

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2024

Public Authority: The Council of King's College London
Address: Strand
London
WC2R 2LS

Decision (including any steps ordered)

1. The complainant has requested information from King's College London (KCL) relating to donations made by a named donor. KCL provided some information but withheld other information, citing sections 41(1) (information provided in confidence), 43(2) (commercial interests) and 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that KCL correctly cited sections 41(1) and 43(2) of FOIA. The public interest regarding section 43 lies in non-disclosure. The Commissioner finds that KCL breached section 1(1)(b) and 10(1) of FOIA by disclosing information to which the complainant was entitled beyond the legislative timeframe. It breached section 17(1) of FOIA by later relying on exemptions it had not included in the refusal notice.
3. The Commissioner does not require further steps.

Request and response

4. On 11 August 2023, the complainant wrote to KCL and requested information in the following terms:

"This is an FOI request about the Lau China Institute. It has been reported that the Lau China Institute was set up following a

donation from Dr Lau Ming-wai, who is based in Hong Kong. Please provide

a) emails sent in 2011 and 2012 between KCL staff responsible for administering this donation and Dr Lau,

b) any due diligence conducted by KCL on Dr Lau,

c) a list of Dr Lau's visits to the Institute,

d) any agreement or MoU signed in relation to this gift,

e) details of any requests Dr Lau made in respect of his gift or has made since,

f) details of any further donations by Dr Lau, or any other 'ongoing support' as mentioned here

g) information as to how Dr Lau's donation is held by KCL. Is it invested? Is it in an endowment?"

5. Clarification was requested by the university on 12 August 2023 as follows:

"Further to your request for information dated 11th August 2023, please can you clarify the following part(s) of your request:

b) any due diligence conducted by KCL on Dr Lau,

c) a list of Dr Lau's visits to the Institute,

d) any agreement or MoU signed in relation to this gift,

Please can you provide the time frame you are interested in for the above questions."

6. On 14 August 2023 the complainant clarified:

"The University must do its due diligence before receiving the money, so I think b) is self explanatory.

The same goes for d): the MoU or agreement would date from the time the gift was agreed... c) should be in the last ten years."

7. There was a further request for clarification from KCL on 12 September 2023 regarding part f).

8. The complainant clarified on 2 October 2023 as follows: "Any further donations by Dr Lau to the Institute or King's as a whole."
9. KCL responded on 23 November 2023 and provided some information "relevant to the request", the remaining information being withheld under section 40(2) of the FOIA.
10. On 30 November 2023 the complainant made an internal review request.
11. In the internal review on 28 December 2023 KCL partly upheld the complaint. Some information was provided in response to request parts b) and g). KCL cited sections 41(1) and 43(2) of FOIA in addition to section 40(2).

Scope of the case

12. The complainant contacted the Commissioner on 25 January 2024 to complain about the way their request for information had been handled. The complainant was not content with KCL's response to a), d) and e). They also wanted the information at part c) but conceded that they could understand why data privacy might "rule out" a response.
13. KCL responded to the Commissioner's investigation letter by stating that it had cited section 40(2) to the names of parties identified directly and indirectly. Any emails or communications between the donor and the university were exempted under section 41(1) and where the information concerned "granular information regarding the details of individual gift agreement" KCL cited section 43(2) of FOIA.
14. In a telephone call on 14 May 2024 the Commissioner asked KCL if it held the information regarding part c) of the request. KCL explained that it did not hold a "list" of visits, just some information falling within scope. KCL said that it could have made this point clearer.
15. The Commissioner considers that the scope of his investigation is to look at KCL's citing of sections 41(1), 43(2) and section 40(2) of FOIA.

Reasons for decision

Section 41 – information provided in confidence

16. Section 41(1) of FOIA provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and, (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

17. The Commissioner’s advice on section 41 states that -

“information will be covered by Section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”¹

Was the information obtained from any other person?

18. Section 41(1)(a) states that the information must have been obtained from “any other person”.

19. KCL has cited this exemption for parts a), c) and e) of the request. The information it has withheld under section 41 is -

“emails/communications between the Donor and the University, where the information provided to us by a third party where that information is private and personal in nature and relates to the Donor’s finances and personal interest in the University from a donation point of view”.

20. KCL confirmed that “any other person” the information has been obtained from is Dr Lau. The Commissioner accepts this view. KCL also identified junior KCL employees but he does not consider junior KCL employees to be third parties as they work for KCL.

21. However, in his published guidance on section 41, the Commissioner advises that an authority must consider whether disclosing the

¹ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

information it created would reveal the content of the information it obtained from the other person. If it would, then the exemption may also cover the material it generated itself.

22. The Commissioner has next considered whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence

23. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

24. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

25. KCL's view is that disclosure of this information would constitute an actionable breach of confidence.

Does the information have the necessary quality of confidence?

26. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

27. KCL states that the information "is not trivial". It explains that it is "personal and private information relating to the Donor and their engagement with the University". This "private subject matter...is not otherwise accessible to the general public".

Was the information imparted in circumstances importing an obligation of confidence?

28. For this reason, the "withheld information was imparted in circumstances giving rise to an obligation of confidence". KCL contends that -

"With regards to emails between the college and third parties, the college said that these clearly represent information provided to it by a third party. In respect of internal emails, the college advised that these contain information provided by third parties so meet the relevant criteria...The internal emails discuss the information the third parties have supplied and again can therefore be said to be information obtained from another person."

29. KCL refers the Commissioner to paragraph 13 of his own guidance and to pages 2-3 of his decision IC-153644-G0J2. The Commissioner accepts that the emails between the donor and KCL would be considered by the donor to be private and personal. He agrees that the information has been imparted in circumstances that give rise to an obligation of confidence. It is not the type of information that the donor would anticipate being published and therefore there is an implicit obligation of confidence.

Would disclosure be detrimental to the confider?

30. KCL explains that "the information is private and personal in nature and relates to the Donor's finances and personal interest in the university from a donation point of view". It argues that "any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right".
31. In his guidance the Commissioner is satisfied that where the information relates to a "an individual's private and personal life" it "can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider". He considers that -

"case law also now suggests that any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right".

Is there a public interest defence for disclosure?

32. KCL argues that, "There is a significant expectation of confidentiality in relation to such private discussions between a donor and their relationship manager..." It states that there is "no overriding public interest arguments" that "exist which would act as a defence to an actionable breach of confidentiality".
33. Although section 41 is an absolute exemption (and there is no requirement to consider the public interest test), it is accepted that if there is an overriding public interest in disclosure it can be a defence to an action of breach of confidentiality.

34. The correspondence between KCL and the donor from 2011 and 2012 is limited. The Commissioner accepts that because of the nature of the relationship between donor and donee the information is not trivial. It contains the donor's personal information and reflects their interaction with KCL. The Commissioner understands that this information is not otherwise accessible to the general public.
35. The Commissioner notes that there is a public interest in understanding how university funds are acquired and from where. But the Commissioner is satisfied that this is to a large extent met by the information KCL has provided or put into the public domain. The information is private and personal in nature and relates to what the donor would have considered to be their private discussions with KCL employees. There is a significant expectation of confidentiality in relation to private discussions around the donations provided. Although the complainant may consider that the public interest arguments they have put forward are persuasive and may act as a defence to an actionable breach of confidentiality, this will depend on the actual information held. Having seen the withheld information, the Commissioner does not accept that this is the situation here.
36. The Commissioner has decided that section 41 of FOIA applies to the information withheld under a), c), and e) by KCL.

Section 43(2) – commercial interests

37. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
38. KCL cited section 43(2) of FOIA for parts a), c), d) and e) of the request. The information is - "granular information regarding the details of individual gift agreement as contained in the contract...and private communications involving the donor where disclosure could harm" KCL's commercial interests".
39. The Commissioner has defined the meaning of the term "commercial interests" in his guidance on the application of section 43 as follows:

"A commercial interest relates 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.”²

40. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
41. The Commissioner’s guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
42. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for it to be successfully engaged.
43. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
44. KCL states that the prejudice was to its own commercial interests. It contends that “Donations have been recognised as a commercial activity for universities and refers the Commissioner to his decision notice where it says that, “The Commissioner has consistently recognised that higher education institutions operate in highly competitive markets – both the market for students and the “market” for donations.”³ KCL has to compete “globally with other higher education institutions to secure donations. These donations “enable us to maintain and enhance the quality of our research and teaching” and continue to attract “the most talented students and staff”.
45. KCL argues that -

“Disclosure would be likely to prejudice our commercial interests if it became known, that as a result of any FOI request, the University was required to reveal granular information collected on/from that donor or private communications and agreements with that donor, as it would send a message to all existing or prospective donors that the University was not able to protect their privacy. There are other options for prospective donors to turn to,

² [Section 43 - Commercial interests | ICO](#)

³ [IC-217933-T3T1](#)

not just in the UK but internationally, if they lose confidence in King's."

46. As a result -

"Potential donors would be likely to conclude that any dealings that they may have with the University would not be on a confidential basis. This in turn would be likely to deter them from making donations and encourage them instead to support other causes or institutions. Moreover, existing donors would be less likely to donate again, contrary to the normal pattern of giving."

47. The Commissioner has noted that "the anonymised terms of the donation agreement have already been disclosed to the requester as our 'standard terms' under the internal review".

The Commissioner's view

48. It is an established fact that donations are a significant part of a university's revenue. KCL has provided a clear link between disclosure and a real and significant prejudice to its commercial interests, though at the lower level of prejudice ("would be likely to"). Section 43(2) is engaged.

49. The Commissioner has gone on to consider the public interest in this matter.

Public interest factors in favour of disclosing the requested information

50. The complainant made the following arguments in their internal review request:

"Lau China Centre is more or less the biggest China studies institute in the country. China studies have been identified as critical to our future by the UK government, because China has been called an "epoch-defining challenge". But the donor here, Lau Ming-wai, is a political figure in Hong Kong, where criticising the CCP [Chinese Communist Party] is illegal. In theory he could obviously be exerting or have exerted influence over the UK's biggest China studies institute...There is a very clear public interest in his visits, donation requests + any agreements signed and due diligence, along with everything else I asked for, being published."

51. The complainant set out their argument to the Commissioner for the release of this information being in the public interest. The complainant wants to know if the donor has "exerted influence on the Lau China Institute and specifically whether the donations "had any terms attached

which might have restricted i) the appointment of the Institute's Director, or ii) the work of the Institute". They support their argument by providing "examples of appointment requests accompanying donations for the study of China: e.g. Cambridge's Chong Hua Professorship" received via an information request. The complainant names various academics as pro-Chinese and suggests that the wealth from which the donation comes "may be taken to depend in part on good relations with the CCP" and states that the donor "himself advised the HK [Hong Kong] government on stopping pro-democracy protests in the 2010s". The complainant quotes the following:

'The seriousness of CCP influence over UK Sinology^[4] was underlined by Parliament's Intelligence and Security Committee's recent Report: "Chinese attempts to interfere with, and stifle debate, amongst the academic community in the UK are a significant problem, made possible by China's academic 'buying power'."

52. Additionally the complainant points out that the issue of funding in Higher Education "such as the Higher Education (Freedom of Speech) Act 2023, [...] requires the following of the Office for Students (OfS), which regulates English universities...to monitor overseas funding of registered higher education providers...with a view to assessing the extent to which the funding presents a risk" to matters listed such as "freedom of speech within the law" and "the academic freedom of academic staff" in these providers. The complainant states that "the OfS has yet to start fulfilling this function" because the "legislation does not come into force until 1 September 2025". The complainant wants responses regarding appointment preference and whether the donation/s were accompanied by such requests because of the issue of ongoing exertion of influence.

53. The complainant points to -

"cross-party support and broad expert backing (including from the LCI [Lau China Institute]) behind the argument that the UK's relations with and knowledge of China are key to the future wellbeing of this country".

They state that "the largest China Institute "is funded exclusively...by a

⁴ The study of Chinese civilisation

man living in Hong Kong, where criticising the CCP is punishable by imprisonment...”

54. For the reasons provided in the four paragraphs above, the complainant believes that there is “an obvious and overwhelming public interest in disclosing the terms of the donation”.
55. KCL recognises the importance of accountability and transparency regarding its processes.

Public interest factors in favour of maintaining the exemption

56. KCL maintains that it has already provided information to the complainant in the form of a “published policy and confirmation that Dr Lau as a potential donor was subject to the assurance measures in relevant policies and procedures” that “demonstrate the fundraising was conducted in a professional and ethical way in compliance with University policy”. Standard terms which are identical have been disclosed “except for the removal of personal data and commercially sensitive information” and KCL’s bank details. The amounts donated have been provided (the 2011 public donation was already in the public domain). The purpose for which the donations were used for has also been disclosed. KCL’s view is that transparency requirements were served “without exposing granular detail” which would be likely to prejudice its commercial interests and lead to the results outlined in the next two paragraphs that would not be in the public interest.
57. KCL explains that donations are a valuable source of revenue and that it needs “to be in a position to fundraise effectively”. It argues that it is “not in the public interest to discourage future donations or hinder the university’s ability to secure future gifts with this Donor or others”.
58. KCL argues that “Higher Education is an aggressively competitive global marketplace” and “Donors can easily go elsewhere”. Its view is that donors are likely to be deterred from making future gifts and it could damage KCL’s existing relationships with donors. It is not in the public interest for there to be a negative impact on services that KCL can offer or “hinder its ability to attract students”. Reducing donations would mean that KCL would be “forced to pass on the cost of educational provision to its students”. Its conclusion is that KCL has disclosed what information it has been able to in the interests of transparency but that it needs to “maintain effective income from its donors”.

The balance of the public interest

59. The Commissioner understands the complainant’s arguments and the public interest in understanding what influence may or may not have been used in this instance. However, KCL has provided information

about donations given and what they were used for plus its standard terms. It has also explained that the donor was “subject to assurance measures”. The Commissioner recognises the highly competitive market that higher education institutions operate in, both in terms of donations and attracting students. Given these dual commercial pressures, the Commissioner has decided that the balance of the public interest lies in not disclosing the withheld information as this may lead to a loss of revenue if potential donors decide to bestow their donations elsewhere or, in the case of existing donors, do not donate again. It could be argued that other educational institutions are subject to the FOIA but KCL is also competing with higher education institutions abroad. Should there be a decline in revenue from this source it will impact on services offered to students and may increase the fee burden on those students. This could result in KCL presenting a less attractive proposition which is not in the public interest.

60. As the Commissioner has found the information to have been correctly withheld under sections 41 and 43 he has not gone on to consider section 40(2).

Procedural matters

61. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information that has been requested and (b) communicate the information to the applicant if it is held and is not exempt information.
62. Section 10(1) provides that a public authority must comply with sections 1(1)(a) and 1(1)(b) promptly and in any event not later than the twentieth working day following the date of receipt of a request for information.
63. Under section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
64. KCL communicated information to which the complainant was entitled late, both at the refusal stage and at the time of the internal review. The Commissioner has therefore recorded a breach of section 1(1)(b). Because of the late provision of this information KCL breached section 10(1). KCL also relied later on exemptions it had not included in the refusal notice, breaching section 17(1) of FOIA.

Right of appeal

65. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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