be that holding property on indefinite loan does not attract a period of limitation until a tortious act is committed in relation to the property-which is not the case with the Churchill papers.



J Nursaw

31 May 1990





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LONDON  
SW1H 2HP

Please quote A81/199/MAB

Your reference

Date 6 June 1990

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*Sally Finn*

## PAPERS TAKEN AWAY BY FORMER PRIME MINISTERS: THE WILSON PAPERS

Thank you for letting me have a copy of your advice to Mr Bower which I have discussed with Jim Nursaw in view of his involvement in a related matter.

Shortly, our view is that there appears to be nothing in the Public Records Act 1958 to prevent a Department from releasing copies of official documents to a third party, or making copies specifically for this purpose, at any rate before they have been selected for permanent preservation and safe-keeping under section 3. On this footing the copies will become the absolute property of the recipient in the absence of any other basis for the arrangement (eg loan). We were therefore somewhat puzzled by the reference in Mrs Thatcher's letter of 30 July 1987 to Lord Wilson to the papers being "subject to the Public Records Acts".

Any decision to release copy documents will, of course, have to take account of their contents and classification, if any. The Convention summarised in Mrs Thatcher's letter is clearly designed to establish a practical approach to what amounts to a problem of propriety, which is

not strictly for us. Our only comments are that there must clearly be a risk of a breach of the official secrets legislation if control of sensitive documents, some of them apparently classified as Secret, passes to a third party, and that this risk must necessarily be greater if effective control passes overseas.

I am copying this to Mr Bower, and to Miss Andrews in the Cabinet Office, Historical Section.

Yours,

Man Blythe

M A BLYTHE



25M

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HO95/455/

M Carpenter Esq  
Treasury Solicitor's Department  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

5 July 1995

*Dear Michael*

**CHURCHILL PAPERS - NAO ENQUIRIES**

I enclose a note of our meeting with Nigel Gale yesterday. I think I should show it to Sir Robin Butler so would be most grateful for any comments/additions you may have.

*Yours ever*

*Pat*

MISS P M ANDREWS

NOTE FOR RECORD

**CHURCHILL PAPERS - NAO ENQUIRIES**

Following his meetings at DNH and the NHMF, Mr Nigel Gale, NAO, visited Hepburn House on Tuesday 4 July to see Miss P Andrews, Cabinet Office, and Mr M Carpenter, Treasury Solicitor.

Mr Gale's main interests were:-

- the nature of the decision to terminate the litigation and,
- the extent to which information about the Gift and the reason for the termination of litigation is in the public domain

To a lesser extent Mr Gale was interested in the copyright situation, but he was particularly interested also to establish whether any improper pressure had been brought to bear upon the NHMF (eg from No 10) to purchase the Churchill papers.

Mr Carpenter explained the background to the litigation and said that it had been terminated when the purchase was made; when ownership of the whole Archive passed to the new Sir Winston Churchill Archive Trust, there was no longer a need to establish ownership as between State and non-State papers which would, as had always been our aim, preserved in one Archive at Churchill College. The decision to terminate the litigation if the negotiations succeeded was taken some time before they were completed.

Mr Gale said that NHMF's Press Release made no reference to the gift of the official papers and he seemed to feel that therefore the distinction between the purchase of the personal papers and the gift of the official ones had not really got over to the public, even to MPs such as Mr Chris Smith. As I recall, our concern, when commenting on the Press Release, was to ensure that it made clear that what was being bought was only the non-official papers. The distinction between official and non-official papers and the fact that ownership of the official papers had been transferred by Deed of Gift was certainly in the public domain as a result of Parliamentary Questions. Whether termination of the litigation and the reasons for it was similarly in the public domain was less certain. Certainly the information had been provided for Qs and As and Lines to Take but it may not have been used simply because the questions had not been asked. We offered to check PQs answered but Mr Gale said he had his own copies.

Mr Carpenter explained the situation with regard to copyright. He said that it would have been possible to seek to reach an agreement under which copyright was transferred as well as the actual documents but it was very clear that the Churchill family would never have agreed to relinquish their rights in this respect. We were in discussion with Churchill College, together with HMSO, on how the copyright provisions were to be enforced. The new Trust has a copyright licence allowing copying for research and library purposes, not for commercial exploitation. If anyone, including the Churchill family, seeks to exploit papers in Crown copyright we shall need to be forewarned.

We assured Mr Gale that no undue pressure had been brought to bear upon the NHMF, from No 10 or elsewhere, to purchase the Archive.

Mr Gale said that he would now prepare a letter for the C & AG to send to Mr Chris Smith, who had written asking for assurances that the NAO would be looking at the legality of the transaction. He would send it to us and to DNH in draft form for comment in the next two to three weeks.

MISS P M ANDREWS

Historical and Records Section  
5 July 1995

for information - & ( )  
hope not  
imitation.  
Alexandra

With compliments



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Vol 95 No 6

# NHMF shows naivety in lottery grant allocations

April's announcement of the first lottery grants from the National Heritage Memorial Fund (NHMF) contained much that should be welcomed.

Monies handed out totalled over £24m and there is plenty more to come. Museums in general did well, with a range of small local museums and larger independent museums benefiting (see p8). It is certainly encouraging to note that the trustees recognise the diversity of museums throughout the UK. We await with interest to see where the big money goes.

The awards set two particularly useful precedents. It is now clear that NHMF does not have hard and fast rules on what partnership funding constitutes. That they were prepared to put up approximately 75% funding for the projects at Eyam and Elmbridge Museums must give heart to those who are despairing of raising 50% of the cost of projects. Secondly, the early manifestation of endowments for two projects shows that the trustees are aware of the difficulties of generating revenue funding.

And yet the overall memory is one of controversy and bad feeling. The £13.25m grant to acquire Churchill's private and public papers has no direct relevance to museums but there are two aspects that have serious and damaging implications. Firstly, the naivety of NHMF. Allowing this scheme to be in the first round without an awareness of the controversy it might produce does suggest a worrying lack of judgement and perspective. Such grants are often sensitive; more tact and thought should go into future announcements.

Secondly, in what must be a first, NHMF has, with a single action, created a market for papers of politicians and other prominent people. The implications for collections are clear to see – most museums depend on the good will and largess of owners of objects and collections.

The lottery can only be sustained if it enjoys broad public support and the sound judgement of those given responsibility for making awards. Sadly, much of the good work achieved so far has been eroded in the first set of grants. A period of silence punctuated by sound and sensible, even dull, grant making would now be gratefully appreciated.





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## THE TREASURY SOLICITOR

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Office of Public Service & Science Legal Adviser

Miss P M Andrews  
Cabinet Office  
Historical and Records Section  
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Marsham Street  
London SW1P 4HW

Please quote:

Your reference: HO95/447

Date: 4 July 1995

*Dear Pat,*

### CHURCHILL COLLEGE: COPYRIGHT

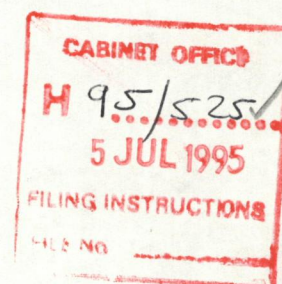
Thank you for your letter of 3 July.

My understanding (admittedly obtained only from Peregrine Churchill) is that Southampton University would not be entering into an agreement covering the whole of the Churchill Archive. It seems that the article which appeared in the Guardian on 29 June is based on an earlier form of press release. The one sent to me by Southampton University did not indicate an intention to cover the whole of the Archive, although I am sure that there probably was such an intention.

As you say, it will be useful to raise the matter with Alan Kucia at Cambridge on Friday. I am copying this letter to recipients of yours.

*Yours sincerely,  
Michael Carpenter*

**MICHAEL CARPENTER**  
for the Treasury Solicitor





FOLIO  
23

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HO95/447

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Treasury Solicitor's Department  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

3 July 1995

*Dear Michael*

**CHURCHILL COLLEGE: COPYRIGHT**

Thank you for your minutes of 28 June following your telephone conversations with Mr Peregrine Churchill and Mr Winston Churchill MP.

I think it is not quite true to say that the transfer by Southampton University to a multi-media format involves only those "Jenny" papers not at Cambridge. The article which appeared in The Guardian on Thursday 29 June (copy attached) makes it quite clear that it is the intention that the whole archive should be so transferred. I spoke to Alan Kucia, Archivist at Churchill College and he said that requests had already been made for access to Class 28 of the Churchill Archive which contains some of the "Jenny" papers. They are not Crown Copyright but they do form part of the former Chartwell papers now owned by the new Trust.

I understand that the Chairman of the new Trust takes the view that cataloguing at Cambridge must take priority over Southampton's work, so we shall no doubt hear more on this front.

We are to meet Alan Kucia at Cambridge on Friday, together with Jim Wretham, HMSO; perhaps the situation will become clearer then.

Copies go to Paul Jenkins and Hilary Fassnidge, T Sol, Gordon Robbie, HMSO and Richard Jackson, LSLO.

*Yours ever*

*Pat*

MISS P M ANDREWS

(21)

HISTORY

## Winnie's words to Jenny go on CD-ROM

**T**HE CHURCHILL Archives, controversially bought from the family with National Lottery money earlier this year, are to be made available to the public on CD-ROM following a deal with Southampton University announced yesterday.

The university will catalogue and computerise the massive archive, which contains over three million documents, using novel software devised by its professor of electronics and computer science, Wendy Hall. The first CD-ROM will contain correspondence between Sir Winston Churchill and his

mother Jenny, in combination with appropriate photographs, video and sound, and will go on sale at Christmas 1996.

The announcement coincided with the inauguration at the university of one of the fastest computers in Britain — an IBM SP2 parallel computer. The key to making widely available these insights into Churchill's character will be the Microcosm multimedia software designed by Hall and her team.

The combination of the parallel supercomputer and the Microcosm software will overcome a problem that currently besets proponents of

multimedia — how to find all related groups of information that have common links (whether previously known or not) but exist in different forms, and present them to users in an accessible form.

What Microcosm can do is find the "missing" links — regardless of whether the data is graphical or textual — while the SP2 will enable the mass of papers to be digitised and catalogued within an acceptable time.

Even so it will take 15 years before the complete Churchill archive is available to the public.

John Stansell

3.3



faxed  
22



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Office of Public Service & Science Legal Adviser

**MINUTE**

**To:** Miss P Andrews  
Historical & Records Section  
Cabinet Office

**From:** Michael Carpenter

**Room:** -

**Date:** 28 June 1995

---

c.c. Mr Jenkins  
Mr Robbie, HMSO  
Mr Jackson, LSLO  
Miss Leech, CO  
Miss Fassnidge

**Churchill Archives : copyright**

As a follow-up to my minute earlier today, I should tell you that I have now taken a call from Mr Winston Churchill MP.

The conversation took a similar turn to my earlier one with Peregrine Churchill in that it seemed to be quite clearly recognised that the Churchill family could not dispose of Crown copyright in any of the Archive material. It was explained that the material being transferred by Southampton University into a multi-media format was the collection of Lady Jenny Churchill and not the Archive which is now held at Churchill College. Mr Winston Churchill recognised that any copying of that Archive in electronic form would require close consultation with and permission of the Crown.

I explained that, provided it was recognised that the copying of Crown copyright material would need a permission, there did not seem to be any present difficulty. The recent letters had been sent, because it appeared that from Peregrine Churchill's letter that the whole of the Churchill Archive was to be electronically copied. It was therefore necessary to put on record the Crown's claims. However, the Crown did not claim title to the "Jenny" papers, nor did any of them seem to be ones in which Crown copyright would subsist.

The conversation did, I think, serve to clear the air and Mr Winston Churchill seemed clearly to understand our position.

*M.C.*



*Faxed*



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Office of Public Service & Science Legal Adviser

### MINUTE

**To:** Miss P Andrews  
Historical & Records Section  
Cabinet Office

**From:** Michael Carpenter

**Room:** -

**Date:** 28 June 1995

---

c.c. Mr Jenkins  
Mr Robbie, HMSO  
Mr Jackson, LSLO  
Miss Melanie Leech, CO  
Miss Fassnidge

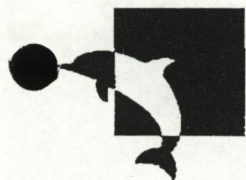
#### Churchill Archives : copyright

1. Since my minute to you of 26 June, I have spoken to spoken to Pergrine Churchill on 27 June and again today. I have also sent letters to Peregrine Churchill, the Vice Chancellors of Cambridge and Southampton Universities and to Peregrine Churchill's literary agent.
2. The conversations with Peregrine Churchill were quite civil. He appears to recognise that he and the Churchill Family cannot deal in Crown copyright and did not intend to do so. The conversations with him were a little unfocussed, but he did make it clear that Southampton University would not engage in any electronic copying without seeking the required copyright clearances. He told me that Southampton University were to make a press announcement today and I attach a copy.
3. As you will see, the proposed electronic copying and cataloguing relates to the "Jenny" papers, i.e. the collection owned by Sir Winston's mother and which were not the subject of the recent litigation. It is doubtful whether there is any material in that collection in which Crown copyright subsists and I do not think we have grounds to object to the press release.
4. Southampton University are on notice of the Crown's claim to copyright in the Chartwell papers and would be imprudent indeed to embark on electronic copying

without permission. We may need to follow up my letter to the Vice Chancellor with a request for confirmation that the agreement with Primary Source Media does not involve the copying in computerised form of any Crown copyright material.

5. Peregrine Churchill seems concerned about library and archive copying, as permitted in the two copyright licenses relating to the Churchill Archive (i.e. the 1946 settlement papers). I think I managed to re-assure him that these did not amount to a licence to Churchill College to reproduce the Archive for commercial purposes.

*M.B.*



University  
of Southampton

# News Release

Ref: 95/74

28 June 1995

## University to produce Churchill family papers in multimedia format

A specialist group at the University of Southampton is to be responsible for transferring the first instalment of the Churchill family papers into multimedia format (*it was announced today*). The Jennie Randolph Churchill family papers, which include Sir Winston's letters to his mother, are part of one of the most important archives of the twentieth century. They will be contained in the first title to be published in computerized form by Primary Source Media of Reading in 1996.

The specialist group working on the project at the University is the Digital Libraries Research Centre (DLRC) which was established in 1994 and draws together the work of researchers in both of the University's Arts and Engineering Faculties, led by Dr Frank Colson (History) and Professor Wendy Hall (Electronics and Computer Science). The University will be working closely with the publishers, Primary Source Media.

The finished work will include images of text and glossary notes on the people mentioned, together with essays by leading specialists on major aspects of Churchill's life. The multimedia format allows for use of film, video and audio as appropriate, and this revolutionary new form of publication will enable the archives to be viewed and assessed by professional and lay readers alike.

There are several strong reasons for Southampton being selected for this project. Dr Colson and the historians will be using the software of the Microcosm hypermedia system, which has been developed at the University by Professor Hall. Microcosm is a versatile system which allows users to browse and query large multimedia collections. It is fundamentally different to most other hypermedia systems because of its ability to integrate information produced from a variety of sources, all in their original format.

Microcosm is already successfully established in the education world as a teaching tool -- particularly for history. The system has been specifically tailored to provide a historian's 'workbench'.

The project will exploit the huge potential of the new IBM SP2 Parallel Supercomputer which is being unveiled at the University on Wednesday 28 June (*today*). The IBM SP2 has been provided to the University by IBM, as part of its Shared University Research Programme. The system can deal with tremendous volumes of all types of information and its calculations are performed at a rate of billions per second.



In addition to the technology there is a strong body of expertise at Southampton on the issues which arise when large archives are digitized. Work in this area has been going on in the University's Hartley Library since the 1980s and includes the Wellington and Mountbatten Archives. The Digital Libraries Research Centre itself was established to administer the research work generated by the handling of very large multimedia archives.

The advent of the Churchill family papers in electronic form is expected to stimulate a substantial programme of research and scholarship.

The University of Southampton has exclusive rights to digitise and prepare for publication the Jennie Randolph Churchill family papers in this manner.

#### **Notes for editors**

1. The Microcosm software system is supported and marketed by Multicosm Ltd, a company which the University helped to set up and which has the sole licence to exploit the commercial potential of Microcosm.

#### **For further information:**

**University of Southampton**

Professor Wendy Hall, Electronics and Computer  
Science (01703) 592388

Dr Frank Colson, History (01703) 593079

Sarah Watts, Public Affairs, University of Southampton (01703) 593807

**Primary Source Media**

Julie Kelsall/Ian Savage (01734) 583247



## THE TREASURY SOLICITOR

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

Peregrine Churchill Esq  
Fairdown  
Vernham Street  
Vernham Dean  
Hampshire SP11 OEL

Please quote: A930329G/MC

Your reference:

Date: 27 June 1995

*Dear Mr Churchill,*

### Churchill Archives : copyright

Thank you for your letter of 25 June. I am grateful to you for informing me of the proposed agreement you intend to make with Southampton University.

You have, of course, referred to my letter of 5 April written to those acting on behalf of the Trustees of the Churchill Archive (i.e. yourself and Mr Ian Montrose acting in the capacity of Trustees). That letter pointed out that any discontinuance of the proceedings (in Her Majesty's Attorney General -v- Montrose) was without prejudice to the question of copyright ownership.

The Purchase Agreement, entered into by the Trustees of the National Heritage Memorial Fund, the University Council of Cambridge University, the "Churchill Trustees" and yourself and Mr Winston Churchill MP in a personal capacity, makes it entirely clear that such right of access to the Chartwell Papers and the post-1945 papers as is there conferred is conferred to enable the "Copyright Holders" to exploit such copyright as may be owned by or licensed to them and that any permission to exercise such right of access shall not be taken to confer any right to exploit any copyright.

My letter of 5 April pointed out that the suggestion that the material in the Churchill Archive should be stored in an electronic medium raised copyright issues which would require a separate resolution.

I was therefore surprised to see the reference in your letter to the possibility of an agreement being signed this Wednesday granting "an exclusive copyright licence to transfer all the Churchill Archives at Cambridge ... on to electronic recording". The Controller of Her Majesty's Stationery Office (who administers Crown copyright) has not been concerned in any

negotiations on this matter with Southampton University and the agreement referred to cannot therefore transmit any interest in the Crown copyright which subsists in the material. The Crown has granted no licence to Southampton University for the electronic reproduction of Crown copyright material contained in the Archive and any such licence will require discussion with those responsible for administering Crown copyright. I must, in the interim reserve all the Crown's rights, including that of taking infringement proceedings, in relation to the proposed agreement you intend to enter into with Southampton University.

I am sending a copy of this letter to Miss Anthea Morton-Saner of Messrs Curtis Brown. In view of the references in your letter to Mr Winston Churchill MP as a party to the proposed agreement I am also taking the liberty of copying this letter to him. I am also copying this letter to the Vice Chancellors of the Universities of Cambridge and Southampton.

*Yours sincerely,  
Michael Carpenter*

Michael Carpenter  
for the Treasury Solicitor



## THE TREASURY SOLICITOR

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

Professor H Newby, Ph.D  
The Vice Chancellor  
The University of Southampton  
Highfield  
Southampton SO9 5NH

Please quote: A930329G/MC

Your reference:

Date: 27 June 1995

*Dear Vice Chancellor,*

### The Churchill Archive

Mr Peregrine Churchill has written to me indicating that he was proposing to enter into an agreement with the University of Southampton to secure the electronic recording of the Churchill Archive held at Churchill College, Cambridge.

That Archive contains Crown copyright material, but no licence for its electronic reproduction has been granted by the Controller of Her Majesty's Stationery Office. In these circumstances, and in view of the mention of Southampton University in Mr Churchill's letter to me, I am copying to you a letter I am now sending to Mr Churchill on behalf of the Treasury Solicitor.

*Yours sincerely,  
Michael Carpenter*

Michael Carpenter  
for the Treasury Solicitor



**THE TREASURY SOLICITOR**

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

Miss Anthea Morton-Saner  
Messrs Curtis Brown  
162-168 Regent Street  
London W1R 5TB

Please quote: A930329G/MC

Your reference:

Date: 27 June 1995

*Dear Miss Morton-Saner,*

**Churchill Archive**

I understand from Mr Peregrine Churchill that you act on his behalf and on behalf of Mr Winston Churchill MP in relation to the administration of such copyrights as they may own in the papers of the late Sir Winston Churchill.

I attach a copy of the letter Mr Peregrine Churchill has sent to me and a copy of the letter I am today sending him on behalf of the Treasury Solicitor.

*Yours sincerely,  
Michael Carpenter*

**Michael Carpenter**  
for the Treasury Solicitor



## THE TREASURY SOLICITOR

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

Winston Churchill Esq, MP  
House of Commons  
Westminster  
London SW1

Please quote: A930329G/MC

Your reference:

Date: 27 June 1995

*Dear Mr Churchill,*

### Churchill Archive

Mr Peregrine Churchill has recently written to me suggesting that an agreement would shortly be reached with Southampton University to which you would be a party and which would provide for the electronic reproduction of the Churchill Archive.

I am today writing to Mr Peregrine Churchill on behalf of the Treasury Solicitor in relation to this matter and I attach a copy of my letter, together with a copy of Mr Peregrine Churchill's letter to me.

*Yours sincerely,  
Michael Carpenter*

Michael Carpenter  
for the Treasury Solicitor

Pat - 27/6

Sir R is content with  
the draft.

He suggest the letter  
be faxed to P.C.

today. I told Mc and  
he said he would fax it

V.

\*\*\*\*\*  
-COMM. JOURNAL- \*\*\*\*\*  
DATE 25-APR-1995 \*\*\*\*\* TIME 16:44 \*\*\*\*\* P.1

MODE = MEMORY TRANSMISSION

START=25-APR 16:42      END=25-APR 16:44

FILE NO. = 073

NO.	COM	ABBR/NTWK	STATION NAME/ TELEPHONE NO.	PAGES	PRG.NO.	PROGRAM NAME
001	OK		72103503	002/002		

-HRS 0171 217 6010 -

\*\*\*\*\*  
071 217 6010- \*\*\*\*\*





**CABINET OFFICE**  
Historical and Records Section  
Hepburn House  
Marsham Street  
London SW1P 4HW  
Fax: 071 217 6010

ENQUIRIES:  
071 217 6050



**URGENT**  
**YES/NO**

### **FACSIMILE LEADER**

**NAME:** Miss Melanie Leech

**DEPARTMENT:** Cabinet Office

**ADDRESS:** 70 Whitehall

**FAX No:** 7 270 0208

**FROM:** Pat Andrews

**DOCUMENT REFERENCE/TITLE:** Churchill Archive - Copyright

**TOTAL NUMBER OF PAGES:** +7

**DATE:** 27 June 1995

**MESSAGE:** I tried to FAX this over yesterday evening but was too late!  
The letter needs to go off today. Is it possible for Sir Robin to have a  
look at it and, if he agrees, give the go-ahead please?

**ACKNOWLEDGEMENT REQUIRED YES/ NO**

H095/432

SIR ROBIN BUTLER

**CHURCHILL ARCHIVE - COPYRIGHT**

Treasury Solicitors have received a letter from Mr Peregrine Churchill notifying them of a proposal to grant Southampton University an exclusive copyright licence to transfer all the Churchill Archives at Cambridge onto electronic recording (CDROM). An agreement to this effect is to be signed on Wednesday 28 June and announced at a Conference of American Historians at London University.

Mr Michael Carpenter advises that Mr P Churchill should be warned that he is not in a position to licence all the material in the Churchill Archive as a part of it is Crown copyright. He proposes to do this by means of a letter along the lines of the attached draft.

Unless you have any objection the letter will be sent tomorrow and it will be copied to Mr Winston Churchill MP and to the Vice-Chancellors of Cambridge and Southampton Universities so that they are aware of the situation. As you know Mr Winston Churchill owns some of the copyright as, we are told, does Mr Peregrine Churchill, but neither of them can acquire copyright in the official material which is in Crown copyright without our agreement.

*Pat Andrews*

MISS P M ANDREWS

Historical and Records Section  
26 June 1995

Draft

Peregrine Churchill Esq  
Fairdown  
Vernham Street  
Vernham Dean  
Hampshire SP11 OEL

**Churchill Archives : copyright**

Thank you for your letter of 25 June. I am grateful to you for informing me of the proposed agreement you intend to make with Southampton University.

You have, of course, referred to my letter of 5 April written to those acting on behalf of the Trustees of the Churchill Archive (i.e. yourself and Mr Ian Montrose acting in the capacity of Trustees). That letter pointed out that any discontinuance of the proceedings (in Her Majesty's Attorney General -v- Montrose) was without prejudice to the question of copyright ownership.

The Purchase Agreement, entered into by the Trustees of the National Heritage Memorial Fund, the University Council of Cambridge University, the "Churchill Trustees" and yourself and Mr Winston Churchill MP in a personal capacity, makes it entirely clear that such right of access to the Chartwell Papers and the post-1945 papers as is there conferred is conferred to enable the "Copyright Holders" to exploit such copyright as may be owned by or licensed to them and that any permission to exercise such right of access shall not be taken to confer any right to exploit any copyright.

My letter of 5 April pointed out that the suggestion that the material in the Churchill Archive should be stored in an electronic medium raised copyright issues which would require a separate resolution.

I was therefore surprised to see the reference in your letter to the possibility of an agreement being signed this Wednesday granting "an exclusive copyright licence to transfer all the Churchill Archives at Cambridge ... on to electronic recording". The Controller of Her Majesty's Stationery Office (who administers Crown copyright) has not been concerned in any negotiations on this matter with Southampton University and the agreement referred to cannot therefore transmit any interest in the Crown copyright which subsists in the material. The Crown has granted no licence to Southampton University for the electronic reproduction of

Crown copyright material contained in the Archive and any such licence will require discussion with those responsible for administering Crown copyright. I must, in the interim reserve all the Crown's rights, including that of taking infringement proceedings, in relation to the proposed agreement you intend to enter into with Southampton University.

I am sending a copy of this letter to Miss Anthea Morton-Saner of Messrs Curtis Brown. In view of the references in your letter to Mr Winston Churchill MP as a party to the proposed agreement I am also taking the liberty of copying this letter to him. I am also copying this letter to the Vice Chancellors of the Universities of Cambridge and Southampton.

**Michael Carpenter**

FAIRDOWN  
VERNHAM STREET  
VERNHAM DEAN  
HANTS SP11 0EL

Tele: 0264 737 240  
Fax 0264 737 215

25 June 1995

Michael Carpenter Esq  
The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

0171 210 3503

yr ref; A930329G/MC

Dear Mr Carpenter

**CHURCHILL ARCHIVES COPYRIGHT**

Your letter of 5 April addressed to Messrs Goodman (copy enclosed), has been referred to myself. The Churchill Trustees do not own any copyright.

Sir Winston's copyright (excluding some published works) is owned by the present Winston Churchill MP. Other Churchill copyright is under my care either by inheritance or as executor of their estates,

Messrs Curtis Brown (Miss Anthea Morton-Saner 396 6600) is our agent for the administration of all Churchill copyrights; you could refer to her should you require more information.

It is our intention to grant Southampton University an exclusive copyright licence to transfer all the Churchill archives at Cambridge, and other relative material elsewhere, onto electronic recording and complete the historical research and editing by Cambridge and Southampton Universities.

The contracts will be signed on next wednesday the 28th and announced to the Press at a conference of American Historians at London University. IHM are cooperating with Southampton which is a diplomatic triumph making an exclusive and valuable source of supply for apparatus. The retail organisation will be by Research Publications Ltd who has formed a Company for the purpose. All finance will be from private sources.

As perhaps you know, Southampton University has a potential electronic system which I equate, in commercial importance, with Xerox. The latter, which was a British invention, was lost to America through the usual lethargy in high quarters. Our exclusive contract will give Southampton the finance and technical experience to dominate the world market.

Under the Purchase Agreement made with the National Heritage Memorial Fund, a sub-agreement was attached giving the purchaser copyright privileges specified in the 1988 copyright act specifically for approved Libraries. The purpose was to allow academic historians to exchange copies of documents for research but on strict conditions that the copy was not to be given to anyone else, and disposed of after use.

- 2 -

These conditions should only be given to responsible people with knowledge of international copyright law and trustworthy Libraries. The Archives were sold to the University, the signatures were the Vice-Chancellor, the Master of Churchill College and the Librarian of Cambridge Library; the latter already had the benefit of the 1988 copyright act, so the sub-agreement seemed superfluous; unless we were dealing with an unauthorised body, in which case I expressed doubt that the sub-agreement would override an Act of Parliament.

Under the purchase agreement the copyright holders have the right of entry to the Archive Centre, at any reasonable time, to copy or research papers. We have sought permission to start work on the electronic project by Southampton University. Churchill College was very cooperative.

Lately a Chairman, one Andreas Whittam Smith from the Independent newspaper, has been appointed to the purchasing Trust; which is now more a Quango in the real sense of the word. Our Agent gave him a formal notice of our intentions and received a telephone reply to say he wants no publicity and we are not allowed into the Churchill Archives for some months until he has had a meeting with all the Quango members.

Mr Smith is launching his own electronic publishing Company in September called Notting Hill Publishing. His advertising puff states "We collaborate with famous names and leading thinkers on a list of arts, science, and biography." He could use the sub copyright agreement to publish Churchill copyright on the plea he is providing Historical documents for educational study.

I have no reason to suppose anything of the sort is intended. The Company is being run by his son, but it may pass into other hands. The long term view makes me feel a bit nervous.

When I discussed the matter with Miss Nayler last February, the members of the Trust (Quango) were all academics, I would have objected if I had been told the Chairman was to be an outsider journalist with conflicting commercial interests.

We could serve a writ on Churchill College to gain entrance which the agreement states is our right; But this will also cause publicity which nobody wants.

I am very sorry to bother you with this problem; but I thought as the Treasury is involved and as you are a lawyer concerned with the preservation of national records, and there has never been such a valuable collection of 100 years of political and private records; nor has there been such an opportunity to promote an all British electronic business more efficient than any American or Japanese genius; your advice, if nothing else, would be of great assistance.

Yours sincerely

*Peregrine Churchill*

Peregrine S Churchill

I shall be in London on Wednesday 28 at Tele: 351 4671.

**THE TREASURY SOLICITOR**

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service &amp; Science Legal Adviser

Messrs Goodman Derrick  
Solicitors  
90 Fetter Lane  
London EC4 1EQ  
For the attention of Mr Wissun

Please quote: A930329G/MC

Your reference:

Date: 5 April 1995

Without Prejudice**HM Attorney General -v- Montrose**

I am writing to you in my capacity as legal adviser to the Historical Records Section of the Cabinet Office and to the Controller of HM Stationery Office.

As you are of course aware, negotiations are presently underway to establish an acceptable basis for the future of the Churchill Archive and which would obviate the need for the present litigation. The necessary documents for a transfer of ownership of the papers comprising the Archive are being drawn up by Messrs Farrer & Co, and I believe you have received drafts.

The litigation has concerned the ownership of the papers in the Archive, and - in particular - the ownership of official papers, rather than the copyright which subsists in those papers. It is noted that it is not the intention of your clients to assign copyright in the papers to Cambridge University, and the Crown similarly does not propose to assign copyright in those papers in which Crown copyright subsists. The draft documents are, accordingly, neutral on the question of copyright ownership, and this neutrality reflects the course of the litigation. It follows that any discontinuance of the proceedings would be without prejudice to the question of copyright ownership.

The Cabinet Office is, of course, aware of the suggestion by your clients that the Archive should be stored in an electronic medium so as to be accessible, *inter alia*, on CD-Rom format. The Crown would not be opposed in principle to such a proposal, but on the assumption that the litigation is discontinued on an agreed basis, it would be necessary to reach a separate resolution of the copyright issues raised by the proposal. Such issues would, of course, include the question of copyright held by third parties.

I would imagine that this accords with your clients' expectations, but I would be grateful to know as soon as possible if this is not so.

**Michael Carpenter**







Hard copy

19

## THE TREASURY SOLICITOR

Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

Direct Line 0171 210 3450 Direct Fax 0171 210 3503

Office of Public Service & Science Legal Adviser

### MINUTE



To: Pat Andrews  
Historical & Records Section  
Cabinet Office

From: Michael Carpenter

Room: -

Date: 26 June 1995

c.c. Mr Jenkins  
Mr Robbie, HMSO  
Mr Jackson, LSLO  
Miss Fassnidge

#### Churchill Archives : copyright

1. You will see from the attached that Peregrine Churchill has told me of an intention to grant Southampton University an exclusive copyright licence to "transfer all the Churchill Archives at Cambridge .... on to electronic recording". It appears that an agreement to this effect is to be signed on Wednesday, 28 June.
2. The rest of the letter is the usual ramble. However, I note that the (new) Churchill Archive Trustees are refusing to give access to the Churchill Archives "for some months" until there has been a meeting of all Trustees. Whether or not the Trustees do grant access is a matter for them, but it seems to me that it is not unreasonable of them to delay matters. (We are, of course, due to see Mr Kucia on 7 July). Equally, the question of whether the editor of the Independent should be a Trustee is not a matter for us.
3. Subject to your views, and those of copy recipients, I think it is necessary to put a warning shot across Peregrine's bows, pointing out that he is not in a position to licence all the material in the Churchill Archive, as a part of it is Crown copyright. I would propose to write to Peregrine Churchill (with a copy to Messrs Curtis Brown) along the lines of the attached draft. Peregrine Churchill cannot acquire any copyright interest by purporting to act as the copyright owner and - I would have

thought – the prospective licensee would need a rather clear form of indemnity from Peregrine as to the consequences of any infringement action brought by the copyright owners (which would of course include the Crown).

4. I would be grateful for comments in the course of this afternoon.

A handwritten signature in blue ink, appearing to be 'MB', located to the right of the fourth list item.

Draft

Peregrine Churchill Esq  
Fairdown  
Vernham Street  
Vernham Dean  
Hampshire SP11 0EL

**Churchill Archives : copyright**

Thank you for your letter of 25 June. I am grateful to you for informing me of the proposed agreement you intend to make with Southampton University.

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I am sending a copy of this letter to Miss Anthea Morton-Saner of Messrs Curtis Brown and to [Churchill College] [Vice Chancellor of Southampton University?].

**Michael Carpenter**

FAIRDOWN  
VERNHAM STREET  
VERNHAM DEAN  
HANTS SP11 0EL

Tele: 0264 737 240  
Fax 0264 737 215

25 June 1995

Michael Carpenter Esq  
The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

0171 210 3503

yr ref; A930329G/MC

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Under the Purchase Agreement made with the National Heritage Memorial Fund, a sub-agreement was attached giving the purchaser copyright privileges specified in the 1988 copyright act specifically for approved Libraries. The purpose was to allow academic historians to exchange copies of documents for research but on strict conditions that the copy was not to be given to anyone else, and disposed of after use.

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Yours sincerely

*Peregrine Churchill*

Peregrine S Churchill

I shall be in London on Wednesday 28 at Tele: 351 4671.



Financial Times  
23 June 1995

## Point of order 17

■ After the government's wounding experience with the abrasively independent Sir John Banham, cynics expected it to appoint a group of yes-men to the reconstituted local government commission which will finish the job of re-drawing England's county boundaries.

Not so. The new commission includes Professor Michael Clarke, of Birmingham University's

Institute of Local Government Studies. A former chief executive of the Local Government Management Board, Clarke is one of the most widely liked and respected figures in local government. He is also one of the best-known critics of local government reorganisation.

Not content with concluding that "the entire remit the commission was given was flawed", Prof Clarke has described the cost of the review, in terms of lost opportunities, as enormous. Hope the authorities have not got their Professor Clarkes mixed up.

The Independent  
23 June 1995

# Lottery chief sacked over deal with lover

MARIANNE MACDONALD  
Arts Reporter

Georgina Nayler, head of the fund which allocates the multi-million pound heritage lottery budget, has been effectively sacked following the award of two lucrative computer contracts to her partner.

Ms Nayler, 36, left the National Heritage Memorial Fund yesterday after being removed from the post of accounting officer — hers by right as head of a public body — making her position untenable.

The announcement follows the recent scandal over the purchase in April of the Churchill archive for £12.5m.

It is an embarrassing end to an impressive career. Ms Nayler joined the fund 13 years ago as a secretary, and within seven years had been appointed director of the whole organisation on a £47,000 salary. Last year her job expanded hugely when the fund took control of the newly created lottery budget worth more than £150m a year, bringing her total budget to £250m. But she became the subject of

a Department of National Heritage inquiry after Simon Stillwell, with whom she has a personal relationship, was awarded contracts worth almost £40,000 for consultancy work at the fund.

The first was awarded to SIMNO Software Services, the company owned and operated by Mr Stillwell, in February 1993 after a competitive tender. This contract was fully reported in writing to the department and approved by the chairman of the NHMF, Lord Rothschild.

But a second £35,000 contract for the company to draw up user

requirement specifications for computer software was not put out to tender or reported to the department or Lord Rothschild.

Ms Nayler was aware of the second contract although she was not involved in its award. However, a statement issued last night by the NHMF observes: "As she has now acknowledged, she could have forbidden it."

The second contract was given to SIMNO despite a recommendation from the DNH after the award of the first contract that it should not happen again to prevent "the risk of criticism".

The NHMF statement stresses that the DNH permanent secretary, Hayden Phillips, said after the inquiry there was "no evidence of misappropriation of public funds" and no evidence Ms Nayler "acted in any way illegally or dishonestly".

But it continues: "Nevertheless, the trustees and the director recognise that . . . an accounting officer responsible for public funds must, at all times, carry out his or her duties and responsibilities beyond criticism and that in this case, she has laid herself open to criticism."

jun95\20allan



2-4 Cockspur Street,  
London SW1Y 5DH  
Telephone: 0171-211 6255/6/7  
Facsimile: 0171-211 6259

10571 ✓



From Hayden Phillips CB, Permanent Secretary



**RESTRICTED - MANAGEMENT**

A C S Allan Esq  
Principal Private Secretary  
10 Downing Street  
London SW1

C Mr Vennig  
✓ Miss Andrew

21 June 1995

*Hayden Alex*

**NATIONAL HERITAGE MEMORIAL FUND (NHMF)**

You are aware of the difficulties which have arisen at the NHMF over the letting of contracts for IT services to the firm run by the partner of the Director, Miss Georgina Nayler. John Kingman's letter of 18 April to Rachael Reynolds enclosed some briefing which informed you of this. The Prime Minister asked me about the position when he met my Secretary of State on 15 May to discuss the Lottery. I am now writing to alert you to the fact that I have concluded she cannot remain as Accounting Officer. I expect she will then leave. There will be bad publicity for the NHMF and the Lottery, particularly coming in the wake of the furore over the Churchill Papers. But to allow her to continue would, in my view, have led to even greater subsequent criticism.

Briefly, the NAO, in carrying out work in preparation for my approval of NHMF's systems, came across evidence of a conflict of interest in the letting of contracts to Simno Software Services, an IT consultancy firm run by Miss Nayler's partner, Mr Simon Stillwell. The NAO advised Miss Nayler to inform me immediately of what had taken place. This she did although, unfortunately, not with the full frankness I would have wished. Subsequently, I decided that a full investigation should be carried out of the adequacy of procurement systems and practices



## RESTRICTED - MANAGEMENT

at the NHMF over the last three years. The review was carried out by the DNH's Head of Internal Audit.

In the light of the subsequent report, and her comments, I concluded that:-

- a) Miss Nayler allowed a clear conflict of interest to arise when she permitted her partner's firm to be included among those asked to tender for an initial IT contract from the NHMF though to comply with propriety she played no part in the granting of the contract, and told her Chairman;
- b) despite a subsequent letter from the Department indicating that the preferable course would have been to have avoided any conflict of interest, she permitted her partner to be awarded a further and larger contract for work, which has resulted in payments of some £35,000 (excluding VAT);
- c) that work was offered to him without competitive tender;
- d) despite the fact that the further work granted to him was in excess of the £10,000 limit for which prior agreement of the Department was required in terms of the NHMF's Financial Memorandum, the Department was not notified about this further contract; and
- e) she allowed a number of other IT contracts (to other firms) for sums in excess of £10,000 to be let, also without notification to the Department.

I have held two meetings with Miss Nayler (at the second of which the NHMF Chairman was also present) to enable her to comment on my principal findings. She did not seek to deny them, but has questioned some of the detailed findings and asked for a number of other facts to be taken into account, arguing that in employing Simno she secured value for money for the NHMF.

I have considered very carefully the action which I should take in the light of all of the evidence. I took into account the fact that there was no evidence of any illegal or dishonest behaviour on Ms Nayler's part, or that of anyone at NHMF. However, the conflict of interest she allowed to occur put her in breach of her basic responsibilities as an Accounting Officer.

I have therefore concluded that I have no alternative but to withdraw her status as an Accounting Officer. Lord Rothschild has consulted fellow Trustees about the action they should take in consequence. They accept, reluctantly, that Ms Nayler cannot continue as Director, but proposed that she should stay as Director and Accounting Officer, with any support I felt necessary, until a new Director is appointed. I have told them I cannot agree both that she is unsuitable, but that she can retain her status, even temporarily.

Accordingly, Miss Nayler will have her contract terminated. I am making urgent arrangements to ensure that a temporary replacement for her as Accounting Officer is installed until the

**RESTRICTED - MANAGEMENT**

Trustees are able to appoint a permanent successor. Both we and Lord Rothschild have already given a good deal of thought to how these events should be handled publicly, and I have asked Andrea MacLean to let you have the terms and timing of the NHMF announcement, and what we would say, once they are finally settled in the course of today or tomorrow.

A copy of this letter goes to Robin Butler and Terry Burns.

Yours ever  
Hayden

**HAYDEN PHILLIPS**



Cultural Property Unit  
 Department of National Heritage  
 2-4 Cockspur Street, London SW1Y 5DH  
 Tel: 0171-211 6158  
 Fax: 0171 211 6170

FAX TRANSMISSION COVER SHEET

Date: 19/6  
 To: Pat Andrews  
 Fax: 217 6010  
 Subject:  
 Sender: Carol Hobbey

YOU SHOULD RECEIVE 2 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL 0171-211 6158

Could you give me a ring to discuss the following PQ. Neither Margaret O'Mara ~~nor~~ nor I were around at the time discussions were going on about an NHMF purchase + we don't know if a separate approach was ever made to the SoS. Do you? I am also trying to get hold of Carolyn Morrison, but she's out of the office at the moment.

Carol

Spoke C Hobbey 19/6  
 Said have no recollection of an approach to SoS or his predecessor. She is going to check with C Morrison.

POA  
 19/6

HOUSE OF COMMONS PARLIAMENTARY QUESTION

ORAL (\*): \_\_\_\_\_

NAMED DAY (N) WRITTEN: \_\_\_\_\_

ORDINARY WRITTEN:  \_\_\_\_\_

MP'S PARTY: LAB

Date PO was tabled: 15/6/95

For answer on : 19/6/95

Return to PB by : 20/6/95 HAM

ACTION OFFICER: MR HELSTON

DIVISION: CPU

MINISTER ANSWERING

Secretary of State

CC

Mr Sproat

143 Mr Gordon Prentice (Pendle): To ask the Secretary of State for National Heritage, if any person associated with the Winston Churchill Memorial Trust sought to interest him or his predecessor in the possible purchase for the nation of the Churchill papers prior to the acquisition of the papers by the National Heritage Memorial Fund. (29854)

ACTION OFFICER  
(in case of queries)

OFFICIAL APPROVAL  
(must be Grade 5 or above)

MINISTERIAL APPROVAL



17

Cultural Property Unit  
 Department of National Heritage  
 2-4 Cockspur Street, London SW1Y 5DH  
 Tel: 0171-211 6158  
 Fax: 0171 211 6170

FAX TRANSMISSION COVER SHEET

Date: 16.6.95  
 To: Pat Andrews  
 Fax: 217 6010  
 Subject:  
 Sender: Carol Holey

YOU SHOULD RECEIVE 5 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL 0171-211 6158

I am sending a copy of a letter <sup>from Mrs Bantock</sup> which responds to a reply from No 10 re. the Churchill Archive. My draft reply follows which I would be grateful if you could have a look at today. Please let me know if you have any comments.

Thanks

Carol

CABINET OFFICE
H 95/468 ✓
16 JUN 1995
FILING INSTRUCTIONS
FILE NO. _____

Miss Antonia Blewett  
Political Office  
10 Downing Street  
London SW1A 2AA

CLOSED UNDER THE  
24 May 1995  
FREEDOM OF INFORMATION  
ACT 2000

Dear Miss Blewett,

Thank you for your letter dated 22 May.

In normal circumstances I would not have bothered to reply to your letter but I am sure you understand that I find the attempt to deliberately massage facts concerning the misuse of Lottery money completely unacceptable. The whole episode is a scandal and just seems to get worse.

- 1] The decision to pay off Winston Churchill, a fellow Tory MP, was personally approved by John Major - how then could this decision be "independent" of government.

This payment was approved just before VE Day. The decision was clearly made to generate good exposure for the Prime Minister. This shows what dreadful advice he receives from those around him. The action was a monumental example of extreme bad taste.

- 2] As is well known, the principal beneficiary of the £12M lottery money (via the Churchill Trust) is Winston Churchill. Do you know of anyone else who will benefit? To suggest anything else is naïve.
- 3] No-one seems to know which of the papers belong to the Churchill family and which belonged to the country - and clearly no-one will be allowed to know.

It is fair to say that John Major is universally disbelieved when he says that no papers were sold that were owned by the State - this is simply absurd; as you know, great effort was taken to avoid this being tested in court.

CLOSED UNDER THE  
FREEDOM OF INFORMATION  
ACT 2000

CAB 107/816

letter dated 24/5/95

- 2 -

- 4) Of the 200 awards that you mentioned, the overwhelming amount that has actually been paid has not gone to local good causes, it has gone to just two people; an American multi-millionaire and Winston Churchill.

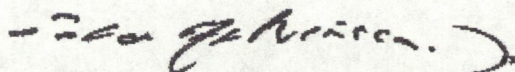
John Major seems to have forgotten that the Lottery money is not his money, it is not government money, it is not tax money. It is money that most of us expected would be used (after the winnings had been paid) to help the local community and those in need.

Rewarding a Tory MP with money that could have been used to help so many people was stupid and immoral. I cannot see how this "improves the quality of life for everyone in the UK" (aside presumably from the friends and colleagues of those in positions of authority).

Together with most other people I know socially and in business I am another ex-conservative supporter. The abuse and mishandling of the Lottery money was the last straw. I am genuinely sorry that John Major, who seems to be a nice but weak man, seems to constantly receive such very bad advice from those around him.

I do not therefore find your reply reassuring. I find it very immature and misleading; it just adds to the tawdriness that seems to surround this episode and, currently, the Conservative Party in general.

Yours sincerely,



Peter Atkinson



10 72176010 P.04

CLOSED UNDER THE  
FREEDOM OF INFORMATION  
ACT 2000

I am replying to your letter of 24 May which commented further to the recent announcement about the Churchill Archive. Let me answer your points in turn.

First, I confirm that it was indeed only the non-State papers which were purchased with Lottery funds awarded by the National Heritage Memorial Fund (NHMF). The NHMF reached its decision entirely independently of Government. It has always been the intention, and Parliament has enshrined this in legislation, that National Lottery money should be distributed by independent bodies. The timing of the announcement was entirely a matter for the NHMF too.

*7  
ppl  
casel*

*Use of Lottery money is wholly a matter for NHMF*

*The preservation of the nation's great Archive seemed particularly apt in the year of the 50th Anniversary of VE Day.*

Far from seeking to avoid testing in court which papers should be classified as State papers, it was the Government who started the litigation. However, once the NHMF had approved the Lottery application, the Government elected to transfer the State papers free of charge to Churchill College to enable the Archive to remain intact and so did not pursue the legal action any further. The papers which the Government transferred were exactly the same as those to which it had laid claim at the outset of litigation in the originating summons and these included all those documents produced by Sir Winston in his official capacity as a Minister of the Crown.

The papers which were purchased with Lottery funds were sold by the Churchill Archive Settlement Trust which was established by Sir Winston for the benefit of future generations of his male heirs, not just the current generation. Any release of funds is governed by a board of Trustees

CAB 103/816 letter dated 24/5/95

only they know who will benefit.  
who are bound by law to act in accordance with the original terms of the Trust.

Finally, it is important to see this particular award in the context of the operation of the Lottery as a whole. It is estimated that it will raise some £150 million during its first year of operation for each of the five recipient areas - the arts, sport, charities, the heritage and the Millennium Fund. The *Heritage Lottery Fund* has received around £91.8 million to date, of which £25.5 million in total has already been awarded to various projects. The NHMF has stated that it will continue to fund both large and small projects and that it welcomes applications from small organisations as well as for large scale projects.

For meeting with NAO on

9 July

Patrick James of NIMF  
says no record of N Gede's  
meeting with Sir Naylor.

but he is sending me  
copy corresp. with

G. Proutie

He never did!

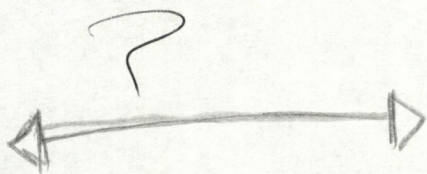


Jon Standiffe

747 2032 .

?

Copy to Dr Carpenter.



Patrick James

493 8111

Anglo A.

2.30 Sect.



97/11 wing [NP566.WPD]

F.

From: N PITTMAN  
Director of Resources  
and Services

Tel: 071 211 6189

Date: 14 June 1995

PS/MR PHILLIPS cc:

*Mr Hogg*      *Mr Hogg*  
*95th line ok that this would*  
*ultimately have to be resolved in the*  
*courts. He heard very long and*  
*complex, so may have to discuss in*  
*more detail with*  
*TSD, 9 June*  
*14/6*

**CHURCHILL PAPERS: NAO ENQUIRIES**

You will want to note that Miss O'Mara and I had a meeting this morning with Nigel Gale of the NAO about the purchase with Lottery money of the Churchill Papers. This follows a letter which Chris Smith MP had sent to the C&AG asking particularly about the action which had been taken to ensure that no State papers were included among those for which Lottery money had been paid.

2. Miss O'Mara explained some of the background to Mr Gale and in particular emphasised that DNH's involvement had largely been limited to the period some time ago when it had been a possibility that the Churchill Papers might be acquired with "old NHMF" money and a possible top-up from a call on the Reserve. She explained that issues to do with the gift of the State papers were primarily ones for the Cabinet Office and undertook to let Mr Gale have a copy of the breakdown of Accounting Officer responsibilities between Mr Phillips and Sir Robin Butler which was recently agreed. Mr Gale said that he was to see Georgina Naylor at the NHMF next week to talk through various issues to do with the NHMF's consideration in deciding to allocate Lottery money to the purchase. Miss O'Mara suggested that he should also at some point speak to Nigel Carpenter and Paul Jenkins about the legal proceedings and to Pat Andrews in the Cabinet Office about questions on the ownership of the Government papers. Mr Gale raised a number of questions about copyright and Intellectual Property Rights in the papers and referred to a previous sale (?) of some Churchill papers to an independent trust some 15 years ago. Miss O'Mara indicated that there was little we could say about this, and in any case that (as has been widely reported) the NHMF did not acquire the copyright in any of the non-State papers.

3. Mr Gale said that it was his aim to deliver a short report to the C&AG which should enable him to write back to Chris Smith "before the autumn" indicating that, in the NAO's view, everything had been done correctly in relation to the purchase. He said that although strictly it was not necessary to clear this with DNH, he had no doubt that the C&AG would want to show us what he was going to say before sending his letter.

N PITTMAN

*copied to JI Carpenter*

np566  
**CABINET OFFICE**  
**H 95/493!**  
**26 JUN 1995**  
**FILING INSTRUCTIONS**  
FILE No \_\_\_\_\_

102  
14



2-4 Cockspur Street,  
London SW1Y 5DH  
Telephone: 071-211 6189  
Facsimile: 071-211 6230

Director of Resources and Services

COPIES :

~~Miss [unclear]~~  
PS / MR PHILLIPS  
SELF

Mr L.P. Weight (w/o)  
Mr CHESTERTON } attach  
                                      } parts

1 Mrs Hogg  
2. Mr [unclear]

Nigel Gale, esq.  
National Audit Office  
157-197 Buckingham Palace Road  
Victoria  
London SW1W 9SP

16 June 1995

Dear Nigel,

CHURCHILL ARCHIVE

When you came in to see Margaret O'Mara and myself the other day, we agreed to let you have a copy of the note which had passed between Mr Phillips and Sir Robin Butler about respective Accounting Officer duties for particular matters concerning the acquisition of the Churchill Papers with Lottery funds provided by the National Heritage Memorial Fund.

I now attach a copy of the statement setting out the respective responsibilities as agreed with Sir Robin Butler last month. I hope this gives you the information you need.

Yours,

N PITTMAN

PS Thank you also for your letter of 14 June. I can confirm that there would be no problem about Jerry Cant contacting the relevant Grade 5s here to talk about S4C and English Heritage in advance of our meeting on 26 June. The relevant people to contact are Sally Booth (ext. 6463) for S4C and Hugh Corner (ext. 6365) for English Heritage.

np572



ANNEX

1. Mr Phillips is the Accounting Officer for the part of the National Heritage Memorial Fund (NHMF) voted by the Department of National Heritage. This does not include Lottery monies.
2. Mr Phillips is Accounting Officer for the National Lottery Distribution Fund (NDLF). As such he had to satisfy himself that the NHMF has systems in place for processing Lottery grants which meet the requirements laid down for allowing draw-down for money from the NDLF. He was advised in this process by the National Audit Office (NAO), and an independent adviser. The NHMF systems were judged to be satisfactory both by the NAO and Mr Phillips.
3. Mr Phillips must be satisfied that the distributor (NHMF) meets its responsibilities to the Secretary of State and Parliament as set out in section 2.4 of the Statement of Financial Requirements (SFR), attached at A. (The SFR was issued to the NHMF, as a Lottery distributor, under section 26(3) & (4) of the National Lottery etc Act 1993, attached at B.)
4. Mr Phillips appoints the Accounting Officer for the NHMF who is responsible to him for ensuring that Lottery and grant-in-aid monies are distributed with due regularity and propriety (cf section 2.5 of the SFR, attached at C).
5. Responsibility for State papers lies with the Accounting Officer of the Cabinet Office.
6. Legal responsibility for any Deed of Gift concerning State papers lies with the Accounting Officer of the Cabinet Office.
7. Matters of copyright of State papers lies with the Accounting Officer of the Cabinet Office.

Cultural Property Unit  
3 May 1995

A

Draft of 11 October 1994

more of Lottery funding, and include a full description of the current and future financing of all major projects funded (ie. all those involving £5 million or more of Lottery funding).

Responsibilities of the Department's Accounting Officer

2.4 The Department's Accounting Officer is responsible for satisfying himself that the distributing body meets its responsibilities to the Secretary of State and Parliament. Specifically, this means satisfying himself that:

- a) the body acts in accordance with the directions issued by the Secretary of State under section 26(1) [and (2)] of the 1993 Act;
- b) financial and other management controls including monitoring and audit applied by the Department (under section 26(3)) are appropriate and sufficient to safeguard the use of Lottery funds, conform with the requirements of propriety and regularity and good financial management, and are regularly monitored to ensure compliance;
- c) financial and other management controls applied by the body in their use of Lottery money conform with the requirements of propriety and regularity and good financial management;
- d) there is a statement of the financial relationship between the Department and the body (the Statement of Financial Requirements) and that this is reviewed regularly;
- e) the DNH Accounting Officer is informed of any systems failure in the distribution of Lottery proceeds by any of the Department's distributing bodies.

Responsibilities of the Body's Accounting Officer

B

PART II

24. At such times as the Secretary of State thinks appropriate, payments of such amounts as he thinks appropriate may be made to a body specified in section 23 out of so much of any money in the Distribution Fund as is held for distribution by that body.

Payments from Distribution Fund to distributing bodies.

25.—(1) Subject to the provisions of this Part, a body shall distribute any money paid to it under section 24 for meeting expenditure of the relevant description mentioned in section 22(3).

Application of money by distributing bodies.

(2) A body shall not under subsection (1) distribute money for any purpose or in any manner if it does not have power to distribute money for that purpose or in that manner apart from subsection (1).

(3) A body may defray out of any money paid to it under section 24 any expenses incurred by the body in consequence of this Act.

(4) The Trustees of the National Heritage Memorial Fund may apply any money paid to them under section 24 for any purpose for which they have power to apply money under section 4 of the National Heritage Act 1980 (acquisition, maintenance or preservation of property in respect of which they may make grants or loans under section 3(1) of that Act).

1980 c. 17.

Control by the Secretary of State

26.—(1) A body shall comply with any directions given to it by the Secretary of State as to the matters to be taken into account in determining the persons to whom, the purposes for which and the conditions subject to which the body distributes any money under section 25(1).

Directions to distributing bodies.

(2) The Trustees of the National Heritage Memorial Fund shall comply with any directions given to them by the Secretary of State as to the matters to be taken into account in determining the purposes for which and the conditions subject to which the Trustees apply any money under section 25(4).

(3) A body shall comply with any directions that the Secretary of State considers it appropriate to give the body for securing the proper management and control of money paid to the body under section 24.

(4) Directions under subsection (3) may in particular require a body—

(a) to obtain the consent of the Secretary of State before doing anything specified, or of a description specified, in the directions;

(b) to provide the Secretary of State at times specified by him with such information as he may require.

(5) The Secretary of State shall consult a body before giving any directions to it under this section.

27.—(1) Where subsection (2) applies, the Secretary of State may by order prohibit a body from distributing money under section 25(1) to a person specified in the order.

Power to prohibit distribution in certain cases.

(2) This subsection applies if at the time the order is made—

(a) the person specified is a company of which the body, or a wholly-owned subsidiary of the body, is a member, or

DIRECTIONS ISSUED TO THE TRUSTEES OF THE NATIONAL HERITAGE MEMORIAL FUND UNDER  
SECTION 26 OF THE NATIONAL LOTTERY ETC. ACT 1993

The Secretary of State for National Heritage, in exercise of the powers conferred by section 26(1) and (2) of the National Lottery etc. Act 1993, hereby gives the following Directions to the Trustees of the National Heritage Memorial Fund:

1. In these Directions -
  - (A) any reference to a section is a reference to a section of the National Lottery etc. Act 1993;
  - (B) "capital expenditure" has the meaning given to that expression in the Schedule to these Directions.
  
2. The Trustees of the National Heritage Memorial Fund shall take into account the following matters in determining the persons to whom, the purposes for which and the conditions subject to which they distribute money under section 25(1) or the purposes for which and the conditions subject to which they apply money under section 25(4):-
  - (A) the need to ensure that they do not solicit particular applications;
  - (B) the need to ensure that they consider applications which relate to the complete range of activities which fall within section 22(3)(c) and in respect of which the Trustees of the National Heritage Memorial Fund have the power to distribute or apply money;
  - (C) the need to ensure that money is distributed under section 25(1) or applied under section 25(4) for projects which promote the public good (including the widening of public access) or charitable purposes and which are not intended primarily for private gain;
  - (D) the need for money distributed under section 25(1) or applied under section 25(4) to be distributed or applied for the purpose of capital expenditure on projects and only to be otherwise distributed or applied for the purpose of endowments or in the form of revenue grants where
    - (i) such costs are associated with a capital project in respect of which money has been or is proposed to be distributed under section 25(1) or applied under section 25(4); and
    - (ii) the project would not otherwise be completed because no other source for such costs is available;

- (E) the visibility of projects and in particular the need for resources to be available to meet any running and maintenance costs associated with each project for a reasonable period, having regard to the size and nature of the project;
- (F) the need for projects to be supported by a significant element of partnership funding, and/or contributions in kind, from other sources;
- (G) such information as they consider necessary to make decisions on each application, including independent expert advice where required;
- (H) the need not to distribute money under section 25(1) to a company falling within section 27(2)(a);
- (I) the objective of achieving an overall balance of funds for projects related to the relative population of each county of the United Kingdom taking one year with another and taking into account any special needs that might be identified in any particular year.

Signed by authority of the Secretary of State  
for National Heritage

20

June 1994

*Sally Booth*

A Grade 5 Officer in the

Department of National Heritage

Draft of 11 October 1994

- 2.5 The [Director/Director-General/Secretary-General/Chief Executive] has been appointed by the [Accounting Officer of the body's sponsoring Department (DAO)] to be the body's accounting officer. The accounting officer's general duties in respect of the proper management and control of non Lottery resources are set out in the letter from the Departmental Accounting Officer [dated xx/xx/xx], the Financial Memorandum [paras. xx to yy] and in the prevailing edition of the Treasury Memorandum "The Responsibilities of a NDPB Accounting Officer". In respect of Lottery money, the accounting officer's responsibility to the DAO is confined to ensuring that it is distributed with due regularity and propriety (ie. that all items of expenditure and receipts are dealt with in accordance with the legislation authorising them, any applicable delegated authority and the established principles of Government Accounting; and in accordance with Parliament's intentions).



THE TREASURY SOLICITOR  
Queen Anne's Chambers  
28 Broadway London SW1H 9JS

Telephones      DIRECT LINE 0711-210  
                      SWITCHBOARD 0171-210 3000  
  GTN 210  
FAX NO: 0171-210

Miss P Andrews  
Historical & Records Section  
Cabinet Office  
Hepburn House  
Marsham Street  
London SW1P 4HW

With the Compliments of

MICHAEL CARPENTER

To: Michael Carpenter  
Treasury Solicitor's Department

From: Bill Godwin

c.c. Pat Andrews  
Duncan Chalmers

CLOSED UNDER THE  
FREEDOM OF INFORMATION  
(Drafted 14 June 1995  
Typed and circulated by TSD)  
ACT 2000

Ministers' papers in private hands

**Draft paper for Cabinet Office – Mr Chalmers' comments**

1. In his letter of 11 June, Duncan Chalmers commented on my minutes of 31 May and 7 June and draft paper enclosed with the latter. (Please see also my minute of 3 June). On his second page, he comments paragraph by paragraph on the draft. My responses to his comments follow.

2. Paragraph 1:

It seemed to me that assertion of Cabinet control in 1917 meant that a new convention was replacing what one might call earlier *laissez faire*. But, subject to further comments from you or Pat Andrews or Duncan Chalmers himself, I can try to clarify to meet his criticism.

3. Paragraph 2:

On this paragraph I think I am bound by my remit, which was to deal only with Cabinet Ministers' papers – presumably for a reason noted by Duncan himself in paragraph 23 of the Assessment of Evidence circulated with his letter of 17 May, that Cabinet Office respects the authority of Departments over their own documents. That may break down in the case of a Prime Minister who wants the papers he has as a departmental Minister, earlier in his career: did Cabinet Office take the lead in dealing with Lord Callaghan's departmental papers?

CABINET OFFICE  
H 95/4757  
20 JUN 1995  
FILING INSTRUCTIONS  
FILE NO. \_\_\_\_\_



CLOSED UNDER THE  
FREEDOM OF INFORMATION  
ACT 2000

CAB 103/816

letter dated  
16/06/95

4. Paragraph 3:

A slip for which I apologise. My intention was simply to adopt the formulation used by Sir Harold Kent in paragraph 2 of a letter dated 24 November 1959 on Cab 21/4336. For "legal", substitute "official".

5. Paragraph 4:

I would accept the amendment suggested.

6. Paragraph 5:

I note Duncan's comment with interest. Maybe the trust of which we learned from WSC played some part in this.

7. Paragraph 9:

The comment here arises from the observations on the first page of his letter. I think the answer may be that I failed to give full weight to the word "accord", and *de minimis* exception I suggested was misconceived. If a Department copies a document because the Courts' rules of procedure require it to provide a copy to a party with which it is litigating, the copy is not a record. A record is to be kept in order that something may be remembered. A document created expressly for transmission to another party cannot be a record. On the same argument, documents despatched by Departments such as MAFF, Home Office, Inland Revenue or DSS, to members of the public in the discharge of the Department's official functions are not records – the records are the copies retained by the Departments.

8. If that is right, what was the purpose of the provision for disposal in section 3(6)? A look at some PRO files on the drafting of the 1958 Act shows the following history. Originally, the provision was for selection for preservation with a discretion to destroy records not so selected. As the Bill progressed, the provision for destruction was changed from a discretion to a requirement when an amendment put down by Mr du Cann was accepted. His reasoning seems to have been that what does not need to be kept should be destroyed, and there is a suggestion that part of that thought was that civil servants might otherwise be tempted to sell off unwanted copies.

9. The draconian provision for destruction was tempered by providing for other ways of disposal subject to the Lord Chancellor's approval. Those responsible for the policy of the Bill had in mind the possibility of gifts to learned societies or to Commonwealth Governments, but as the Bill progressed specific purposes were dropped in favour of the broad discretionary power for the Lord Chancellor.
10. In the absence of any proprietary right of Cabinet Ministers in their papers, it seems to me that in law the Lord Chancellor's approval is as much needed for a transfer of papers to them as to Commonwealth Governments. It is to be noted that public records were the responsibility of the Master of the Rolls before the 1958 Act. That Act transferred the direction of the PRO to the Lord Chancellor, with general responsibility for the execution of the Act, and the duty of supervising the care and preservation of public records. I cannot cite authority on the point, but it seems to me difficult to argue that the convention was not affected by legislation vesting those functions in a Minister, and containing a specific provision entirely apt to describe transactions under the convention.
11. I am not sure that there is anything between Duncan and me on his points as to custody and creation. It seems to me that creation is relevant because it determines the status of a document, custody because it determines rights of access.
12. When Duncan Chalmers refers to delegation, I think he means delegation under the doctrine of the Courts that duly authorised civil servants may perform acts in the name of their Minister. But I should be grateful for particulars if there are delegations in provisions of statutory powers.
13. Moving on now, the next paragraph in my draft on which Duncan comments is para 120: The heading should be changed to "Papers lodged with Institutions". The point made may cease to be relevant – it depends on the regime eventually adopted. But in the past some Ministers, apparently regarding themselves as owners, lodged their papers with institutions. It was assumed that there was a permanent transfer, which would be acceptable having regard to the nature of the papers and the institution, but it might be otherwise if it turned out to be a loan, enabling the Minister's heirs to claim possession on his death. Even in the case of a permanent transfer, difficulties could arise if copies of the papers were in the PRO and not yet available for public access. However sympathetic to Cabinet Office representations that similar instructions should apply to access to its copies of the papers, the institutions might be embarrassed if it refused access to a student to whom access would ordinarily be

given. It was therefore suggested that a Minister contemplating transfer to an institution should do so on terms which would enable it to withhold access so long as access was not available in the PRO.

14. I thought it right to get the point on the record, but I now think it is not important enough for the proposed paper to the Cabinet Secretary, and could be left to be dealt with if it remains relevant when revised procedures are in force.

15. Paragraph 17:

Noted. Amend the second sentence to read: "Northern Irish Public Records legislation is still permissive, in the sense that Departments retain discretion in respect of their handling of records".

Former Prime Ministers

16. Isobel Hodge has kindly typed my notes on the papers of the former Prime Ministers and I shall let you have a draft for the paper to the Cabinet Secretary very shortly.

Draft Paper

17. I look forward to discussing the further work to be done with you, Pat Andrews and Duncan Chalmers as soon as convenient.

**W H Godwin**

16 June 1995



SOLICITOR'S OFFICE

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Queen Anne's Chambers  
28 Broadway  
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New St. Andrew's House  
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Rutland Exchange No. ED319

Telephone 0131-244 5247  
Fax 0131-244 4704

6 June 1995

*Thanked him by  
my letter from  
home WTTG 19/6*

*Dear Bill,*

RE: STATE PAPERS

I refer to your letter of 26 April and must apologise for my delay in responding.

As requested, I enclose a further copy of the Opinion of the Scottish Law Officers.

*Yours sincerely*

*Bob*

ROBT BRODIE  
Solicitor

ENCL



O P I N I O N

by the

SCOTTISH LAW OFFICERS

on

QUESTIONS CONCERNING THE STATUS AND  
RIGHTS OF POSSESSION OF NOTARIAL  
PROTOCOL BOOKS.

1. We answer this question in the affirmative. In our opinion notarial protocol books fall into the category of registers concerned with the "private interest and securities of the subjects". The reasoning at page 5 of the Memorial that such books by virtue of their issue by the Clerk to the Admission of Notaries, their use, and their required delivery to the Lord Clerk Register (now the Keeper of the Records of Scotland), must be res extra commercium seems to us cogent and convincing. We find it unnecessary to elaborate upon it.

2. We also answer this question in the affirmative. The Keeper is the proper custodian of such books after they have passed out of the keeping of the notaries to whom they were originally issued. There is no bar by prescription or acquiescence to his insisting that they be restored to his custody (Presbytery of Edinburgh v. University of Edinburgh 1890 S.L.R. 567 at 573). We see no reason why the Keeper should not enforce his title to custody.

3. Enforceability of the Keeper's right should present no procedural problem if the books concerned, and particularly the de facto custodians of them, are located within the area of jurisdiction of the Scottish /



2.

Scottish Courts. Of course, if this is not so, grave difficulties could arise. It is conceived that the practical problem may arise chiefly in the case of custodians within the English jurisdiction, in which case advice would require to be sought through the Treasury Solicitor. The more acute problems which would be presented where other foreign jurisdictions were involved, could in our view, only be resolved in the context of particular cases as and when these arise.

THE OPINION OF

*William J. Douglas*

Lord Advocate

*Alan Stewart*

Solicitor General

O P I N I O N

by the

SCOTTISH LAW OFFICERS

on

QUESTIONS CONCERNING THE STATUS AND

RIGHTS OF POSSESSION OF NOTARIAL

PROTOCOL BOOKS.

---





**CABINET OFFICE**  
Historical and Records Section  
Hepburn House  
Marsham Street  
London SW1P 4HW  
Fax: 071 217 6010

**ENQUIRIES:**  
071 217 6050



**URGENT**  
YES/NO

**FACSIMILE LEADER**

**NAME:** Mrs P. Illsley  
**DEPARTMENT:** Cabinet office  
**ADDRESS:** Room 6/2  
 GOGGS  
**FAX No:** 270 6054

**FROM:** Varinda Walters  
**DOCUMENT REFERENCE/TITLE:**  
**TOTAL NUMBER OF PAGES:** 142 **DATE:** 14 / 6 / 95

**MESSAGE:**

Pat  
 We spoke about this  
 Varinda

Pat  
 Card Hobley, INH,  
 would be grateful  
 for any thoughts  
 you might have  
 on the attached  
 before 1.30 pm p.m.  
 Pat

**ACKNOWLEDGEMENT REQUIRED YES/ NO**



---

Cultural Property Unit  
Department of National Heritage  
2-4 Cockspur Street, London SW1Y 5DH  
Tel: 0171-211 6158  
Fax: 0171 211 6170

---

FAX TRANSMISSION COVER SHEET

---

Date: 14/6  
To: Pat Andrews  
Fax: 217 6010  
Subject:  
Sender: Carol Hobley

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---

Is there anything we can say in addition to the line about the outline catalogue?  
Grateful for your thoughts by 1.30pm today if at all possible.

Trish  
Carol

No. 118

Sessions: 13th June 1995

4867

1241

THE CHURCHILL PAPERS  
AND THE HONOURABLE MEMBER FOR DAVYHULME

13695

Mr Gordon Prehice

★ 1

That this House notes with grave concern that the National Heritage Memorial Fund has agreed to pay the honourable Member for Davyhulme's family trust over £12 million for an indeterminate number of, as yet, uncatalogued private papers belonging to the late Sir Winston Churchill on the basis of a confidential valuation provided by antiquarian book sellers, Bernard Quaritch Ltd; and calls on the National Heritage Memorial Fund, that acts as agents of the nation in purchasing the papers, to publish the valuation report and to commission a second opinion on the value of the acquisition.

1242 GLASGOW EVENING TIMES ANTI-DRUGS CAMPAIGN

13695

Mr Mike Watson  
 Martin Eyle  
 Mr Ian Davidson  
 Mr David Marshall  
 Mr Jimmy Wray  
 Mr Jimmy Dunnachie

★ 6

That this House congratulates the Glasgow Evening Times on its anti-drugs campaign, in particular the immediate success of the hotline enabling the public to expose the merchants of death on the city's streets; recognises that drug abuse is in large measure the result of appalling social conditions and the lack of jobs available for young people; and urges the Government to ensure that increased resources are made available to statutory and non-statutory organisations which help those affected, directly and indirectly, by drug abuse.

NAMES WITHDRAWN (TO PERMIT ADDITION TO AN AMENDMENT)

978 FIRST WORLD WAR MEMORIAL AT THIEPVAL: Mr Jack Thompson and Mr Lawrence Cunliffe have withdrawn their names.

\* The figure following this symbol gives the total number of names of Members appended, including those names added in this edition of the Notices of Motions.

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14

Cultural Property Unit  
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FAX TRANSMISSION COVER SHEET

Date: 14/6  
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Travis  
Carol

⊗

No. 118

Notices of Motions: 13th June 1995

4867

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13:6:95

Mr Gordon Prentice

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*Sir Iobn Byrne*

# HM Treasury



Parliament Street  
London SW1P 3AG  
Telephone 0171-270 4360

*13*

Fax 0171 270 4834

Sir Terence Burns  
Permanent Secretary

RESTRICTED - MANAGEMENT

*985 ✓*

Hayden Phillips CB  
Department of National Heritage  
2-4 Cockspur Street  
LONDON  
SW1Y 5DH

13 June 1995

*C - Mr Jennings  
Miss Andrews*

*Dear Hayden,*

## NATIONAL HERITAGE MEMORIAL FUND

Thank you for your letter of 12 June. I am grateful to you for alerting me and other colleagues to this case.

I very much agree with what you told Lord Rothschild: that Accounting Officer status should be withdrawn from Miss Nayler at once. Although this is a matter for you, I would advise against acceding to any request from the Trustees for Miss Nayler to stay on temporarily, even under competent supervision. Your own investigation reveals that she allowed a clear conflict of interest to arise and is therefore unfitted to act as an Accounting Officer. There would be legitimate criticism if she were nevertheless able to carry on regardless.

As you say, Miss Nayler's immediate removal will entail appointing a temporary accounting officer. There are a number of options. You could look to appoint a competent person to do this from among the Trustees of the Fund, from among serving officials at DNH, or from among serving or recently retired civil servants more generally. I shall certainly be happy to propose some names in the latter category if you need them.

More generally, this case may have implications for the control systems operated by the Lottery distributing bodies and for your own oversight of those controls. This is no doubt something which can be explored when you meet Peter Sedgwick and other Treasury officials later this week.

CABINET OFFICE  
H .....  
15 JUN 1995  
FILING INSTRUCTIONS  
FILE NO. ....

RESTRICTED - MANAGEMENT

I am sending copies of this letter to Robin Butler, Richard Wilson, Andrew Turnbull, Tim Lankester, Russell Hillhouse and Michael Scholar.

*Yours ever,*

*Terry*

**T BURNS**



Sir Robin Butler

12



jun95\9burns

2-4 Cockspur Street, London SW1Y 5DH Telephone: 0171-211 6255 Fax: 0171-211 6259

CABINET OFFICE 15 JUN 1995 FILING INSTRUCTIONS

Mr. Vennings and Mrs. Andrews should be aware PSB 14 '6

From Hayden Phillips CB, Permanent Secretary

RESTRICTED - MANAGEMENT

Sir Terence Burns HM Treasury Parliament Street London SW1

Fax form with handwritten details: To Sir Robin Butler, Cabinet Office, From Hayden Phillips, DNH, Tel No 211 6255, No of Pages 3, Post-It Fax Note Ref No 7688

C - Mr Vennings Mrs Andrews 12 June 1995

Terence Burns

THE POSITION OF THE DIRECTOR OF THE NATIONAL HERITAGE MEMORIAL FUND

I should alert you and other colleagues to the action which I am minded to take in relation to a conflict of interest which has arisen at the National Heritage Memorial Fund.

In summary, the Director, Georgina Nayler, permitted contracts for IT consultancy to be entered into with her partner. He runs a singleton consultancy called Simno Software Services.

There were two phases to the contract. The first, in 1993, was for a small sum of money (£3,500). At the time she set herself aside from the actual contractual arrangements and my Department was notified. We then sent her a letter indicating that, while she had acted properly in so far as she could, given the conflict of interest, it was preferable that such conflicts were avoided for the future. The incident was not referred to me at the time.

She took no action on the letter and subsequently a further and much larger contract was entered into in circumstances in which she was aware of the Department's advice and aware of the proposal to employ her partner. She allowed the work to go forward and the total value of the contract over time amounted to just under £40,000. There was no competitive tender, nor any notification to the Department, as was required under the terms of the Financial Memorandum. A number of other IT contracts were awarded to other firms without competitive tender and above the delegated limits given to the NHMF.

## RESTRICTED - MANAGEMENT

I became aware that there were problems with procurement at the NHMF in early April this year as a result of the work we were doing with the NAO in certifying the systems of all Lottery distributing bodies so as to enable me to allow them to draw down money for grant purposes. The NAO and I were satisfied that this should be allowed to go ahead, subject to separate consideration being given to the fitness of senior officers at the NHMF.

I asked my Head of Internal Audit to investigate further and report back to me. Miss Nayler and her advisers have been given a full opportunity to comment on the findings. The main findings I have mentioned are not contested. I understand the NAO intend to note the NHMF's accounts in relation to what has occurred.

In other respects I have no reason to question Miss Nayler's good performance as the chief operating officer at the NHMF and in turning a very small organisation into a much larger one with a greater budget. Undoubtedly the pressures that this work imposed may have contributed to the problem but what occurred was such a serious breach of the basic responsibility she has as Accounting Officer that I have come to the conclusion that it would not be defensible to allow her to continue to hold that status. She, and her advisers, have sought to suggest to me that value for money was obtained by the use of Simno Software Services but I am clear in my own mind that where such a basic conflict of interest has arisen, where the Accounting Officer has been warned, and where the conflict is allowed to continue so as to disable that person from discharging their responsibilities, value for money arguments are largely irrelevant to the decision.

I have therefore told the Chairman, Lord Rothschild, that I must proceed to tell her that her Accounting Officer status is withdrawn, and that in my view the cleanest and clearest thing to do is to act now. This comes at a very difficult time for the NHMF and will be very damaging to it. They have been undertaking a restructuring and pay and grading exercise which will lead to proposals coming to me and to the Treasury for the upgrading of the Director's post for which she would therefore, in any event, have to compete. It is possible that the NHMF Trustees may respond by suggesting she remain as the Accounting Officer for the intervening period and that I should put in a senior and experienced civil servant to provide assurance.

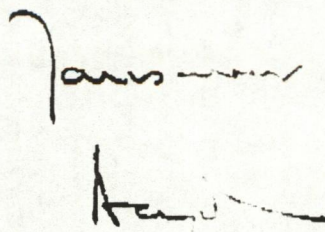
Apart from notifying you and other colleagues to the case, I would be grateful if you and they could give consideration to whether you have among existing or recently retired staff someone suitable either to act as a full-time temporary Director or as a part-time mentor and support.

I am not aware of many precedents for what I propose. Tim Lankester's experience with the head of the Students Loan Company may be a relevant case but I have already had to block an extension of the appointment of a former Chief Executive of the Sports Council on grounds of unsuitability as an Accounting Officer and to block for a year the appointment of a new Chief Executive on similar grounds.

I shall be informing John Bourn once I have settled with Lord Rothschild how we intend to handle the practical consequences.

**RESTRICTED - MANAGEMENT**

I am copying this letter to Robin Butler, Richard Wilson, Andrew Turnbull, Tim Lankester, Russell Hillhouse and Michael Scholar.

A handwritten signature in black ink, appearing to read 'Hayden Phillips', written in a cursive style.

**HAYDEN PHILLIPS**



Dr Robin Butler  
POL 11

12

DEPARTMENT FOR EDUCATION

SANCTUARY BUILDINGS GREAT SMITH STREET WESTMINSTER LONDON SW1P 3BT  
DIRECT LINE 0171 925 6234 SWITCHBOARD 0171 925 5000 FAX 0171 925 5841 GTN No. 3060

SIR TIM LANKESTER KCB  
Permanent Secretary

**RESTRICTED - MANAGEMENT**

9870 ✓

Hayden Phillips CB  
Permanent Secretary  
Department of National Heritage  
2-4 Cockspur Street  
London  
SW1Y 5DH

12 June 1995

C - Mr Vennig  
Ms Andrews

Dear Hayden,

Thank you for sending me a copy of your letter of 12 <sup>June</sup> May about the Director of the National Heritage Memorial Fund.

As you say, there are similarities with the case of the Chief Executive of the Student Loans Company who was dismissed following an investigation of his handling of company resources. The actual dismissal was carried out by the company's board. He ceased to be Accounting Officer several months earlier when it became clear that he would probably have to go. Between then and his dismissal he was on (genuine) sick leave, so fortunately we did not have to face the situation which would have been very uncomfortable for us and the company of his continuing as Chief Executive but not being the Accounting Officer.

I am consulting here on whether we could offer anyone as temporary Director and will get back to you.

Copies go to Robin Butler, Richard Wilson, Andrew Turnbull, Russell Hillhouse and Michael Scholar.

*Handwritten signature*

CABINET OFFICE  
H .....  
15 JUN 1995  
FILING INSTRUCTIONS  
FILE NO .....

TIM LANKESTER



CLOSED UNDER THE

10

W H Godwin, Esq.,

FREEDOM OF INFORMATION

cc. Mr Carpenter, TSD  
Miss Andrews, Cabinet Office

CABINET OFFICE  
H 95/466  
15 JUN 1995  
FILING INSTRUCTIONS  
FILE NO. -

ACT 2000

MATTERS ARISING FROM THE CHURCHILL ARCHIVES LITIGATION

Thank you for sending me copies of your minutes of 31 May and 7 June to Michael Carpenter and your draft paper enclosed with the latter.

As I mentioned when we spoke on the telephone last Thursday, the logic of the interpretation of the Public Record Act 1958 in your minute of 31 May is unassailable, but I remain doubtful as to its application. The Act provides a legal framework for government and legal archives ; but in so doing does not distinguish between contemporary administrative documents and historical public records. It is not only their creation, but also their custody which determines what are public records. The Public Records Acts bear only on documents which are still in official custody.

Documents which are, on creation, public records may cease to be so when transmitted outside government. This regularly happens in the ordinary course of administration, but it would be absurd to bring the Public Records Act to bear on such everyday transmissions and to involve the Lord Chancellor in the current administration of other ministers' departments. Collections of papers in the hands of former ministers are more likely to have been acquired as part of the processes of administration than subsequent historical documentation.

For this reason I should prefer to base the control of public records on their safe custody rather than their creation. In effect this would mean either ensuring that records which were properly departmental (or Cabinet) records should remain in official custody or under some measure of official control even when temporarily on loan to ministers and former ministers. The thrust of the argument in your minute could then be applied to those papers ; and the Lord Chancellor's consent could be a requirement for their disposal.

I should point out that, while most statutory powers over public records are vested in the Lord Chancellor, he has delegated many of them, though not those prescribing access periods under s.5 of the 1958 Act and approving the retention of records in departments under s.3(4), to the Keeper of Public Records. It is the Keeper who is responsible for the guidance, co-ordination and supervision of departments in exercising their functions under s.3(1).

With regard to your draft paper, may I offer the following comments, citing your paragraph numbers.

CLOSED UNDER THE  
FREEDOM OF INFORMATION  
ACT 2000

CAB 103/816 letter dated 11/06/95

Paragraph 1 : it is not true that the convention(s?) about use of Cabinet papers by former ministers date from 1917. They go back earlier, but they are not recorded in formal Cabinet records since these are virtually non-existent before 1916. More narrowly, the decision in 1917 modified existing conventions, but in a manner quite different from decisions of subsequent Cabinets, at least until 1934.

Paragraph 2 restricts the ambit of the paper to Cabinet papers of former Cabinet ministers. For reasons advanced in my draft paper I think that it is essential to deal with both Cabinet and departmental records.

Paragraph 3 : Is 'legal functions' used in a special sense? Or would 'executive functions' or 'Crown functions' be better?

Paragraph 4 line 6 : add ', if he exercised a right to retain Cabinet documents,' after 'a Minister'?

Paragraph 5 : I agree with your doubts about effective enforcement of contractual conditions. As early as 1892 the Foreign Office sought, without signal success (except paradoxically from Lord Randolph Churchill), to ensure that former ministers and others with confidential circulated papers should ensure that their heirs and executors were bound either to return such papers or institute adequate measures to safeguard them and their use.

Paragraph 9 : As I have already indicated above, the de minimis exceptions are likely to be less numerous than copies of documents transmitted in the course of ordinary administration.

Paragraph 10 : I was uncertain whether 'Gifts' meant gifts to ministers or by ministers to institutions. We should need to cover deposits also. However, it is not clear what sanctions exist to enforce conditions, particularly where ownership is claimed by former ministers or where no conditions have been imposed or agreed in the past.

Paragraph 17 : I do not think that any provision against alienation exists in Northern Ireland. The Northern Ireland Public Records Acts are still purely permissive, though currently the Secretary of State operates in broadly the same manner as the Lord Chancellor under direct rule arrangements, notably in respect of access.

We have agreed to meet at the PRO, Kew to look at the Public Records Act bill papers and related files. I hope that the above comments will be of use.

D.

C D Chalmers

DI HAND

From W H Godwin

9

To Michael Carpenter TSD

Cc ~~XXXXXXXXXXXXXX~~

Pat Andrews Cab Off ✓

7 June 1995

Duncan Chalmers

Churchill case-follow-up

1. Herewith a first shot at my contribution to a paper for Sir Robin Butler.

It does not deal with ~~recovery~~ the papers of former Prime Ministers-your topic

(b) as I need the notes which I believe you are kindly having typed for me.

And of course it needs in due course your contribution on copyright.

2. Trying to focus on the outstanding issues, I thought it wiser not to read

Duncan Chalmers' draft until I had finished mine, in case I was tempted

to do no more than concur with him. As it is, I was led outside your proposed

structure, and on a quick skim the 2 efforts may be complementary.

3. I shall be getting in touch with Duncan Chalmers to ask him for the

PRO references to their papers on the PR Act, and also to follow up his

reference in para 21 of his paper to Parliamentary Counsel-I should be interested

to see their advice.

4. You and Pat Andrews may think it would be useful if we could meet next week

to discuss how we take this forward from the existing drafts.

W H Godwin

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FREEDOM OF INFORMATION  
ACT 2000



CLOSED UNDER THE  
FREEDOM OF INFORMATION  
ACT 2000

CAB 103/816 letter dated 07/06/95

PA

DRAFT 7/6/1995

Paper for Cabinet Secretary on

MATTERS ARISING FROM THE CHURCHILL ARCHIVES LITIGATION

Intro ductory

1. The recent litigation concerning the Churchill Archives has exposed difficulties in the operation of the constitutional convention governing the use of Cabinet papers by Cabinet Ministers after they have left office. This convention enables the Cabinet of the day to decide the rules which should govern custody of such papers, and access to them, and disclosure of their contents, by former members of the Cabinet. Since the convention's inception in 1917, the rules have been varied on a number of occasions. Annex 1 briefly summarises the rules in force from time to time.

(IS SUCH A SUMMARY AVAILABLE? I HAVE NOT SEEN RULES POST ~~1945~~ 1945.)

2. It may be necessary at a later stage to go wider, and, for example, look also at the position of Ministers not in the Cabinet, but the present paper deals only with the Cabinet papers of former Cabinet Ministers. It does so on the basis that no difference is to be made between a Prime Minister and his Cabinet colleagues in this context.

Some relevant law

3. The legal starting point for a consideration of these matters is that such papers have been prepared for the purpose of discharging legal functions and are therefore the property of the Crown, and public records as defined in the First Schedule to the Public Records Act 1958(c.51).

4. It follows from Crown ownership that a former Minister may not derive a legal interest ~~from~~ in the papers from any other source. His interest might derive from a gift, or a loan, or as in the Churchill case from possession for a period sufficient to extinguish the Crown's title under the Limitation Act 1980. The view taken by the Law Officers in 1934 was that under the rules then applying, a Minister obtained a right of possession which was personal to him, so that an action<sup>to</sup> to recover the papers after his death would lie against his estate.

<sup>Gift</sup>  
5. The current practice is to give the departing Minister copies of documents

comprised in specified categories, subject to requirements as to safe storage, controlled access, assurances as to keeping the papers in the United Kingdom, and so on. The word "requirements" is used because at one stage the Cabinet imposed them through undertakings from the Minister, while the current practice is to draft them as conditions with a contractual foundation. The Treasury Solicitor advised that the undertakings were unenforceable whereas the conditions would be binding. *(Even so, how prevent breach? What remedy for breach?)*

6. It may however be open to doubt whether all the Cabinet Office objectives can be met where ownership passes to the former Minister. The most difficult objective may be to keep the papers in the country, given the possibility of successive transfers of ownership. And it may be that the device of a trust could be used to frustrate the Cabinet Office aims.

#### Loan

7. It is clearly easier both to attach conditions to a loan and to enforce them. A loan would no doubt be less attractive <sup>to Ministers</sup> than an outright transfer of ~~an~~ ownership, but it would not be a complete innovation—rather, a return to the regime which operated in 1934. And it would allow the Cabinet Office a degree of control which would not be possible with a transfer of ownership.

#### Public Records Act 1958

8

8. An incidental advantage of a loan is that the document would retain its status as a public record, which it loses on a transfer of ownership from the Crown. (But it would not come within section 5 Access to Public records, which applies only to such records in the Public Record Office or an appointed place of deposit).

9. A more substantial point arises on section 3 Selection and preservation of public records. Subsection (6) requires that public records which have been rejected as not required for preservation shall be destroyed or (if some person other than the Lord Chancellor is responsible for them), subject to the approval of the Lord Chancellor, be disposed of in any other way. It may be that the arrangements made in pursuance of section 3 are such that the subsection is not apt to cover papers given to former Cabinet Ministers. But the intention of

The Act appears to be that public records should all be dealt with in one of the three specified ways—preservation, destruction, or (excluding records for which the Lord Chancellor is responsible) any other way provided the Lord Chancellor approves. There may be de minimis exceptions (e.g., copies of public records supplied on discovery in litigation to which the Crown is a party—assuming that this form of disposal has not in fact been approved by the Lord Chancellor). But a fairly long-standing practice of handing over public records, being copies of Cabinet papers, is a matter of some gravity. It may be considered appropriate to pursue this question with the Lord Chancellor's Office (and perhaps the Public Record Office).

#### Gifts lodged with Institutions

10. It is not uncommon for papers in the possession of former Ministers to be lodged with such Institutions as Universities. It is important in such an event to ensure that, if this is acceptable to Government under the relevant arrangements, the terms of lodging are suitable and in particular contain a discretion for the Institution to apply controls over access which mirror those for which section 5 of the Act provides.

XI Questions of Procedure Paragraph 15 of the 1992 version of Questions of Procedure might usefully be amplified in a separate note for Cabinet Ministers.

#### Private Offices

12. The Private Secretaries of Cabinet Ministers should be fully instructed as to the procedures to be followed in relation to Ministers' papers on their relinquishing office.

#### Copyright

13. MR CARPENTERS PAPER TO BE INSERTED OR ANNEXED OR PUT IN AS A SEPARATE PAPER

#### Official Secrets

14. Regard must always be had to the requirements of the Official Secrets legislation. (NEED THIS BE EXPANDED?)

#### Privy Council oath and Sovereign's consent

15. Much reliance has in the past been placed on the Privy Counsellor's oath as a safeguard for the secrecy of proceedings in Cabinet, the <sup>rationale</sup> ~~theory~~ being that the Cabinet began as a Committee of the Privy Council. As noted in Paragraph 27 of

Professor Bradley's affirmation in the Churchill proceedings, the present trend sees the value of the oath diminishing in this respect. ~~For what it is worth,~~ Sections 1.1 and 20 of Questions of Procedure treat the Council and the Cabinet as separate entities. The oath may now be more relevant in the case of members of the Court of Appeal than that of Cabinet Ministers. Similarly, the practice of seeking the consent of the Sovereign to disclosure of the proceedings seems to be, if not in abeyance as Professor Bradley suggests (paragraph 28), at least on the wane.

16 Sir Edward Heath and others

A NOTE TO FOLLOW, EITHER AS PART OF THIS PAPER OR SEPARATELY

United Kingdom

17. Scottish law does not permit trading in public records. It is not inconceivable that Northern Irish law is not identical with English law. Consultation with the Scottish and Northern Irish Departments appears to be necessary.

20

Recommendations

TABLE TO FOLLOW

WTT



**THE TREASURY SOLICITOR**  
**Queen Anne's Chambers**  
**28 Broadway London SW1H 9JS**

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  GTN 210  
FAX NO: 0171-210

Miss P Andrews  
Historic & Records Section  
Cabinet Office  
Hepburn House  
Marsham Street  
London SW1

With the Compliments of

Michael Carpenter

Churchill Archive-

follow-up

CLOSED UNDER THE

From Bill Godwin

FREEDOM OF INFORMATION

3 June 1995



cc Mrs Andrews

CABINET OFFICE

H 95/451 ✓

- 8 JUN 1995

FILING INSTRUCTIONS

FILE NO

1. Many thanks for your minute of 26 May, which reached me yesterday (as a result I hope of your being able to take a short break after all the pressures on you recently).

2.

As you know, I had to defer work on your agenda until I had dealt with a DSS case, and I was not able to make a start until the end of last week, since when I have been trying to clear my mind about the general context of the specific topics for the proposed paper.

3. Since 1917, a convention has operated in relation to the treatment of the papers of Cabinet Ministers when they leave office: it seems to have been that a Cabinet may decide at any time—on taking up office, during office and on relinquishing office—what rights a Cabinet Minister is to have when he leaves the Cabinet. The Convention has applied only to Cabinet Ministers. (Contrast Questions of procedure which covers all Ministers.) No difference has been made between the Prime Minister and other Cabinet Ministers, at any rate until Lord Callaghan's and Lord Wilson's papers came to be dealt with. The convention involves some waiver of the Crown's common law right of ownership.

4. Is such a convention (like the prerogative) ousted where Parliament enacts law with which the convention is incompatible? On the true construction of section 3(6) of the Public Records Act 1958, must the approval of the Lord Chancellor be obtained before effect is given to the convention?

5. It could be said that that approval would be signified by his mere concurrence in the wishes of his Cabinet colleagues' wishes, but my feeling is that it would require more formality than that to satisfy the Statute, if indeed it does apply, and that such formality would result in a significant role for the Minister with general responsibility for public records.

6. I am grateful to you for taking on the copyright topic (d), and shall address myself to topics (a) to (c) during the coming week.

7. I am sending a carbon to Duncan Chalmers, and should be grateful if you could copy this to the others (with my apologies to all for the timing)

A.H.Z.

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ACT 2000

CAB 103/816 letter dated 3/6/95





THE TREASURY SOLICITOR  
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Miss P Andrews  
Cabinet Office  
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Hepburn House  
Marsham Street  
London SW1

With the Compliments of

cc. Miss Andrews

W6 5/6 7



Churchill Archives Centre  
Churchill College, Cambridge CB3 0DS

Piers Brendon, M.A., Ph.D.  
Keeper

The Treasury Solicitor,  
Queen Anne's Chambers,  
28 Broadway,  
London SW1H 9JS

31 May 1995

Your Ref. A930329G/MC

Dear Mr Carpenter,

The Sir Winston Churchill Archive Trust

Thank you for your letter of 26 May.

Alan Kucia and/or I would be very happy to meet you and Miss Andrews to discuss practical arrangements for giving effect to the understandings relating to the copyrights of papers in the Churchill collection.

I look forward to hearing what dates would suit you and Miss Andrews.

Yours sincerely,

Piers Brendon

CABINET OFFICE  
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- 6 JUN 1995  
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- 1 JUN 1995  
SOLICITOR

30.5.95



From W H Godwin

To Miss Andrews, Cabinet Office  
Mr Carpenter TSD  
Mr Chalmers

The Public Records Act 1958 ("the Act")

1. For present purposes, the key words in the definition of public records are in paragraph 2(1) of the First Schedule: "... administrative and departmental records belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty's Government in the United Kingdom..."

2. All the papers we are concerned with belong to Her Majesty, subject to what is said in paragraph 3 below, and to a possible exception in respect of papers produced by Cabinet Ministers themselves. This was Sir Winston Churchill's sticking-point. It was also of concern to Sir Harold Kent when the Cabinet Office Historical Section consulted him as Treasury Solicitor in the late 1950's. (Cabinet Office file 4/2/45). However, he advised that "the only practical line is to regard all papers prepared for the purpose of discharging official functions as public records". This seems to me the right approach to the present problems.

3. In his initial Instructions to Counsel to advise on the Churchill Archives (5 June 1991), Mr Colin Gregory, referred to the Instructions to the Law Officers to advise as to recovery of the Black Prince's Register, and their Opinion of 1914. In those papers, questions were raised as to the "indefeasible right of the Crown to its official records", and the Law Officers advised that the "Crown did not own the documents as private and personal property, and could not, effectively transfer their ownership to third parties." Mr Gregory pointed out that the Law Officers' Opinion of 1956 reached the opposite conclusion, and that, even if there once was a doctrine of inalienability, it is no longer operative. In their Opinion of 25 July 1991, Counsel rejected the view that the Crown's right to its official records was incapable of alienation. (As this is a United Kingdom matter, it should be recalled that in Scotland public documents cannot be bought or sold.)

4. For the reasons given above, it is taken in this note as given that all the relevant papers are Crown property when they are brought into existence and consequently become public records within the ambit of Section 3 of the Act.

5. Subsection (1) imposes a duty on departmental records officers to arrange for the selection of records which ought to be permanently preserved. By virtue of subsection (4), public records selected for permanent preservation must in due course be transferred to the Public Record Office ("PRO"), or a place of deposit directed by the Lord Chancellor.

6. Subsection (6) requires that public records which are not required for permanent preservation "shall be destroyed" or disposed of in some other way which must have been approved by the Lord Chancellor.

7. It is therefore open to the Cabinet Office to make a copy of a document for a former Prime Minister, or pass him or her an existing spare copy, but either way not a document needed for permanent preservation, if the Lord Chancellor approves.

8. If there is a gift of the copy document, it ceases to be a public record because it is no longer owned by the Crown. If there is a loan, it remains a public record, and would be returned to the Cabinet <sup>Office</sup> as such in accordance with the terms of the loan. But while on loan it would not be covered by Section 5 of the Act (Access to public records) because it would not be a public record in the PRO.

9. So, whether a gift or a loan, Section 5 would not apply to a document in the possession of a former Prime Minister or his or her transferee. I do not know the basis of the earlier advice that it would apply, and I am trying to trace it - there may be something in its reasoning that we need to take into account.

10. Among the papers I have seen in relation to Lord Wilson's papers, there is a minute dated 17 May 1990 by Mrs Finn of the Lord Chancellor's Department ("LCD"), in paragraph 5 of which she says that "the otherwise unlawful creation and removal of a special class of papers is permissible under a convention". I do not see what is unlawful in the public records context about taking an extra copy and handing it over (and Mark Blythe took a robust view of this question in his letter of 6 June 1990 to Mrs Finn). But (subject to Cabinet Office views, and perhaps those of LCD and PRO) it seems to me that the arrangements for handing papers over to require the approval of the Lord Chancellor.

*W H Godwin*

W H GODWIN  
31 May 1995

CLOSED UNDER THE



W. Godwin, Esq.

FREEDOM OF INFORMATION

cc. Miss P.M. Andrews  
Michael Carpenter, Esq

26 May 1995

ACT 2000

MINISTERIAL PAPERS

I have now completed the paper which I began just before our meeting with Treasury Counsel in April. I have taken the opportunity of bringing the earlier sections up to date. This is enclosure B.

Enclosure A is a first shot at a paper to go to Sir Robin Butler. I have done no more than slightly recast the earlier part of the paper at Enclosure B and add some conclusions, which represent my current thoughts. Some of the evidence and citation of sources might profitably be omitted ; and it clearly requires an executive or management summary at the beginning. What I have not covered are the problems of evidence and research that would be required for any assertion of the Crown's claims in the courts. I think that it may be worth including a paragraph to that effect so that the problems are understood by those who count.

The paper also needs a lawyer's eye and slant, as well as a second pair of eyes to bring out the salient points and sharpen it up. But I hope that it will provide you with something to begin to pull together our rather diffuse discussion last week. I have tried to bring together various strands of action and documentation and to integrate it with what is going on elsewhere in government, especially discussions between the Cabinet Office (Pat Andrews) and the PRO. This line would I know commend itself in the latter quarter.

I am copying the papers to Pat Andrews and Michael Carpenter for their sines ; and I hope it will go some way to meet their needs. I have not picked up in detail the points made in past Lord Chancellor's Department papers about public records in private hands, but I doubt whether it is worth going into great detail. Nor have I made any reference to the papers of prime ministers after Churchill. Again a paragraph on this, starting with the relatively satisfactory arrangements for Eden's papers which might serve as a model to encourage the others and their heirs, might be useful. Pat Andrews is probably best placed to supply this, but I can put something together, if necessary.

I shall await hearing from you or others, however, before doing anything further.

D.  
C D Chalmers

CABINET OFFICE
M 95/431 ✓
3 MAY 1995
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ACT 2000

CAB 603/816 letter 26/05/95

## CONTROL OVER MINISTERIAL PAPERS

1. The recent case of the Churchill Archives and the public interest has highlighted the difficulties and confusion over the ownership and control of ministerial papers. This paper identifies some of the lessons learned as a result of the Churchill case, assesses the constitutional conventions and statutory powers which may be seen to bear on the subject and makes recommendations for improved measures to prevent official documents getting out of official custody and into private hands and to recover them where they have already done so.

2. The main issue is ownership and it is necessary in the face of uncertainty and misunderstanding to assert Crown ownership of all official documents and public records created or received and kept by ministers, officers and servants of the Crown in the course of their official duties. Attempts to introduce other issues, such as custom and practice in relation to the retention, possession and ownership of official documents by former ministers and others, restrictions on the use of official documents and information and even cases of the recovery of official documents from private hands, tend to cloud the main issue, because custom and practice are both uncertain and variable in the absence of clear-cut and enforceable law, particularly statute law.

3. The following factors have been considered as bearing on these issues: the privy counsellor's oath and obligations ; the Sovereign's consent to disclosure and use of information about Cabinet proceedings ; the Official Secrets Acts ; other restrictions on disclosure and use of information from Cabinet documents and other state papers ; Crown ownership of Cabinet and other state documents ; Crown copyright ; and the Public Records Acts. Each of these factors has limitations which are set out in the remainder of this note.

### Privy Council membership

4. The concept of the Sovereign's consent to the disclosure or use of Cabinet documents (see paras. 10-14 below) was formally founded on the oath and obligation of privy counsellors to preserve the confidentiality of proceedings and advice to the Sovereign. From 1919 Cabinet Office restrictions on their use by ministers and former ministers formally relied on these related considerations, buttressed where practicable by prime ministerial directives and Cabinet resolutions.

5. However, oaths and conventions are difficult to enforce, and political divisions and both official enquiries and public discussion of the conduct of the First World War encouraged political and military memoirs, unauthorised disclosure and publication and a limited relaxation of the rules as they affected ministers and former ministers.

6. In January 1922, with Lloyd George's tacit support, Churchill secured from the coalition Cabinet a right for former ministers to quote directly from wartime official documents in order to

vindicate their actions and rebut criticisms in publications about the conduct of the war, provided publication did not compromise current public interest. In 1923 the first volume of Churchill's The World Crisis was serialised in The Times and led to questions in the Commons about his use of official documents. Bonar Law, the Prime Minister, replied that Churchill had the First Lord's consent to publish Admiralty orders, but when pressed on a possible breach of the Privy Counsellor's oath replied : 'I have taken the oath and personally I think I should consider it a breach'. Churchill objected to Bonar Law that he had consulted Asquith as the Prime Minister of the time as well as his 'principal colleagues of those days', before publishing official documents from his period at the Admiralty. He continued to consult the Government of the day and individual departments before publishing official documents. (John F Naylor A man & an institution (Cambridge : 1984), pp.117-8 ; M Gilbert Winston S Churchill, Companion Volume to Vol. V The Exchequer Years 1922-1929, pp.32-39 ; PRO CAB 27/213 item 5)

7. The practical force of the oath is also open to question. As early as 1909 the distinguished lawyer, Sir Frederick Pollack, held that it was not an 'indispensable obligation of secrecy' but instead 'a mere case of historical survival' ('Government by Committee in England' The Law Quarterly Review 25, pp.60-62).

8. Ivor Jennings took a similar view : 'Membership of the Privy Council is a historical survival. It is said that the Privy Councillor's oath restrains those who take it from publishing information obtained in the service of the Crown. It is difficult to believe that it is the oath alone and not the weight of tradition, the insistence of the Prime Minister, or the disapproval of colleagues, that makes the secrecy of the British Cabinet more effective than is common in most governmental systems.' (I.Jennings Cabinet Government (3rd ed.,1969), pp.228-9).

9. The Cabinet Office, however, continued to give weight to the oath on occasion, notably when Hankey advised Lloyd George 'to ask for official permission through the proper channel, viz the Prime Minister', observing : 'I have, of course, no status to give you official permission to publish official documents. I can, on my own authority, exempt you neither from the Privy Counsellor's Oath nor the Official Secrets Act.' (John F.Naylor A man & an institution (Cambridge, 1984), pp.118-9 ; House of Lords Record Office Lloyd George Papers G/212, Hankey to Lloyd George, 8 January 1933).

#### Sovereign's consent

10. The requirement that the Sovereign's consent should be obtained for any disclosure or publication of Cabinet proceedings was closely related to the privy counsellor's oath. In 1935 the Parliamentary Counsel confirmed the principle in relation to Cabinet proceedings and documents and in 1940 extended this advice to other state documents of similar secrecy, founding his view on the ownership of the documents by the Crown : 'All these secret documents, whether Cabinet, Departmental, or otherwise, are the property of the Crown and he could see no



logical or other reason for distinguishing them in regard to the question of whether the consent of the Crown to be obtained through the usual channel should be given to their disclosure in Parliament.' (Reported by Sir Rupert Howorth in a letter to G W Lambert, War Office, 11 January 1940, PRO CAB 21/2161).

11. Permission was commonly sought in the 19th century, usually in connection with resignation or other personal statements by former ministers, who appear usually to have adhered to the conventions until recent times. Applications were not always submitted to the Sovereign, however, but were sometimes decided by the Prime Minister, apparently with no reference to the Palace.

12. The majority of applications were in connection the publication of memoirs or biographies. In answer to a parliamentary question about Churchill's publication of Admiralty documents on 15 February 1923 Bonar Law said: 'it is of course an obligation upon Ministers and officials not to disclose confidential State or official papers without the previous approval of His Majesty's Government for the time being, or in the case of Cabinet information, without the consent of His Majesty' (160 HC Debates, 15 Feb 1923, col. 315). Practice by both politicians and the Cabinet Office in relation to the principle of the Sovereign's consent, however, has been far from consistent. In 1926 even Hankey appears to have regarded application to the Sovereign as optional, writing to Churchill about the third volume of The World Crisis: 'I do not know if it has occurred to you, as a Privy Counsellor, to ask leave of the King. I am not sure that it is necessary, and in any event the King could only refer the matter back to the Prime Minister. I have a feeling at the back of my mind that the King will take it rather well if you ask him.' Concern by King George V in 1934 led to new procedures for consulting the Sovereign. By 1949 they had fallen into disuse and had to be reinstated. This resulted in 1949 in a restatement of the principle and new procedures agreed between the Cabinet Office, the Prime Minister's Office and the Palace, whereby the Cabinet Secretary and the Prime Minister became the normal channels for applications to be considered and, where necessary, submitted to the Sovereign. (John F Naylor A man & an institution, p.348 n.10; PRO CAB 63/38, Hankey to Churchill, 10 Dec. 1926; CAB 21/2161, 3740 and 3755; PREM 1/171, PREM 6/11 and PREM 8/1133).

13. However, the principle has not always been observed, despite periodic restatement in Parliament and attempts to enforce it in the courts, which have largely failed in the face of changing public opinion and earlier access to information through the Press, media, memoirs, contemporary history and public records. This renders the convention of limited value in relation to control over records which are already more than fifty years old.

14. The special concern of the Sovereign with Cabinet documents was with disclosure and publication and questions of ownership, custody and control or of use and misuse have been raised less

frequently. The Queen's consent was sought, however, both for the transfer of Cabinet records to the Public Record Office and their opening to inspection in accordance with the Public Records Acts. George V indicated his distaste for the use by ministers of official information, particularly Cabinet information, in newspaper articles for which they were paid. There are echoes of this concern in the judgment in the Crossman Diaries case, even though the lord chief justice declined to issue injunctions preventing disclosure because the passage of time since the Cabinet meetings in question was too great to prejudice seriously the public interest in the confidentiality of Cabinet documents. The sale of modern official documents for private profit would, on the evidence of the Churchill Papers, raise greater objections, but in practice even this issue is affected by the passage of time and there are several instances of official papers of former ministers being sold or bequeathed. Among the most notably are those of Bonar Law and Lloyd George, which were acquired by Lord Beaverbrook as a bequest in 1923 and by sale in 1951, respectively, and which, with his own papers, including ministerial papers, passed to the First Beaverbrook Foundation and were subsequently deposited by the Foundation in the House of Lords Record Office.

#### The Official Secrets Acts

15. The first Official Secrets Act was passed in 1889 partly to guard against espionage but largely to prevent unauthorised disclosure of official information following a series of leaks of diplomatic documents. It applied only to Crown servants and certain government contractors and proved to be ineffective. Acts of 1911 and 1920 widened both its application and powers, the latter making it an offence to retain any official document without authority, for any purpose prejudicial to the State. Although use was made of the Acts to prevent or punish disclosures of official secrets, public opinion became inimical to prosecutions other than for espionage and the Official Secrets Act 1989 limited severely the categories of information covered.

16. The Official Secrets Act 1989 does not provide an effective weapon against retention of official documents for several reasons :

- a) the limited categories of information and documents protected ;
- b) the need to demonstrate that disclosure or retention is against the public interest ;
- c) the lessening of confidentiality with the passage of time, reflected in the judgment in the Crossman Diaries case and the report of the Radcliffe Committee on Ministerial Memoirs ;
- d) the effect of public access to official information through official publications and the operation of Open Government procedures and the Public Records Act.

#### Other restrictions on disclosure and use of official information

17. Jennings has pointed out that the real basis of Cabinet secrecy is political necessity : 'The Cabinet deliberates in

secret ; its proceedings are confidential. The Privy Councillor's oath imposes an obligation not to disclose information ; and the Official Secrets Acts forbid the publication of Cabinet as well as other official documents. But the effective sanction is neither of these. The rule is, primarily, one of practice. Its theoretical basis is that a Cabinet decision is advice to the Queen, whose consent is necessary to its publication. Its practical foundation is the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away.' (I.Jennings Cabinet Government (3rd ed., 1969), p.267)

18. There are several instances in Hansard and in Cabinet Office and Prime Minister's Office files of criticism by Parliamentarians of unauthorised disclosure and indeed breaches of official custody of Cabinet and other state documents. These do serve to show that the concept of private ownership of official papers adopted by some ministers and former ministers have not been universally accepted. More recently, public and Parliamentary reaction to the National Heritage Memorial Fund grant from Lottery funds to the Churchill Trustees has served to underline this.

19. In 1916 an Order in Council was issued, with Parliamentary approval, prohibiting inter alia under Defence Regulations the publication of Cabinet proceedings or, without lawful authority, 'the contents of any confidential document belonging to, or any confidential information obtained from, any Government department, or any person in the service of His Majesty'. However its efficacy was not tried. It arose from wartime security needs and lapsed with the Defence of the Realm Act 1914.

20. Since the late 19th century at least there have been formal restrictions on the use of official information by civil servants and serving members of the armed forces not only under the Official Secrets Acts but also under Treasury and departmental regulations and King's Regulations and Admiralty Orders. Retired senior officers of the armed forces were in practice treated more liberally than retired civil servants.

#### Crown ownership of state papers

21. Crown ownership of Cabinet documents and other state papers, even where they were no longer in official custody, was affirmed by the Law Officers in 1934 and the Parliamentary Counsel in 1935 and 1940. In this conclusion they relied upon the circumstances of the creation of the documents, following an opinion by the Lord Chancellor and the Law Officers in relation to Crown copyright in 1933. These views predate the Crown Proceedings Act 1947 which may have altered the position of the Crown in relation to the statutes of limitation and the recovery of official documents.

22. Instances of recovery of official documents in earlier and modern times do exist, but rarely have these involved legal proceedings. As a consequence there is no clear body of case law in England.

### Crown copyright

23. The copyright position of Crown documents has been stated in successive Copyright Acts. The 1988 Act establishes Crown copyright in works made by the Sovereign or an officer or servant of the Crown. The Crown therefore claims copyright in any document created by ministers, officers and servants of the Crown in the course of their official duties.

24. In 1933 the Lord Chancellor and the Law Officers were consulted at the instance of the King's private secretary about copyright in letters written by or to the Sovereign. They gave the opinion that section 18 of the Copyright Act 1911 applied to letters written by anyone of the Sovereign's servants on affairs connected with which the writer had some responsibility, direct or indirect, in virtue of the office which he held. The definition in section 18 of the 1911 Act ('any work prepared under the direction or control of His Majesty') was in turn used by the Law Officers to define 'official documents' in their opinion of 1934 on the recovery of Cabinet documents. In this respect, the issues of ownership of and copyright in Crown documents are related. However, this applies only to documents created by the Crown and its officers and servants and not to documents received by them unless they were similarly created by virtue of official duties owed to the Crown. Crown copyright does not therefore of itself provide a basis for the recovery of documents and the assertion of ownership or possession.

### Public Records Acts

25. Powers under the Public Record Office Acts before 1958 were largely permissive in respect of administrative and departmental records, though from 1877 Parliamentary sanction was formally required for the disposal of public records. Under the Public Record Act 1958 departments became responsible for the safekeeping of public records until they were transferred to the Public Record Office or a place of deposit appointed by the Lord Chancellor or were disposed of by destruction or otherwise. Neither the older legislation nor the 1958 Act included any power of recovery of public records out of official custody.

26. The principles which govern the unauthorised disclosure of official information also underlie the access provisions of the Public Records Act. However, they apply only to records in the Public Record Office, in other places of deposit for public records or in government departments and other bodies under the Act.

27. The Public Records Act therefore provides a basis for preventing official documents leaving official custody, but not for their recovery or control once out of official custody.

## Conclusions

26. It is clear from the number of official papers which are to be found in private hands or collections of private papers, even if in public institutions, that the arrangements introduced after 1934 for the recovery of Cabinet documents from former ministers and their representatives have not been effective. Equally, whether under the old Public Record Office Acts, which after 1877 required Parliamentary sanction for the disposal of public records, or under the Public Records Act 1958 which made departments responsible for the safekeeping of public records before their transfer to the Public Record Office, departments have not been able to prevent some ministerial papers from escaping from official custody.

29. The analysis in paragraphs 4-27 suggests that none of the constitutional conventions or specific statutes provide in themselves an adequate means of preventing the removal of official ministerial papers and their ultimate alienation or of recovering them. Nevertheless they should not be overlooked. There would some merit in an approach which incorporated and coordinated them, as appropriate, in targeted guidance.

30. In Scots law a right of recovery of court records and other public documents exists irrespective of the effects of the Limitation Act 1980 (Stair's Encyclopaedia of the Law of Scotland vol. 19, para. 844). The same source points out that there is no provision under the Public Records Act 1958 to reclaim public records which have passed into private hands and no general power now exists of recovering public records under English law. The Limitation Act now effectively bars the Crown from recovering public records after the lapse of six years, except by criminal proceedings.

31. Obstacles to recovery suggest that it would be more fruitful to prevent official documents from leaving official custody and to recover immediately any which may be in the hands of ministers on leaving office than to rely on measures to recover them after an interval of years. It would be invidious to suggest that the problem concerns only ministers; measures are also required to ensure that officials, members of the armed services, consultants and contractors do not retain official papers, but these will necessarily be rather different from those for ministers.

32. In considering the narrower question of disclosure of confidential information by former ministers the Radcliffe Committee rejected legislation, and by implication criminal sanctions, as a means of preventing, instead the committee chose to rely on reinforcing the existing obligation of honour by measures designed to achieve a greater degree of acceptance by former ministers. The committee suggested that the minister should be issued with a separate memorandum abstracting the substance of its report and should sign a declaration similar to that already signed with reference to the Official Secrets Acts. Alternatively, the principles recommended by the committee might be incorporated in the general rules of conduct issued to a minister on appointment. In the event the second proposal

was adopted and a brief reference to Radcliffe principles was included in Questions of Procedure for Ministers. (Report of the Committee of Privy Counsellors on Ministerial Memoirs Cmnd.6386, 1976, pp.25-26, paras.69-71).

33. If there are to be no legislative or other legal sanctions to deter the retention of official documents in private hands, then reliance must be placed on enforceable contractual relationships between the Crown and its ministers, officers and servants. Solutions similar to those proposed by the Radcliffe Committee, but only partially implemented, are likely to provide the best safeguard, reinforced by practice in ministerial, and for that matter all, private offices in accordance with the operation of the Public Records Act.

34. The following steps are therefore recommended :

a) specific reference to Crown ownership of official documents and directions as to their custody should be incorporated in Questions of Procedure for Ministers ;

b) on taking office ministers should be required to sign an undertaking not to retain official documents and to return any in their hands on leaving office ;

c) guidance under the Public Records Acts on private office papers currently in draft should be issued not only to departments but to ministers with the backing of appropriate authority.

C D Chalmers  
26 May 1995

## CHURCHILL PAPERS : ASSESSMENT OF EVIDENCE FOR THE CROWN'S CLAIMS

1. The basis of the Crown's case as stated in the Points of Claim is that by his letter of 19 November 1934 created an express or constructive trust in respect of 'such State documents' as he had preserved, later confirmed in the 1946 Settlement and the 1963 Settlement, and acknowledged by his trustees as late as 1964, and implicitly in the exchanges of correspondence and meetings in 1969. The defence argues against this that there has been a conversion of the state papers by virtue of Sir Winston Churchill's actions and the failure of the Crown formally to establish a claim to ownership.

2. My view has always been that this is the sole issue ; and that attempts to introduce other issues, such as the retention, possession and ownership of official documents by former ministers and others, restrictions on the use of official documents and information and even the recovery of official documents from private hands, tend to cloud the main issue, because custom and practice are both uncertain and variable in the absence of clear-cut and enforceable law, particularly statute law.

3. The following factors have been considered as bearing on these issues: the privy counsellor's oath and obligations ; the Sovereign's consent to disclosure and use of information about Cabinet proceedings ; the Official Secrets Acts ; other restrictions on disclosure and use of information from Cabinet documents and other state papers ; Crown ownership of Cabinet and other state documents ; Crown copyright ; and the Public Records Acts. Each of these factors has limitations which are set out in the remainder of this note.

### Privy Council membership

4. The concept of the Sovereign's consent to the disclosure or use of Cabinet documents (see paras. 10-14 below) was formally founded on the oath and obligation of privy counsellors to preserve the confidentiality of proceedings and advice to the Sovereign. From 1919 Cabinet Office restrictions on their use by ministers and former ministers formally relied on these related considerations, buttressed where practicable by prime ministerial directives and Cabinet resolutions.

5. However, oaths and conventions are difficult to enforce, and political divisions and both official enquiries and public discussion of the conduct of the First World War encouraged political and military memoirs, unauthorised disclosure and publication and a limited relaxation of the rules as they affected ministers and former ministers.

6. In January 1922, with Lloyd George's tacit support, Churchill secured from the coalition Cabinet a right for former ministers to quote directly from wartime official documents in order to vindicate their actions and rebut criticisms in publications about the conduct of the war, provided publication did not compromise current public interest. In 1923 the first volume

of Churchill's The World Crisis was serialised in The Times and led to questions in the Commons about his use of official documents. Bonar Law, the Prime Minister, replied that Churchill had the First Lord's consent to publish Admiralty orders, but when pressed on a possible breach of the Privy Counsellor's oath replied : 'I have taken the oath and personally I think I should consider it a breach'. Churchill objected to Bonar Law that he had consulted Asquith as the Prime Minister of the time as well as his 'principal colleagues of those days', before publishing official documents from his period at the Admiralty. He continued to consult the Government of the day and individual departments before publishing official documents. (John F Naylor A man & an institution (Cambridge : 1984), pp.117-8 ; M Gilbert Winston S Churchill, Companion Volume to Vol. V The Exchequer Years 1922-1929, pp.32-39 ; PRO CAB 27/213 item 5)

7. The practical force of the oath is also open to question. As early as 1909 the distinguished lawyer, Sir Frederick Pollack, held that it was not an 'indispensable obligation of secrecy' but instead 'a mere case of historical survival' ('Government by Committee in England' The Law Quarterly Review 25, pp.60-62).

8. Ivor Jennings took a similar view : 'Membership of the Privy Council is a historical survival. It is said that the Privy Councillor's oath restrains those who take it from publishing information obtained in the service of the Crown. It is difficult to believe that it is the oath alone and not the weight of tradition, the insistence of the Prime Minister, or the disapproval of colleagues, that makes the secrecy of the British Cabinet more effective than is common in most governmental systems.' (I.Jennings Cabinet Government (3rd ed.,1969), pp.228-9).

9. The Cabinet Office, however, continued to give weight to the oath on occasion, notably when Hankey advised Lloyd George 'to ask for official permission through the proper channel, viz the Prime Minister', observing : 'I have, of course, no status to give you official permission to publish official documents. I can, on my own authority, exempt you neither from the Privy Counsellor's Oath nor the Official Secrets Act.' (John F.Naylor A man & an institution (Cambridge, 1984), pp.118-9 ; House of Lords Record Office Lloyd George Papers G/212, Hankey to Lloyd George, 8 January 1933).

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in Parliament.' (Reported by Sir Rupert Howarth in a letter to G W Lambert, War Office, 11 January 1940, PRO CAB 21/2161).

11. Permission was commonly sought in the 19th century, usually in connection with resignation or other personal statements by former ministers, who appear usually to have adhered to the conventions until recent times. Applications were not always submitted to the Sovereign, however, but were sometimes decided by the Prime Minister, apparently with no reference to the Palace.

12. The majority of applications were in connection the publication of memoirs or biographies. In answer to a parliamentary question about Churchill's publication of Admiralty documents on 15 February 1923 Bonar Law said: 'It is of course an obligation upon Ministers and officials not to disclose confidential State or official papers without the previous approval of His Majesty's Government for the time being, or in the case of Cabinet information, without the consent of His Majesty' (160 HC Debates, 15 Feb 1923, col. 315). Practice by both politicians and the Cabinet Office in relation to the principle of the Sovereign's consent, however, has been far from consistent. In 1926 even Hankey appears to have regarded application to the Sovereign as optional, writing to Churchill about the third volume of The World Crisis: 'I do not know if it has occurred to you, as a Privy Counsellor, to ask leave of the King. I am not sure that it is necessary, and in any event the King could only refer the matter back to the Prime Minister. I have a feeling at the back of my mind that the King will take it rather well if you ask him.' Concern by King George V in 1934 led to new procedures for consulting the Sovereign. By 1949 they had fallen into disuse and had to be reinstated. This resulted in 1949 in a restatement of the principle and new procedures agreed between the Cabinet Office, the Prime Minister's Office and the Palace, whereby the Cabinet Secretary and the Prime Minister became the normal channels for applications to be considered and, where necessary, submitted to the Sovereign. (John F Naylor A man & an institution, p. 348 n.10; PRO CAB 63/38, Hankey to Churchill, 10 Dec. 1926; CAB 21/2161, 3740 and 3755; PRM 1/171, PRM 6/11 and PRM 8/1133).

13. However, the principle has not always been observed, despite periodic restatement in Parliament and attempts to enforce it in the courts, which have largely failed in the face of changing public opinion and earlier access to information through the Press, media, memoirs, contemporary history and public records. This renders the convention of limited value in relation to control over records which are already more than fifty years old.

14. The special concern of the Sovereign with Cabinet documents was with disclosure and publication and questions of ownership, custody and control or of use and misuse have been raised less frequently. The Queen's consent was sought, however, both for the transfer of Cabinet records to the Public Record Office and their opening to inspection in accordance with the Public Records Acts. George V indicated his distaste for the use by Ministers of official information, particularly Cabinet

17. Jennings has pointed out that the real basis of Cabinet secrecy is political necessity; 'The Cabinet deliberates in secret; its proceedings are confidential. The Privy Counsellor's oath imposes an obligation not to disclose information; and the Official Secrets Acts forbid the publication of Cabinet as well as other official documents. But the effective sanction is neither of these. The rule is, primarily, one of practice.

Other restrictions on disclosure and use of official information

16. The Official Secrets Act 1989 does not provide an effective weapon against retention of official documents for several reasons: a) the limited categories of information and documents protected; b) the need to demonstrate that disclosure or retention is against the public interest; c) the lessening of confidentiality with the passage of time, reflected in the judgment in the Crossman Diaries case and the report of the Radcliffe Committee on Ministerial Memos; d) the effect of public access to official information through official publications and the operation of Open Government procedures and the Public Records Act.

15. The first Official Secrets Act was passed in 1889 partly to guard against espionage but largely to prevent unauthorised disclosure of official information following a series of leaks of diplomatic documents. It applied only to Crown servants and certain government contractors and proved to be ineffective. Acts of 1911 and 1920 widened both its application and powers, the latter making it an offence to retain any official document without authority, for any purpose prejudicial to the State. Although use was made of the Acts to prevent or punish disclosures of official secrets, public opinion became inimical to prosecutions other than for espionage and the Official Secrets Act 1989 limited severely the categories of information covered.

The Official Secrets Acts

Information, in newspaper articles for which they were paid. There are echoes of this concern in the judgment in the Crossman Diaries case, even though the Lord Chief Justice declined to issue injunctions preventing disclosure because the passage of time since the Cabinet meetings in question was too great to prejudice seriously the public interest in the confidentiality of Cabinet documents. The sale of modern official documents for private profit would, on the evidence of the Churchill Papers, raise greater objections, but in practice even this issue is affected by the passage of time and there are several instances of official papers of former ministers being sold or bequeathed. Among the most notably are those of Bonar Law and Lloyd George, which were acquired by Lord Beaverbrook as a bequest in 1923 and by sale in 1951, respectively, and which, with his own papers, including ministerial papers, passed to the First Beaverbrook Foundation and were subsequently deposited by the Foundation in the House of Lords Record Office.

Its theoretical basis is that a Cabinet decision is advice to the Queen, whose consent is necessary to its publication. Its practical foundation is the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away.' (I. Jennings Cabinet Government (3rd ed., 1969), p.267)

18. There are several instances in Hansard and in Cabinet Office and Prime Minister's Office files of criticism by Parliamentarians of unauthorised disclosure and indeed breaches of official custody of Cabinet and other state documents. These do serve to show that the concept of private ownership of official papers adopted by some ministers and former ministers have not been universally accepted. More recently, public and Parliamentary reaction to the National Heritage Memorial Fund grant from Lottery funds to the Churchill Trustees has served to underline this.

19. In 1916 an Order in Council was issued, with Parliamentary approval, prohibiting inter alia under Defence Regulations the publication of Cabinet proceedings or, without lawful authority, 'the contents of any confidential document belonging to, or any confidential information obtained from, any Government department, or any person in the service of His Majesty'. However its efficacy was not tried. It arose from wartime security needs and lapsed with the Defence of the Realm Act 1914.

20. Since the late 19th century at least there have been formal restrictions on the use of official information by civil servants and serving members of the armed forces not only under the Official Secrets Acts but also under Treasury and departmental regulations and King's Regulations and Admiralty Orders. Retired senior officers of the armed forces were in practice treated more liberally than retired civil servants.

#### Crown ownership of state papers

21. Crown ownership of Cabinet documents and other state papers, even where they were no longer in official custody, was affirmed by the Law Officers in 1934 and the Parliamentary Counsel in 1935 and 1940. In this conclusion they relied upon the circumstances of the creation of the documents, following an opinion by the Lord Chancellor and the Law Officers in relation to Crown copyright in 1933. These views predate the Crown Proceedings Act 1947 which may have altered the position of the Crown in relation to the statutes of limitation and the recovery of official documents.

22. Instances of recovery of official documents in earlier and modern times do exist, but rarely have these involved legal proceedings. As a consequence there is no clear body of case law in England.

#### Crown copyright

23. The copyright position of Crown documents has been stated in successive Copyright Acts. The 1988 Act establishes Crown copyright in works made by the Sovereign or an officer or servant

of the Crown. The Crown therefore claims copyright in any document created by ministers, officers and servants of the Crown in the course of their official duties.

24. In 1933 the Lord Chancellor and the Law Officers were consulted at the instance of the King's private secretary about copyright in letters written by or to the Sovereign. They gave the opinion that section 18 of the Copyright Act 1911 applied to letters written by anyone of the Sovereign's servants on affairs connected with which the writer had some responsibility, direct or indirect, in virtue of the office which he held. The definition in section 18 of the 1911 Act ('any work prepared under the direction or control of His Majesty') was in turn used by the Law Officers to define 'official documents' in their opinion of 1934 on the recovery of Cabinet documents. In this respect, the issues of ownership of and copyright in Crown documents are related. However, this applies only to documents created by the Crown and its officers and servants and not to documents received by them unless they were similarly created by virtue of official duties owed to the Crown. Crown copyright does not therefore of itself provide a basis for the recovery of documents and the assertion of ownership or possession.

#### Public Records Acts

25. Powers under the Public Record Office Acts before 1958 were largely permissive in respect of administrative and departmental records, though from 1877 Parliamentary sanction was formally required for the disposal of public records. Under the Public Record Act 1958 departments became responsible for the safekeeping of public records until they were transferred to the Public Record Office or a place of deposit appointed by the Lord Chancellor or were disposed of by destruction or otherwise. Neither the older legislation nor the 1958 Act included any power of recovery of public records out of official custody.

26. The principles which govern the unauthorised disclosure of official information also underlie the access provisions of the Public Records Act. However, they apply only to records in the Public Record Office, in other places of deposit for public records or in government departments and other bodies under the Act.

27. The Public Records Act therefore provides a basis for preventing official documents leaving official custody, but not for their recovery or control once out of official custody.

*CD Chalmers*  
*26 Aug 1995*



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ENQUIRIES:  
071 217 6050



URGENT  
YES/NO

### FACSIMILE LEADER

NAME: Ms A Crawford

DEPARTMENT: PRO

ADDRESS: Kew

FAX No: 878 8905

FROM: Pat Andrews

DOCUMENT REFERENCE/TITLE: Churchill Papers

TOTAL NUMBER OF PAGES: +3

DATE: 26 5 95

MESSAGE: You may wish to see the attached briefing which has been circulated to No 10, Cabinet Office and DNH Press Offices relating to the laying of a Departmental Minute in the House of Commons on 25 May 1995.

ACKNOWLEDGEMENT REQUIRED YES/ NO

*This is the latest version of the Gift Minute briefing. The Dept 1 Minute, as laid in the House is at the back.*

## BACKGROUND

Under the terms of Government Accounting 6/1991, Section 34, the House of Commons should, as agreed with the Public Accounts Committee (PAC), be notified of gifts made by departments, by means of a Departmental Minute, 14 days prior to the gift taking place.

Ownership in the official papers contained in the Churchill Archive was transferred by HMG, with Her Majesty The Queen's consent, to Churchill College, Cambridge, by means of a Deed of Gift. Because of an oversight, the Minute procedure described above was not followed. A Departmental Minute was presented to the House of Commons on 25 May 1995, in the name of Mr John Horam, Parliamentary Secretary, Cabinet Office, formally notifying the House of Commons and apologising for the oversight.

## LINE TO TAKE

This was an oversight for which an apology has been made to the House.

The gift was reported to the House by the Prime Minister in answer to a Question in the House from Mr Paddy Ashdown MP on 27 April 1995 (Hansard Col No 978, 27 April 1995).

A Departmental Minute has now been presented to the House of Commons in the name of Mr John Horam, Parliamentary Secretary. It is dated 25 May 1995. It apologises to the House for the oversight.

The Departmental Minute does not change anything, it simply notifies the House of Commons that the official papers in the Churchill Archive have been transferred formally to Churchill College where they have been since the 1970s. (The whole Archive now belongs to the newly created Sir Winston Churchill Archive Trust which is a charitable Trust set up for the purpose of preserving these papers for the nation.)

## SUPPLEMENTARIES

Q1 What did the Gift cover?

A1 The official, ie State papers in the Churchill Archive.

Q2 What is it worth?

A2 As the Departmental Minute explains, HMG could put no value on the papers as it would not itself have sold official papers. However, the independent valuer retained by the National Heritage Memorial Fund, valued the Archive as a whole and ascribed a value of £10 million on those papers classified "Official". Those classified "Speeches" which contain a proportion of official ie State papers, were valued at £5 million.



- Q3 Why were these papers given to Churchill College?
- A3 Ownership of the papers, which have been in the possession of Churchill College since the 1970s, was transferred to the newly constituted Sir Winston Churchill Archive Trust to enable the Archive to be retained, intact, in this country so that it can be made available to historians, researchers and others free of charge for the purposes of research.
- Q4 Was copyright given to Churchill College also?
- A4 No, copyright in the official, ie State papers, is vested in the Crown and has not been assigned to Churchill College.
- Q5 Does this mean that speeches made by Sir Winston Churchill during the War can be reproduced free of charge?
- A5 They can be reproduced free of charge for the purposes of research and private study. Any reproduction for commercial use would require a licence from the copyright owner.
- Q6 Why were the papers given away rather than simply deposited at Churchill College or loaned to the College?
- A6 It was important to reach an arrangement whereby the ownership of the various parts of the Archive could no longer be disputed. The sale of the personal and literary papers and the transfer of the State papers to the newly constituted trust resolved the outstanding questions of ownership and classification of parts of the Archive and made it no longer necessary to pursue the litigation.
- Q7 Couldn't the Gift Minute have been laid on 26 April, making the Gift conditional on the approval of Parliament.
- A7 This may have been a possibility to be explored had the need for a Minute been appreciated; this was, as the Minute makes clear, an oversight.
- Q8 What would have happened had Parliament been given the chance to comment and there had been objections?
- A8 This is a hypothetical question and cannot now be answered.

TOTAL P.05

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The Clerk of the Parliaments  
Votes and Proceedings Office  
House of Commons  
LONDON  
SW1A 0AA

25 May 1995

Dear Sir

DEPARTMENTAL MINUTE DATED 25 MAY 1995 CONCERNING THE GIFT OF  
STATE PAPERS IN THE CHURCHILL ARCHIVE TO CHURCHILL COLLEGE,  
CAMBRIDGE

- 1. The paper referred to above is presented for laying before the House of Commons by Command of Her Majesty.
- 2. It is complete and is not in dummy form.
- 4. A print order is not required.
- 4. Please lay in the name of Mr John Horam.

Yours faithfully

S B ABBA  
Parliamentary Section

LAYING BEFORE THE HOUSE OF COMMONS

Paper received for laying before the House of Commons on this date

Date..... Signed..... for  
Clerk of the Parliaments





**DEPARTMENTAL MINUTE DATED 25 MAY 1995 CONCERNING THE GIFT OF  
STATE PAPERS IN THE CHURCHILL ARCHIVE TO CHURCHILL COLLEGE,  
CAMBRIDGE**

*Presented to Parliament  
by the Parliamentary Secretary  
by Command of Her Majesty  
MAY 1995*

**LONDON  
CABINET OFFICE**

**Not to be printed**

DEPARTMENTAL MINUTE DATED 25 MAY 1995 CONCERNING THE GIFT OF STATE PAPERS IN THE CHURCHILL ARCHIVE TO CHURCHILL COLLEGE, CAMBRIDGE

1. It is normal practice, when a Government Department proposes to make a gift of public stores or property, either of an unusual nature or of a value exceeding £100,000, for the department concerned to present to the House of Commons a Minute giving particulars of the gift and explaining the circumstances: and to refrain from making the gift until 14 days (exclusive of Saturdays and Sundays) after the issue of the Minute, except in cases of special urgency.
2. At the time of the purchase by the National Heritage Memorial Fund of the private papers in the Churchill Archive, Her Majesty's Government, with Her Majesty The Queen's consent, agreed to transfer the official papers to Churchill College, Cambridge, so that the archive would be secured for the nation and remain, intact, at Churchill College, where it has been since the mid 1970s.
3. Her Majesty's Government would not itself have sold the official papers in the Churchill Archive so that no value can be ascribed by Her Majesty's Government to those papers in the event of such sale. However, during the negotiations which led to the sale of the private papers an independent valuation of the Archive was obtained by the National Heritage Memorial Fund on the hypothesis that they could be sold on the open market. The papers which are classified as "Official" and are State papers were valued at £10 million. Further State papers are included in the valuation under "Speeches", a category with a total value of £5 million.
4. The Treasury has approved the laying of this Minute. However, due to an oversight, which is much regretted, the Department had overlooked the fact that the proposal to make such a gift should have been notified to the House in advance by means of the Minute procedure. The gift was reported to the House of Commons by the Prime Minister, the Rt Hon John Major MP, on 27 April 1995, the day after it was made.



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**Restricted**

Miss P Andrews  
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With the Compliments of



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Office of Public Service & Science Legal Adviser

### MINUTE

**To:** Mr B Godwin  
**From:** Michael Carpenter  
**Room:** c/o 480  
**Date:** 26 May 1995

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#### Restricted

c.c. Mr Jenkins, T-Sol  
Miss Andrews, CO  
Mr Chalmers, CO

#### Churchill Archive : the lessons learnt

1. We met on 16 May to consider how best to turn to advantage the work which has been done to prepare for the litigation which has now been discontinued.
2. We agreed that it would be useful to prepare a paper for Sir Robin Butler drawing together the various strands of endeavour and setting out a number of recommendations to seek to ensure that the Crown is better placed in future to deal with a future case like that of the Churchill Archive.
3. We envisaged that the paper might deal with four main topics, viz.
  - (a) What lessons have been learnt from the Churchill case?
  - (b) What (if anything) can the Crown do to prevent the sale of other Ministerial papers no longer in official custody (e.g. those of the late Lord Wilson, Lord Callaghan and Baroness Thatcher)?
  - (c) Recommendations to improve the Crown's position in the future (e.g. drafting of new passages in Questions of Procedure for Ministers which might be adopted by an incoming Prime Minister).

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- (d) What steps are necessary to preserve Crown copyright in the Churchill and Prime Ministerial papers and generally?
4. We recognise that the existing arrangements relating to Prime Ministerial papers may not be watertight on the question of ownership. Particularly is this the case with Baroness Thatcher's papers, where the arrangement appears to prevent a sale overseas but not one effected within the United Kingdom. A further point was that restraints on access (so as to preserve the 30 year rule) might not be effective to prevent sales without any immediate delivery.
5. We agreed that submission of the paper ought to be made to Sir Robin by the end of June, and I agreed to contribute to the copyright section in the draft. I hope this gives a sufficient specification of what we need to produce, and I am sure we here are all ready to help in any way we can.

M.B.



FOLO  
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H095/401✓

J Wretham Esq  
HMSO  
St Crispins  
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Norwich NR3 4DU

*Dear Jim*

**CHURCHILL ARCHIVE - COPYRIGHT**

I enclose a letter sent by Michael Carpenter, Treasury Solicitor, to Alan Kucia, Archivist, Churchill College, Cambridge.

You will see that it refers to a meeting to be held to discuss future arrangements for handling copyright matters at Cambridge now that the whole Churchill Archive belongs to the new Sir Winston Churchill Archive Trust and is in the possession of Churchill College.

I understand that you have kindly agreed to attend the meeting on behalf of HMSO. It has been arranged for Friday 7 July at 11 am at the Archive Centre, Churchill College, Cambridge. We are invited to stay for lunch!

I look forward to seeing you on 7 July.

*Yours sincerely*

*Pat*

MISS P M ANDREWS



## THE TREASURY SOLICITOR

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Office of Public Service & Science Legal Adviser

Alan Kucia Esq  
Churchill College  
Cambridge CB3 ODS

Please quote: A930329G/MC

Your reference:

Date: 26 May 1995



*Dear Mr Kucia,*

### The Sir Winston Churchill Archive Trust

As you may know from Mr Correlli Barnett, I act for the Cabinet Office in relation to matters concerning the Archive of the late Sir Winston Churchill.

When the deed of gift was executed transferring to the new Sir Winston Churchill Archive Trust those papers over which the Crown laid claim, a copyright licence was also granted to the Churchill Archive Trustees in the terms set out in the deed of 26 April. That licence is, of course, limited in scope and would not extend to the commercial reproduction of the papers.

A similarly limited licence was granted to the Trust by the Third Schedule of the Purchase Agreement, also of 26 April. The concurrence of the two licences has, of course, the advantage for the Trustees of the new Trust that in relation to the permitted acts it is not necessary for them to determine in whom copyright in any particular document vests.

Any copying which does not fall within the terms of the above two licences would, of course, require the consent of the copyright owners. In this regard, I recall that during the negotiation of the Purchase Agreement the Trustees of the new Trust expressed a concern over possible liability for authorising a copyright infringement should any person copy documents which are Crown copyright in reliance on the terms of the Purchase Agreement. I indicated on behalf of the Cabinet Office that the Crown would not seek to render the Trustees liable in circumstances where the infringer has relied on the permission given under clause 7 of the Purchase Agreement and;

- (i) the Trustees or their agents or assignees have warned those seeking to copy the Archive that they do so at their own risk, and
- (ii) the Trustees or their agents or assignees have notified the Cabinet Office as soon as they have become aware of any intention by the "copyright holders" or persons acting on their behalf to copy the Archive in reliance of clause 7 of the Purchase Agreement.

I apologise for repeating so formally what may already be readily understood by you and the Trustees. I think it might be useful if we were to meet to discuss the practical arrangements for giving effect to these understandings, and I believe Miss Andrews has mentioned the possibility that we might meet you at Churchill College for this purpose.

I would suggest, therefore that Miss Andrews' office might contact you to arrange a suitable date for Miss Andrews and myself to call.

I am copying this letter to Miss Andrews at the Cabinet Office.

*Yours sincerely,  
Michael Carpenter*

**Michael Carpenter**