Griffith Asia Institute

Regional Outlook

China's Open Government Information Reform: Transparency vs Secrecy

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Contents

Executive Summary

One of the hallmarks of contemporary discussion about good governance and the rule of law in China is the new emphasis on transparency as a necessary prerequisite for fair and effective 'open public administration'. The issue of state secrets, commercial secrets and transparency was spotlighted internationally at the conclusion of the trial of Rio Tinto Executive Stern Hu. At the same time as Chinese transparency entered a new phase of prioritised reform, there was widespread Western media condemnation of the lack of transparency among China's key state institutions. This lack of transparency was seen as inhibiting the development of the regulatory regimes underpinning lawful governance and rule of law.

This paper contextualises and examines the content and scope of contemporary transparency reform in China, with special reference to the content, scope and practical applications of the new 2007 provisions on open government information and related Supreme People's Court (SPC) judicial interpretation. The new transparency regime is assessed in light of the traditionally exclusive requirements of law regarding state and commercial secrets. There is a new political will in China to support new information disclosure in public administration that has been spurred on for genuine domestic reasons. This is certainly appropriate to China's growing international economic status. However, in light of the new principle 'disclosure is principal and non-disclosure is exceptional', there are new tensions within Chinese state administration that have yet to be fully addressed in SPC interpretation, and transparency reform needs to be expanded to include a new independent review mechanism that can resist the persisting tradition of state secrecy.

system and the nascent, but sometimes palpable, pattern of Chinese 'constitutionalism' and 'rule-of-law' making within China's transitional state. The analysis will establish related law, policy and regulation, placing these within the context of the contemporary correlation of Chinese politics and law, and it will specifically focus on applied state regulation and administrative law that affects the conduct of international business in China's transitional and still significantly opaque regulatory environment.

2. Historical Background[12]

Modern transparency reform has to overcome a less then obliging historical tradition of hierarchy and secrecy that described imperial governance in absolute moral terms. China's extraordinarily long and complex bureaucratic tradition instinctively regarded knowledge as power. Imperial rule presumed that government by moral elite ruled for the sake of the people, but government by the people was never an option. The controlling of information by parent officials' (××ï) was a matter of refined state administrative technique.[13] In the paternalistic context of imperial rule, the Emperor's subjects were not rights-bearing citizens.[14] They were dependent (d)-1.e (d)-1e (d)-1e(e)1 (r)3.6 ( )-6 (an o)axe dynastic control (v)1.9 (e)-1iS.21.6 (s)-2.2 (oc)-3 (i)-1.7 (e)-1iSty.

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information technology, Hu acclaimed a new trend towards modern public administration, and he tied conventional notions of cadre work style (½ ``) to the importance of open communications to facilitate better policy development and application. 'Transparency' was correlated with the rule of law and 'government democracy' in key policy statements in 2004–05. Reacting to SARs and the initial failure to report it, the September 2004 Central Committee Decision on Enhancing the Ability to Govern emphasised the importance of improved governance based on acting 'according to law', and required officials to clear the channels by which the state of society and public opinion are reflected.[120] Subsequently, the 2005 white paper on building political democracy required institutional guarantees of 'open administration':

'The Chinese government requires its … departments at all levels to make public their administrative affairs as far as possible, so *to enhance the transparency of government work and guarantee the people's right to know, participate in and supervise the work of government in particular*.'[121]

While no friend of liberal democracy, Hu has advocated 'transparency' as a means of supporting the people's knowledge and participation in good governance based on the rule of law. His

3. The Contemporary Cycle of Transparency Reform

The development of the State Council's OGI Regulations built on eight years of experience derived from open government affairs programs introduced incrementally throughout the country beginning in the 1990s and from locally initiated OGI legislation, adopted since 2003 by over 30 provincial and municipal governments throughout China, as well as within some central government departments and institutions.[24]

The new OGI regulations were published on 24 April 2007, and they came into force on 1 May 2008. They focused on government departments but did not include the National People's Congress and the Supreme People's Court and Supreme People's Procuratorate within their ambit. Horsley observed that the appearance of these regulations marked a 'turning point away from the deeply ingrained culture of government secrecy toward making Chinese government operations and information more transparent'.[25] OGI Article One summed up the lofty goals of the regulations:

> In order to ensure that citizens, legal persons and other organizations obtain government information in accordance with the law, enhance transparency of the work of government, promote administration in accordance with the law, and bring into full play the role of government information in serving the people's production and livelihood and their economic and social activities, these Regulations are hereby formulated.[26]

This is an admittedly ambitious listing, but it is important to note that the goals include elements that favour both what Megan Carter and Li Yanbin call 'the direct relation between the citizen as a principal and the government as an agent, stressing … more democratic legitimacy of all administrative work' and the use of transparency as 'a mechanism to expose corruption and abuse of office power to the public'.[27]

One might well argue that there is a serious lack of provision supporting the actual implementation of the regulations, but this is in fact not specific to the OGI regulations as often law and regulation are passed with the expectation that the Supreme People's Court will later provide detailed clarifications. The SPC issued judicial review interpretation on OGI in December 2010 and it came into effect in August 2011, which is three years behind the OGI. While the OGI regulations did not set up a new independent agency to supervise OGI applications, as mentioned above, the general office of the State Council does have the formal authority to promote, guide, coordinate and supervise implementation of the OGI system.[28] However, they did provide on a new national basis two specific administrative means by which government information would be made available to the public, namely, self-initiative disclosure (主动公开) within 20 business days (Article 15) and formal public request for disclosure, or by request (依申请公开) (within 15–30 business days).

Regardless of the regulations' emphasis on the two forms of disclosure, Shanghai University Professor Weibing Xiao has argued that the new OGI regulations represent the adoption of a 'push model of FOI (OGI) legislation' distinct from a 'pull model'.[29] The former is distinguished by the 'pro-active disclosure of government information' as opposed to the latter's stress on 'citizen-accessed or reactive disclosure'. However, there may be reason for inclusion of the latter in the OGI. The organisational bias of the mass line that underlies the Hu Jintao approach to 'scientific development' tends to

support simultaneous top-down and down-up actions, and the "open by request" for apparently liberal-democratic "pull models" seemingly converges with Hu Jintao's political focus on the importance of "open public administration" as it includes popular participation in administration and popular supervision of officials. And as mentioned above, the importance of such supervision was newly highlighted in the December 2010 white paper.

Article 9 temptingly offers very broad categories of self-initiative disclosure. Administrative units could disclose: information involving the vital interests of citizens,

establish its own mechanism for determining whether the potential release of information would violate the State Secrets Law (SSL). The OGI itself sanctioned the government's withholding of information relating to state secrets, commercial secrets and individual privacy. The extraordinary latitude enjoyed by the units or organs themselves would seem to act at cross purposes with the notion that disclosure is principle and non-disclosure is exceptional. According to Ni Hongtao's research of the first year of applied OGI, the restrictive wording in Article 14 has been used as an excuse for non-disclosure by non-compliant and hostile administrative departments.[25]

Additionally and most importantly, the regulations do not, themselves, provide a ready made transparent mechanism to allow for reasonable challenge to the self-interested decisions of administrative units that seek to deflect embarrassing public criticism and to cover up their bad behaviour under the cloak of the law on secrecy. Furthermore, the SSL does not even pretend to offer much comfort, as information that is classified as 'secret' to protect national security and the public interest is classified by legal procedure and known only by a limited number of people. The SSL's listing of seven categories suggest an unrestricted flexibility and scope: important decisions on state affairs; national defence development and army activities; diplomacy, foreign affairs and secrets concerning foreign countries; national economic and social development; science and technology; national security and criminal investigations; and other state secrets classified by administrative organs. Presumably 'national economic and social development' might cover important commercial and patent information. Moreover, anything left out of the first six categories can be covered by analogy in the seventh category.

Indeed this classification of 'state secrets' casts a very long shadow over the 2007 OGI, which is subordinate to the superior status of NPC law and was obliged to make deliberate reference to the relevant SSL provisions within its own articles. Under SSL Article 13, government agencies and organs have the authority to classify state secrets. Ambiguity in the lines between state secrets and legal information is especially vexing considering that disclosure of 'top secret' information can attract severe penalties up to and including life imprisonment and the death penalty.[26] In the Stern Hu case, the charge of stealing state secrets was dropped for the lesser charge of 'stealing commercial secrets'.

Whereas the SSL is a 'basic law,' there is no discrete law that stipulates what are 'commercial secrets.' Related definition is scattered in the Law on Anti-Unfair Competition, the Criminal Law and other laws, and there is very little practical legal experience in this area. Stern Hu's trial must have wandered into virgin territory. The trial caused international business consternation. Stern Hu received from a Chinese iron company personnel information that constituted 'commercial secrets,' and after his trial the central authorities acted to provide China's many state corporations with a clearer explanation of what is a commercial secret.

Article 111 of the 1997 Criminal Law stipulated sentences ranging from criminal detention, public surveillance, or deprivation of political rights, to life imprisonment for anyone found guilty of stealing, spying on, burying or illegally providing states secrets to an agency or organisation or people outside China.[27]

4. Administrative Judicial Review on OGI

Western legal experts and indeed Chinese judges, themselves, anxiously awaited remedial Supreme People's Court judicial interpretation that would credibly support the 2007 OGI with clear detail on the law's application. Indeed, an interpretation, 'Provisions for Several Issues Concerning Hearings of Administrative Cases Related to Government Information Disclosure', appeared in December 2010 and came into effect 29 July 2011. This interpretation sought to address various problems that had emerged in light of the 2007 OGI. The latter had given rise to a spate of so-called OGI lawsuits against the government. Lacking clear guidance, the people's courts responded in an inconsistent and erratic fashion. Some judges were willing to accept the suits in their courts while others declined in light of uncertainty surrounding the lack of detailed judicial review procedure. The new Provisions were supposed to connect the dots.

The administrative judicial review system in China was formally established in 1989 by the Administrative Litigation Law (ALL). It grants legal jurisdiction power to the courts to review government agency decisions. Critics have argued, however, that the scope for review was too narrowly defined and that the courts have only limited power to review specific administrative disputes cases. The SPC has issued several interpretations over the last 20 years to expand the scope of the administrative judicial review to resolve social conflicts and instability, such as education and salary/wage disputes and disputes about public land expropriations.

The SPC's 2010 OGI interpretation certainly expanded the ALL review scope again. It states that where a citizen, legal person, or other organisation believes that a specific administrative act undertaken during government information disclosure work has violated its legal rights and interests, and where the applicant has filed an administrative lawsuit in accordance with law, the people's court will accept the case.[39] Article 1 of this interpretation lists five categories where a court will accept the disputes, where an agency has refused the open request, fails to respond within the prescribed time limit, provides a response that fails to meet the standards set out in the OGI Regulation, or refuses to correct information after being requested to do so. A court also should accept a lawsuit to prevent disclosure if a citizen or organisation applicant believes that the release of information infringes upon commercial secrets or personal privacy.[40]

Although the scope of this acceptance was expanded, it is still narrowly construed. The interpretation's Article 4 represented a step forward in that it clearly recognised the standing before the courts of citizens, legal persons and other organisations who object to departmental refusal to disclose information. Article 5 placed the burden of proof on the agency (defendant) in the event of a challenge to the plaintiff, namely, the state administration, indicating that nondisclosure of commercial secrets or personal privacy was necessary and lawful in the 'public interest'. The new focus on the importance of the 'public interest' in law is quite interesting, but interpretation did not establish the i

Nevertheless, the SPC interpretation lists other categories under which a court may decline to accept a lawsuit to compel release of information, including when the agency states that it does not have certain information, or when a response would involve disclosure of commercial secrets, state secrets, or infringe upon personal privacy, with no possibility for challenging an agency's self-classification. Some commentators have noted that, like in the original OGI Regulation, the exceptions are large enough to swallow 'disclosure as principal' if an agency does not want certain information released.[42]

While the SPC interpretation provides more clarity around lawsuits to enforce the OGI Regulation, it does not alter limitations in the original OGI Regulation, including that an applicant must show that the request for information is relevant to the applicant's own 'production, life, scientific research or other special needs'. The SPC interpretation also does not modify the carve-out for 'state secrets', a term that in the past has been broadly interpreted by some agencies in declining to release information.[43]

The 2011 provisions represent another step in reform, but the process of SPC interpretation is not yet complete and this may be due in part to the continuing political sensitivity to issues over OGI that challenges the state's capacity to withhold state and commercial secrets. Covington and Burling LLP contend that the SPC's 'interpretation is a small step, but only a small step, in promoting greater governmental transparency and public access to information'.[44]

5. Conclusion

The 2007 OGI regulations are extraordinarily important in as much as they represent a qualitative break with the past and are the first nationwide attempt to create a new regime of government information disclosure in China. Of particular note is the structural creation of a system of 'self-initiated disclosure' and requests for disclosure that are formally, if not always, practically premised on disclosure is principle; non-disclosure is the exception. This paper's analysis argues that related reform based on this new principle and its application in a new mechanism of disclosure suggests a new but tentative pattern of 'thin' transparency that has been politically justified as part of Hu Jintao's strategy for 'open public administration'.

The Party-State is used to a privileged position above the law that was, and still is, constitutionally justified in the principle of 'democratic centralism'. The above analysis acknowledges that there are serious related problems. Principal among these is the persisting influence of the SSL and related regulation that for so many years have fostered a political-legal culture of enveloping secrecy under the Party-State. But now there is a new element that politically and legally qualifies the exclusive culture of state secrecy. There is an explicitly stated new political will to foster transparency so as to promote state legitimacy through the creation of public openness and supervision, and deal with the key issues of corruption and social instability through transparent institutions that act according to law. 'Transparency' has become an important component of state legitimacy. Add to this motivation the concern that China, despite any protestations of 'judicial sovereignty', still has to do something to reassure foreign investment that it can expect fair treatment under Chinese law and policy.

Regulation supporting transparent governance is new. In its formal dimensions, it is path-breaking. However, the 2007 OGI and SPC judicial interpretation are inferior to the SSL, which is 'fundamental law' (. Œ Q q). Hu Jintao has personally endorsed transparency as a new part of 'open public administration' that acts according to the rule of law. The issuance of the 25 March 2010 temporary provisions reflected only a very modest movement towards the clarification needed to implement the new regime for transparency. Modification of the SSL itself has been minor and not that helpful. SPC judicial interpretation is a regular part of the process necessary to the law's practical application. It has started to address some of the issues concerning the burden of proof, but has yet to establish appropriate standards of evidence. The system is moving incrementally in dealing with the legal process of disclosure. Reform is often experimental and sometimes episodic, but it must now focus more systematically on the creation of an appropriate structural mechanism by which to ensure an independent process of appeal that is not compromised in the tradition of state secrecy.

And in China's complex administrative environment, state agencies have an established expertise in delaying and thwarting inconvenient reform. The self-conscious adoption of 'transparency' as a critical component is certainly noteworthy as the cultural and institutional impediments to reform are very real. However, China's internal reform adjustment lags behind China's entry into the world economy as the second largest economy and there is still a very long way to go to create a regime of transparency that can practically counter the problems associated with the law and culture of state secrecy.

Notes

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9 'Landmark decree to encourage government transparency', *China Daily*, 24 April 2007, as cited in Horsley, 'China adopts first nationwide open government information regulations', p. 2.
10 Peerenboom, *China's Long March*, p. 65.
11 Randall Peerenboom, 'Introduction', in Randall Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge: Cambridge University Press, 2010), p. 4.
12 Some of this historical background is discussed in Shumei Hou and Ronald C. Keith, 'A new prospect for judicial review', *China Information*, vol. 26, no. 1, 2012.
13 Discussion with Wang Xixin, Director, Centre for Governance and Public Law, Peking University

39 Article 1,*Provisions for Several Issues Concerning Hearings of Administrative Cases*