

## **Prejudice Test: UK-China Transparency**

Churchill College has decided to apply exemptions under the Freedom of Information Act to elements of Sam Dunning's request of July 2023. The College provided information including minutes of its Council, and the Memorandum of Understanding between the College and Xiaotian Fu.

The College considers two elements of the request to be exempt, and certain items within a third element. Mr Dunning requested:

1. Details (amount given, date given, terms [if any]) of any sums of money given to the college by Fu Xiaotian and any trust, company, foundation controlled by her.
2. Emails sent between college staff and Ms Fu and/or her agents regarding these sums or any other matters.
6. Any minutes of the College's governing body and/or the College Council that discuss Ms Fu, any entity controlled by her, or her/its giving in any respect.

For item 1, Churchill College signed a Memorandum of Understanding (MOU) with Xiaotian Fu in 2016 agreeing to keep the amount of her donation confidential. We are, therefore, applying Section 41, information provided in confidence, to withhold this. Some of the donation may be inferable by answers to other queries, such as expenditure on the garden, as the College wishes to be as helpful and transparent as possible in answering the queries it has received. The overall total for Ms Fu's donation, however, was agreed to be confidential.

For item 2, it is the College's belief that disclosing all correspondence between a donor and the College would prejudice our commercial interests, and we are applying the exemption under Section 43. We also believe that the above exemption of confidence is also possibly engaged in this instance, given a recent ICO decision on an analogous request.

For item 6, the College has provided as many of the relevant minutes as possible. Two have been withheld, as they summarise discussion among the trustee body about the donation and their release would prejudice "the free and frank exchange of views for the purposes of deliberation" (Section 36 FOIA).

### **First Exemption: Section 41 - Confidence**

The terms of the MOU signed by the College and Ms Fu state that "the College agrees to recognise Xiaotian Fu for her major gift and will keep the gift amount confidential". We consider, therefore, that this information was provided in confidence.

The ICO states that "in order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible". Ms Fu's donation amount is not otherwise accessible and is considered, by the College, to be more than trivial.

The second criterion for this exemption is that *“the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person”*. We believe there to be a strong possibility of legal action by Ms Fu herself, should the College breach the confidence agreed in the MOU.

Section 41(1) is an absolute exemption and does not require the full prejudice and public interest tests, although we refer to the requester to the public interest test at the end of this document.

The College is applying Section 43, commercial interests, for the email correspondence with Ms Fu but also notes that Section 41 may apply to this as well. The Commissioner ruled in a recent decision notice (IC-153644-G0J2) on donations from an individual to Pembroke College, Oxford, that:

*“the withheld information [email correspondence] would have been imparted in circumstances giving rise to an obligation of confidence. Given the personal nature of the information and what the college tells donors in relation to the information they publish in their annual reports and what information they do not, it is reasonable to say that there is an implicit obligation of confidence owed. In terms of disclosure causing detriment to the confider, the Commissioner is satisfied that where the information relates to a personal or private matter, it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider.”*

Furthermore, the notice states that:

*“the Commissioner is satisfied that discussions between and about the donor and, the gifts provided to the college, is information which has the necessary quality of confidence”*.

### **Second Exemption: Section 43 – Commercial Interest**

The College considers that disclosure of correspondence between its staff and a donor would negatively impact our commercial interests. Donors, who make up a significant amount of the College’s financial support, would be reluctant to engage and communicate with the College should a precedent be set wherein their correspondence can be released as part of FOI requests. A tacit understanding that correspondence, including negotiations around amounts and purposes of donations, is private, underpins our relationship with donors.

The ICO provides a three-step test to assess commercial interest prejudice when applying Section 43.

- (i) Step 1: Applicable Interests. *The authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect.***

Guidance from the Information Commissioner’s Office requires that the authority show that the prejudice it is envisaging affects the particular interest that the exemption is designed to

protect. The prejudice or harm which the College is envisaging is a reluctance to engage on the part of our donors. The interest it would be harming is the donations received.

The ICO defines a commercial interest as “[relating] to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent”. Donations form a large amount of the College’s income, sustaining our educational activities, including funding student bursaries and support, maintenance of the College estate and research Fellowships.

In Decision Notice IC-216597-F2F8, and multiple other notices, the Commissioner acknowledges that higher education providers are also businesses and must be able to operate in a highly competitive market to remain viable. Without our donors, Churchill College would be unable to do so.

**(ii) Step 2: Nature of Prejudice. The authority must show that the prejudice claimed is real, actual or of substance; and show that there is a causal link between the disclosure and the prejudice claimed.**

Disclosure of this information has real potential to undermine the College’s ability to attract donations. Our donors rely not only on the ability to communicate privately with the College but also on our discretion around their gifts (amount and purpose). It is the opinion of our Development and Alumni Office, from their extensive experience dealing with donors and former students, that such a disclosure would be poorly received by our benefactors.

In a recent decision notice relating to the University of Oxford (IC-217933-T3T1), the Commissioner accepted that:

*“...some donors may be put off from entering the donation process if they believe that, once they have submitted their proposal, their identity will become public, regardless of whether the donation is ultimately made. If that were to happen, it would reduce the public authority’s pool of donors, thereby reducing its income and making it more difficult to attract the best students. That is sufficient to engage the exemption”.*

Whilst this relates to identifiability of donors, the College argues that the same logic applies to communications, including terms, wishes for the donation’s use and other information which reveals the individual’s background, wishes, and the context of their donation.

**(iii) Step 3: Likelihood of Prejudice. The authority must decide whether the prejudice would or would be likely to occur.**

The College considers that prejudice would occur (more than 50% likelihood). The College considered the lower threshold (that the prejudice is ‘likely’ to occur, and whilst a real threat, likelihood is below 50%) but has rejected this in favour of the higher threshold. We consider that the likelihood of the prejudice occurring is above 50% because of the international media interest in Ms Fu’s disappearance.

### **Third Exemption: Section 36 - Free and Frank Exchange of Views**

The College has provided most of its Council minutes where the Xiaotian Fu donation was discussed. Minutes where in-depth discussion took place have, however, been omitted. We consider that these would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. As ICO Decision Notice IC-235966-W5N5 notes, "*members of staff within a public authority must be allowed to exchange views for the purposes of deliberation freely and frankly*". Deliberative discussion around the garden took place and our trustees would be extremely reluctant to discuss such matters, particularly to comment on individual donations, were there a precedent that their deliberation could be made public.

Section 36 must be the opinion of the Qualified Person within a public authority. We have sought the opinion of our Master, Professor Dame Athene Donald, for the application of this exemption and she believes it to be reasonable (the ICO's criterion for engaging Section 36).

### **Public Interest**

Regarding the public interest, the College acknowledges that there is significant public interest in transparency surrounding UK public institutions and China. In this case, however, the individual involved is a private citizen. At the time of the donation in 2016, Xiaotian Fu was significantly less well-known as a journalist. She was an alumna of the College making donations for the provision of the College's estate, which is not uncommon.

Were there elements to the donation which implicated funding from the Chinese state, or any other sources, the public interest might outweigh our commercial interest. The College has, however, no reason to believe that Xiaotian Fu's donations come from any other source than her own personal funds. Furthermore, Ms Fu has not been accused of any crime, and media interest has been generated by rumours circulating on social media. The College has no reason to believe that there is any wrongdoing involved which might create a strong case for disclosure.

Neither the interests of the public, nor those of Ms Fu herself are served by publishing her email correspondence, the donation amount, or the in-depth deliberations of the College's trustees. The emails were written under the tacit understanding of privacy and the donation's amount explicitly specified as confidential. The College is certain that a breach of confidence would not be well-received. The discussion between trustees, exchanging their views also comes with a tacit expectation of confidentiality within the College community.

The College has endeavoured to answer as much of the Freedom of Information request made by Mr Dunning as possible, in a transparent and helpful manner. What we have provided should serve to satisfy public interest.

The College remains concerned regarding the whereabouts and wellbeing of its alumna and her child.

## **Memorandum of Understanding between Churchill College (registered charity 1137476) & Xiaotian Fu**

Xiaotian Fu (G06 Ed) agrees to make a philanthropic pledge and gift of [REDACTED] payable to Churchill College in instalments of [REDACTED] a year, over 5 years. The College has given its approval for naming the garden.

In recognition of the generous gift in 2016 by Xiaotian Fu to Churchill College, the parties agree a Memorandum of Understanding (MOU).

This MOU is affirming the intention to landscape and name the garden behind the College's graduate hostel at 72 Storey's Way and environs. The Garden will be created by the College's Head of Grounds and Gardens and used by Fellows, students and invited guests of the College.

Subject to College approvals it is hereby agreed:

- 1.1 The proposed name for the garden shall be Xiaotian Fu Garden.
- 1.2 The garden would be situated behind 72 Storey's Way and environs, adjoining the College's site. The quarter acre site of the garden would be near the Art Studio, the greenhouse (where over 100 varieties of orchids are grown) and the apple, pear and plum orchard, where the MCR currently have an allotment bed in which to grow vegetables and flowers and, a greenhouse (site plan attached).
- 1.3 The benefaction would be used to create a restful and a peaceful place, for contemplation and private study. In certain times of the year this space might be used by Fellows and students for open air supervisions. Further details on the Garden are in the Appendix. In addition, a proposed project plan and timeline will be attached to the MOU.
- 1.4 Although there is no known alternative proposal that would affect the location and naming of the Garden, the College reserves the right to decide on the use of that space in the future and shall ensure that an equivalent space would be named if the Garden did not continue in its proposed form. Naming shall be offered in perpetuity.
- 1.5 The College will hold the money received within a fund, the Xiaotian Fu Garden Fund, in its accounts, the status of which will be reported annually to the donor.
- 1.6 The Fund will be co-invested within the College's Amalgamated Investment Fund. A portion of the funds would go directly to the cost of creating and maintaining the garden and the majority of the remaining funds would be used for other priorities determined by the College. The College will also be responsible for maintaining the garden and so it will be an ongoing cost.
- 1.7 Funding would also be allocated towards building a nationally recognised collection of Churchill Plants that have been created in recognition of Sir Winston Churchill.
- 1.8 The Xiaotian Fu Garden shall be included on the College's website.
- 1.9 The College will also provide an annual update on the condition of the Garden.

- 1.10 Neither the College nor Xiaotian Fu shall issue any press statements, announcements or other publicity concerning the donation without first obtaining the agreement of the other party, except that the College may (with agreement) identify Xiaotian Fu in its annual report and similar publication.
- 1.11 The College agrees to recognise Xiaotian Fu for her major gift and will keep the gift amount confidential. As a Donor, you will receive recognition at various levels. The Gift will be recorded at College Council (the trustee body) and acknowledgement will be given in the Churchill Annual Review and there will be an invitation to one of the College Feasts.
- 1.12 This Memorandum of Understanding constitutes the entire agreement and understanding of the donor and the College.
- 1.13 This Memorandum shall be subject to the Statutes and Ordinances of Churchill College and the University of Cambridge which may change from time to time.

*Xiaotian Fu*

---

MPhil Xiaotian Fu



*11-06-2016*

---

Date

*Athene Donald*

---

Master, Professor Dame Athene Donald, DBE, FRS  
Churchill College  
Storey's Way  
Cambridge, CB3 0DS

*9-6-16*

---

Date

## References to Xiaotian Fu in Council and Governing Body Minutes

### (i) Council Minute 24624 Naming of a Garden (January 2016)

The Bursar reported that a former MPhil student, Xiaotian Yu, had offered a donation to College of REDACTED with a request that one of the gardens be named after her. The proposal was to landscape the central portion of the garden at 72 Storey's Way and the Head of Grounds and Gardens would design a secluded, private space with areas for students and Fellows to work outside whilst still being close to the main College buildings. The design would be approved by the donor and the Estates Committee.

The garden would take approximately REDACTED of the donation with the rest being used for academic purposes. A draft Memorandum of Understanding had been drawn up and the donor was happy with the College's proposal.

Council approved the proposal to name the garden of 72 Storey's Way.

### (ii) Council Minute 24727 Gifts of £1,000 or more (July 2016)

Council thanked those who had recently made the following gifts to the College:

- £1,600 (inc gift aid) towards the Churchill plant collection or Xiaotian Fu Garden from REDACTED.

### (iii) Council Minute 24771 Draft Appendices to Regulation X (October 2016)

The Bursar presented the draft appendices to regulation X for five new funds created in the last year. These were REDACTED x 5, the Xiaotian Fu Garden Fund and the Xiaotian Fu Fund. The document clarified management and restrictions on these donations received by the College. Council approved the appendices.

### (iv) Council Minute 24940 Xiaotian Fu Garden (April 2017)

The Bursar spoke to her paper on the Xiaotian Fu Garden. Due to design changes and new paths, the cost of the garden had increased to REDACTED with an additional REDACTED to repair and upgrade the lighting in the garden. In short, donations by Xiaotian Fu, would cover the costs of the garden, but the bulk of her donation of REDACTED, intended for studentships, was still to come.

The Council approved the additional expenditure on the garden with an anticipated opening date in autumn 2017.

### (v) Council Minute 25038 Vacation work update (October 2017)

Work had commenced on the Xiaotian Fu garden and it was due to be completed over the autumn and winter, with a formal opening in April 2018.

**(vi) Council Minute 25042 Gifts of £1,000 or more (October 2017)**

Council thanked the donors of the following gifts:

- REDACTED from Xiaotian Fu. This is the second instalment towards this donation.

**(viii) Council Minute 25316 Xiaotian Fu Garden Update (October 2018)** The Bursar reported that Xiaotian Fu would be in College this week to oversee the relocation of one of the rocks and the placing of the plaque in the Garden. The Garden was now complete and a formal opening ceremony would be finalised shortly. The third instalment of the Xiaotian Fu bursary had been received over the summer.

**(ix) Council Minute 2019-195 (October 2019)**

Council thanked the donors of the following gifts of £1,000 or more:

- REDACTED the College from Xiaotian Fu (G06)

*Please note that Xiaotian Fu's further donations were noted by Council in 2020 and 2021. The individual gifts were no longer minuted, but minutes record that Council noted the list of financial gifts over £1,000, which these two donations were part of.*

**(x) November 2019**

*The Xiaotian Fu donations were reported as part of the Bursar's annual financial report to Council. This fund is a line within a list of all funds, and was not specifically discussed, so no minute has been included. This was repeated in the November 2020, November 2021 and November 2022.*

*In these years, the Bursar's report was also circulated to Governing Body. The report marks the only reference to Xiaotian Fu in Governing Body papers, bar a reference to the Xiaotian Fu garden as a 'recent landscaping project' in a Governing Body paper on future landscaping projects, of October 2022.*

**(xi) Council Minute 2021-33**

The Council offered its congratulations to:

□ Ms Xiaotian Fu (G06) on being named one of "Ten Outstanding New Hong Kong Young Persons 2020" and one of the top 50 Overseas Educated Returned Elites of China