

Griffith Asia Institute

Regional Outlook Paper

CHINA'S OPEN GOVERNMENT INFORMATION REFORM:
TRANSPARENCY vs SECRECY

Dr Shumei Hou

Griffith Asia Institute

Regional Outlook

China's Open Government Information Reform:
Transparency vs Secrecy

Dr Shumei Hou

About the Griffith Asia Institute

The Griffith Asia Institute produces innovative, interdisciplinary research on key developments in the politics, economics, societies and cultures of Asia and the South Pacific.

By promoting knowledge of Australia's changing region and its importance to our future, the Griffith Asia Institute seeks to inform and foster academic scholarship, public awareness and considered and responsive policy making.

The Institute's work builds on a 40 year Griffith University tradition of providing cutting-edge research on issues of contemporary significance in the region.

Griffith was the first University in the country to offer Asian Studies to undergraduate students and remains a pioneer in this field. This strong history means that today's Institute can draw on the expertise of some 50 Asia-Pacific focused academics from many disciplines across the university.

The Griffith Asia Institute's 'Regional Outlook' papers publish the institute's cutting edge, policy-relevant research on Australia and its regional environment. They are intended as working papers only. The texts of published papers and the titles of upcoming publications can be found on the Institute's website: www.griffith.edu.au/business-commerce/griffith-asia-institute/

'China's Open Government Information Reform: Transparency vs Secrecy', Regional Outlook Paper No. 33, 2011

About the Author

Dr Shumei Hou

Dr Shumei Hou is a postdoctoral research fellow at the Griffith Asia Institute. She is also a certified lawyer in China. Her recent research concerns include international business in China, overseas investment of Chinese state-owned enterprise, China's changing regulatory environment with special reference to transparency reform and China's adaptation to the norms of the World Trade Organisation. Over the last one and half years of her postdoctoral research at GAI, her publications include two books under contract, two book chapters, two refereed journal articles and one book review. The books are *Reform of China's Judicial Review System under the WTO Regime* under contract with Beijing: People's Court Press, and with Ron Keith and Zhiqiu Lin, *China's Supreme People's Court: Between Power and Principle*, under contract with Routledge (Taylor and Francis), London. The book chapters are 'Chinese outward direct investment: Case studies of SOEs going global', in John Garrick (ed.), *Law and Policy for China's Market Socialism* (Routledge); and with Ron Keith, 'China's Supreme People's Court within the political-legal system', in Bjoern Dressel (ed.), *The Judicialization of Politics in Asia* (Routledge Law in Asia Series); and the journal articles are: with Ron Keith, 'Defense lawyers in the scales of Chinese criminal justice', *The Journal of Contemporary China*, vol. 20, no. 70, June 2011, pp. 375-95; and with Ron Keith, 'The new prospect for transparent court judgment in China?', *China Information*, vol. 26, no. 1, March 2012. The book review is of 'Communities, Crime and Social Capital in Contemporary China', in *The China Journal*, no. 64 (July 2010).

Contents

Executive Summary.....	1
1. Introduction.....	2
2. Historical Background.....	5
3. The Contemporary Cycle of Transparency Reform.....	7
4. Administrative Judicial Review on OGI.....	11
5. Conclusion.....	13
Notes.....	14

Acknowledgement

The research I conducted for this paper is one of the outcomes of a fellowship that I held at the Peking University Law School's Centre for Public Participation Study and Support in the final quarter of 2010. The fellowship was generously funded through the Australia–China Futures Dialogues, and it provided a rare opportunity to interact with senior Beijing academics and jurists who are currently at the forefront of research on transparency and cognate reform of public policy and law. I would also like to take this opportunity to thank my colleagues at the Griffith Asia Institute, especially GAI's Director, Professor Andrew O'Neil, Professor Ronald Keith and Professor Haig Patapan for their encouragement and unstinting mentorship over my first years at Griffith.

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.

1. Introduction

Professor Randall Peerenboom, a leading international authority on Chinese legal reform, states that in countries with the Western rule of law, people 'demanded greater transparency and public participation in order to hold government officials accountable'.¹ With the international advent of 'transparency', the notion of public administration has been updated to include emphasis on 'making connections between citizens, data and government'.² Internationally, contemporary 'governance' infers greater transparency, participation and accountability.

China's leaders have explicitly endorsed 'transparency' as the necessary 'sunshine' that helps to grow sustainable business as against the spread of official corruption. At the 17th National Party Congress on 15 October 2007, President Hu Jintao endorsed 'transparency' in the following way: 'Power must be exercised in the sunshine We will improve the open administrative system in various areas and increase transparency in government work, thus enhancing the people's trust in the government'.³ In the same year the State Council introduced the first national regulation on Open Government Information (OGI) to allow enhanced access to government information based on new systems of disclosure. Moreover, China revised its long established State Secrets Law (SSL) in 2010 ostensibly to support the latest stage of transparency reform. The commitment to transparency was re-affirmed in the 2010 White Paper on *China's Efforts to Combat Corruption and Build a Clean Government*: 'government information ... should be made public in a timely and accurate manner with the requirement of making public as principal and holding back as the exception, to guarantee the people's right to know, participate, express and supervise ...'.⁴ Such political thinking assigns a significantly new dividend to the importance of transparency reform as it has a direct bearing on the legitimacy of the CCP's regime.

However, critics in the West may have some difficulty crediting China's Party leadership with a genuine advocacy of transparency, especially in light of China's well known bureaucratic tradition of state secrecy. For its own real political reasons, the Party leadership has created a new concept of transparent public administration in order to deal with rising social instability and the crippling spread of corruption throughout the state's administrative and judicial processes. In recent years, irregular land taking and urban redevelopment, for example, have increasingly sparked protests and even violence in different parts of China. Chinese authorities clearly recognise that enhancing transparency in planning, along with adequate compensation, will help to defuse volatile situations that could threaten domestic political and social stability. China's leaders have also learned from SARS, avian flu and food safety crises in early 2000s that a lack of transparency can be costly.⁵ Hubbard argues convincingly that the OGI is instrumentally valuable to the Chinese regime, as it 'aids the center's control of a decentralized government' and as it 'promotes the efficient use of government information resources, to reduce the misuse of government information for rent-seeking and outright corruption'.⁶

The unprecedented struggle for transparency in China requires analysis of developing contradictions within Chinese governance. While the new regulations established important procedures for the public acquisition of government information, China still lacks an independent administrative review body that mediates between public and government over the disclosure of information. Currently, the General Office at the State Council and its counterparts at local government level are responsible for resolution of disclosure disputes. Horsley argued that the General Office as the secretariat for State Council is unlikely to create the impartiality and independence that will support public confidence in the fair application of transparent justice.⁷ Wanna,

O'Faircheallaigh and Weller claim that access to relevant information is of course indispensable if administrative review is to be effective, because without it citizens would have extreme difficulty in challenging the actions of ministers or bureaucrats.⁸ Moreover, the application of transparency is also part of the changing administrative dynamic of centre–region relations. Often regional policy and regulation provides experience that is useful to the development of related national legislation. On the other hand, regional governments often engage in the practice of 'local protectionism', shielding privileged local economic interests from the central requirements of law. The OGI has newly embedded in law an extraordinarily important new principle in public administration, 'disclosure is principle and non-disclosure, exceptional' (公开为原则, 不公开为例外的原则). Indeed, in his enthusiasm, Deputy Minister Zhang Qiong, State Council Office of Legislative Affairs, claimed that the regulations would curb 'corruption at its source, largely reducing its occurrence'.⁹

However the core question remains, and that is how can Chinese state administration develop a viable regime of transparency in the face of such a long and deep Chinese tradition of state secrecy? If there is 'transparency' in China then how is it understood and how is it practically applied? To begin with, this question requires the full, accurate and clear identification of the contents of transparency reform as it concerns the practical application of law and regulation. Related analysis can turn to the question of how to deal with the convergence or divergence in the Western and Chinese understandings of 'transparency' and its requirements, as well as the extraordinary relations between law and politics in Chinese public administration.

Particularly under Hu Jintao's current leadership, Chinese law and its practice cannot be understood without reference to politics. New policy reference to transparency was roughly contemporary with the 2007 appearance of 'The Three Supremes' that somewhat incongruously associated the supremacy of law with the supremacy of the Party's cause and the supremacy of the people's needs'. With deliberate reference to comparative rule of law assumptions in the West, this paper accepts that the close relations between law and politics inform Chinese transparency reform. There are obviously differences in the Chinese and Western approaches to law and politics, but are there commonalities that are supported in the reality of Chinese reform?

The question of comparison is often as prescriptive as it is descriptive. Randall Peerenboom, however, has advanced a useful comparative distinction between the 'thick' and 'thin' rule of law. Peerenboom's analysis sees transparency as an important constitutive element of the rule of law, and his analysis offers a useful starting point for the discussion here. His analysis did not, for example, presume subscription to liberal democratic principles of election and separation of powers as prerequisites to a 'thin' as distinguished from a 'thick' formation of the rule of law. However, Peerenboom brought transparency together with procedural rule of law-making, equality before the law, legal stability, clarity and consistency, fair application and enforcement of law, and popular acceptance of law.¹⁰

Also, Peerenboom's controversial new book on judicial independence has suggested that there has been a lot of progress towards judicial independence that has gone unnoticed and he detects some weakness in related Western generalisations noting '... blanket denunciations of the lack of meaningful independence in China fail to take into account China's more complex reality'.¹¹

The analysis here probes the possibilities of a 'thin' transparency reform based on the new key principle in administrative law, namely, 'disclosure is primary and non-disclosure, exceptional'. Hu Jintao has given new priority to transparency in light of a political need for 'open public administration' as a means of combating corruption and maintaining Party legitimacy. Contemporary reform based on the 2007 OGI will be placed within the political context of a comparatively young, but fast modernising judicial

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 Background¹²

Modern transparency reform has to overcome a less than 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' (父母官) 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 upon the provision of instruction and example by their moral betters. The Confucian Analects instructed: 'The people may be made to follow a path of action, but they may not be made to understand it'.¹⁵ The citizen's 'right to know' was not needed to correct government. The law existed only to maintain the moral legitimacy of the state and to enhance dynastic control over society.¹⁶ The Emperor's subjects were not endowed with independent reasoning. In the instance of profligate imperial immorality they could explode with indignant rage, but this was symbolic. It was a reflection of the cosmological disorder that heralded dynastic decline. Moreover, the Emperor's officials were evasive in reporting popular discontent. Honest reporting could invite nervous imperial investigation and possible punishment for failed performance.

This was the historical and cultural legacy that was bequeathed to the Chinese Communist Party (CCP) in 1949. The CCP disavowed the shortcomings of the imperial tradition and called for an alternative mass activism in opposition to 'bureaucratism'. As Professor Stuart Schram put it, the Party's notion of mass-line politics represented a 'rupture with one of the central themes of traditional thought'. The people then became the 'source of good ideas from which correct policies are elaborated'. Not only did the people provide ideas, but they were to participate in the supervision of the state. The Party's mass line was premised on a theory of knowledge that 'scientifically' combined the general with the particular. This viewpoint presumed that the 'scientific methods of leadership' would enhance the Party's real links with the masses in opposition to 'bureaucratic and subjectivist methods of leadership'.¹⁷ Mao, however, supported Confucius on one key point: 'We should never pretend to know what we don't know, we should not feel ashamed to ask and learn from people below. [from the Confucian *Analects*] ... To do this will not lower one's prestige; it can raise it'.¹⁸ Ideally, Mao's mass line encouraged an honest work style that built on open criticism and self-criticism and the reporting of both good and bad news at all levels of government.

Does this revolutionary experience and thinking have contemporary relevance? Transparency *per se* was neither a virtue nor an issue in imperial China, but there was qualified support in the post-1949 mass line of the Communist Party for the later acceptance of incipient 'transparency' as politically expedient and necessary to 'open public administration'. In the 1990s Jiang Zemin formulated a thesis on how political parties lose power – a thesis on 'rise and fall'. Jiang believed that an honest style of government has always been an important factor for popular support, good government, and the stability and prosperity of society. Jiang repudiated bad cadres who came out when the sun was not shining and regarded their position, influence and conditions as their own 'vested interests' even taking 'these things as private property'.¹⁹

Hu Jintao has specifically endorsed 'transparency' (透明度) in the light of the transition from the revolutionary party of the 1950s to today's 'ruling Party' (执政党). Referring to the complexities of a new economic world that was witnessing an explosion in information technology, Hu acclaimed a new trend towards modern public

administration, and he tied conventional notions of cadre 'work style' (工作作风) 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'.²⁰ Subsequently, the 2005 white paper on building political democracy required an 'institutional guarantee' of 'open administration': 'The Chinese government requires its ... departments at all levels to make public their administrative affairs as far as possible, so as *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*'.²¹

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 October 2007 report to the 17th National Party Congress affirmed:

Power must be exercised in the sunshine to ensure that it is exercised correctly We will improve organic laws and rules of procedure to ensure that state organs exercise their powers and perform their functions and responsibilities within their statutory jurisdiction We will improve the open administrative system ... and increase transparency in government work thus enhancing the people's confidence in government.

Recently, the December 2010 white paper on corruption and clean government followed up on this reasoning when it emphasised: '... as sunshine is the best antiseptic, transparency represents the best supervision of power'. The White Paper stressed that 'government information ... should be made public in a timely and accurate manner with the requirement of making public as the principle and holding back as the exception, to guarantee the people's right to know, participate, express and supervise'.²² The White Paper, however, placed China's courts within a Party-led 'supervisory system with Chinese characteristics' that features 'both restraint and coordination among decision-making power, executive power and supervisory power to promote procedural power exercise[s] featuring transparency'.²³

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 'open by request' (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' as distinct from a 'pull model'.²⁹ The former is distinguished by the 'proactive 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 up–down and down–up actions, and the ‘open by request’ or apparently liberal-democratic ‘pull model’ 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, legal persons, or other organisations; information that needs to be extensively known by the public; information that shows the structure, function and working procedures of, and other matters relating to, administrative organs; and ‘other information that should be disclosed on the administrative organ’s own initiative according to the laws ...’. The inclusiveness of Articles 10 to 12 also suggests the primacy of disclosure in that administrative organs are able to disclose regulations, rules, economic, budget and development plans, emergency plans and family planning policies. Indeed, law and regulation that implements policy needs public awareness and compliance, and the OGI may have raised public expectations with respect to government transparency. However, the OGI did not really clarify where disclosure stops and non-disclosure begins.

The advance of a new principle regarding the primacy of disclosure did not guarantee the clarity and the scope of the OGI. The request for information was burdened with very generalised wording concerning the grounds for non-disclosure. The OGI itself did not, and indeed it could not, ensure forthcoming judicial review by the courts.³⁰ Under Article 8, administrative organs were instructed not to endanger state security, public security, economic security and social stability.

Weibing Xiao reacted negatively to the elasticity of such ‘broad and vague’ exemptions: ‘The definition of these securities is left to government agencies, and so can easily be used to refuse access requests’.³¹ Xiao claims that in practice, the ‘disclosure as principle’ is not materialised in the OGI articles and also that the central government revised related provincial regulations in Hebei, Hubei, Jiangsu and Liaoning so as to dilute original reference to such a principle.³² Also, the *Caijing* magazine editorialised that while the first three of these areas, state security, public security and economic security, were often touched on in OGI laws around the world, ‘social stability’ was an internationally unfamiliar category that is especially troublesome.

Professor Wang Xixin, Director of the Centre for Public Participation and Support, has similarly noted his concern that in China’s extraordinary developing context just about anything could relate to social stability. In order to facilitate the struggle against corruption, the State Council on 4 May 2011 specifically opened to the public, government budgetary information concerning official use of funds for overseas travel, the purchase and maintenance of cars, funding for visits to restaurants and ‘other administrative expenditures’.

Caijing criticism also focused on the law’s failure to clearly assign responsibility to disclose information. Alex Wong describes the following dilemma with regard to requests for environmental information: ‘Public requesters of information have found themselves in a twilight zone of non-disclosure in certain cases, with the Environmental Protection Bureau (EPB) claiming that the duty of disclosure rests with the enterprises and the enterprises claiming the duty rests with EPB.’³³ In the rest of the world, factory environmental data reported to the government is considered “government data” and the duty to disclose typically falls upon the government’.³⁴

The underlying problem of ultimate independent supervisory authority was revealed in Article 14 of the 2007 OGI. Each unit within state administration was authorised to

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.³⁵

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 listing's 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 imprisonment³⁶ and the death penalty. 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 state secrets to an agency or organisation or people outside China.³⁷ Article 219 of the 1997 Criminal Law regarded 'commercial secrets' as technical or business information that 'is unknown to the public and can bring economic benefit to the owner, is of practical use, and with regard to which the owner has attached secret-keeping measures'. The same Article assigned seven years imprisonment to anyone who a) acquires the business secrets of a person who enjoys the right to secret information by stealing, luring, forcing or any other improper means; b) reveals, uses or permits another person to use the business secrets of the person who enjoys the rights to secrecy; and c) reveals, uses or permits another person to use business secrets in violation of any agreement or in disregard of

the request of the person who enjoys the right to the protection of the same business secrets'.³⁸

Temporary remedy for the lack of clear law was offered just the day after the Stern Hu trial closed in 25 March 2010 with the 'Temporary Provisions on the Protection of Commercial Secrets in the National Level State Owned Enterprise'. The latter 34 provisions were issued as regulations by the State-Owned Assets Supervision and Administration Commission of the State Council, and this is the administrative agency that reviews in-house determinations by SOEs on complaint. Interestingly in-house decision about the classification of state secrets as well as commercial secrets is granted to SOEs that fall within the 'absolute' as distinguished from 'relatively strong' state control. Those SOEs under 'absolute' control also have the authority to engage a legal procedure that allows the re-classification of 'commercial secrets' as 'state secrets'.

In relation to their foreign competition, SOEs such as China Metallurgical, China Shipping, Petro China (CNPC) and the big commercial banks have a big stick which they can wield to protect their economic interests. The temporary provisions also require that SOEs adopt precautionary measures to protect 'commercial secrets' in dealings with third parties.

4. Administrative Judicial Review on OGI

Western legal experts and indeed China's 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 OGI-based 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's 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 standard of proof necessary to the successful appeal of administrative non-disclosure in the name of the public interest.

Moreover, the court has no jurisdiction to review classified state secrets information.⁴¹ Article 8 supported the state's prerogative to determine what is and what is not 'secret', but the people's court was mandated to make any related decision as to the disclosure of any of the three categories of secret.

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 need'. 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 in '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' (基本法律). 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

- 1 Randall Peerenboom, *China's Long March toward Rule of Law*, (Cambridge, NY: Cambridge University Press, 2002), p. 425.
- 2 S. Chun, S. Shulman, R. Sandoval and E. Hovy. 'Government 2.0: making connections between citizen data and government', *Information Polity*, 15 (2010), pp. 1–9.
- 3 Hu Jintao, 'Hold high the great banner of Socialism with Chinese characteristics and strive for new victories in building a moderately prosperous society in all respects', (15 October 2007), *Documents of the 17th National Congress of the Communist Party of China (2007)* (Beijing: Foreign Languages Press, 2007), p. 41.
- 4 State Council Information Office, 'China's efforts to combat corruption and build a clean government', Document, *China Daily*, 30 December 2010.
- 5 Jamie Horsley, 'China adopts first nationwide open government information regulations', <http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-government-information-regulations/>. Accessed 23 April 2011.
- 6 P. Hubbard, 'China's regulations on open government information: challenges of nationwide policy implementation', *Open Government: A Journal on Freedom of Information*, vol. 4, no. 1.
- 7 Horsley, 'China adopts first nationwide open government information regulations'.
- 8 J. Wanna, C. O'Faircheallaigh and P. Weller, *Public Sector Management in Australia* (Sydney: Macmillan Education Australia, 1994), p. 187.
- 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, December 2010.
- 14 On comparative legal cultures, see Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St Martin's Press, 1994), pp. 43–8.
- 15 As cited in the analysis of Stuart Schram, *The Thought of Mao Tse-tung* (Cambridge: Cambridge University Press, 1989), p. 86.
- 16 See Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State and Social Control in China* (Westport, CT and London: Greenwood Press, 1997), p. 10. Geoffrey MacCormack also makes the key additional point that the 'Confucianization of the law' allowed the judge and ruler to draw directly on their own morality 'in dealing with situations for which there is no legal rule exactly to the point'. Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh: Edinburgh University Press, 1990), p. 38, as discussed in Ronald C. Keith and Lin Zhiqiu, *New Crime in China: Public Order and Human Rights* (London and New York: Routledge, 2006), pp. 8–9.
- 17 On the mass line, see Stuart Schram (ed.), *The Political Thought of Mao Tse-tung*, rev. and enl. Edition (New York: Praeger Publishers, 1969), p. 317.
- 18 On learning from one's subordinates, see *Ibid*, p. 319.
- 19 Jiang Zemin, *Jiang Zemin On the 'Three Represents'* (Beijing: Foreign Languages Press, 2001), p. 133.

- 20 *CCP Central Committee Decision on Enhancing the Ability to Govern*, *Xinhua*, Domestic, 26 September 2004, p. 12, as discussed in Ronald C. Keith and Zhiqiu Lin, 'SARS in Chinese law and politics', *China Information*, vol. xxi, no. 3 (November 2007), pp. 403–24.
- 21 State Council Information Office, *Building of Political Democracy in China*, china.org.cn, 2005, p. 28. Author's italics.
- 22 Information Office, State Council, 'China's efforts to combat corruption and build a clean government', Document, *China Daily*, 30 December 2010, p. 10.
- 23 *Ibid.*
- 24 Horsley, 'China adopts first nationwide open government information regulations'. For discussion of how local policy is generated at the local levels and transmitted to the centre see Sebastian Heilmann, 'From local experiments to national policy: The origins of China's distinctive policy process', *The China Journal*, no. 59 (January 2008), pp. 1–30.
- 25 Horsley, 'China adopts first nationwide open government information regulations', p. 1.
- 26 'Regulations of the People's Republic of China on Open Government Information', adopted by the State Council on 17 January 2007 and effective 1 May 2008, English translation provided by the China Law Centre, Yale Law School, February 2009, p. 1.
- 27 Megan Carter and Li Yanbin, EU Information Society Project, 'Access to government information in Europe and China: What lessons can be learned?', November 2007.
- 28 Horsley, 'China adopts first nationwide open government information regulations'.
- 29 Weibing Xiao, 'China's limited push model of FOI legislation', *Government Information Quarterly*, no. 27 (2010), pp. 346–7. The push–pull dimension seems to converge with Mitchell Pearlman's distinction between 'dissemination' and 'disclosure'. Pearlman describes the former in terms of 'government on its own initiative making available information it believes the public ought to know' whereas the latter connotes 'the government's duty under FOI laws to provide information requested by members of the public'. See Pearlman, 'Freedom of Information', 2.
- 30 This point was raised by Tsinghua Law Professor Cheng Jie, as cited in 'China's Supreme People's Court to release judicial interpretations on open government information this year', <<http://www.greenlaw.org.cn/enblog/?=1138>>. Accessed 30 August 2011.
- 31 Weibing Xiao, 'China's limited push model of FOI legislation', p. 349.
- 32 *Ibid.*, p. 350.
- 33 Alex Wong, 'Progress and retreat for environmental transparency in China: Announcing the 2009–10 Pollution Information Transparency Index (PITI) Result', <http://switchboard.nrdc.org/blogs/awang/progress_and_retreat_for_envir.html>. Accessed 31 August 2011.
- 34 Alex Wong, 'China's Supreme People's Court to release judicial interpretations on open government information this year', <<http://www.greenlaw.org.cn/enblog/?p=1138>>. Accessed 15 August 2011.
- 35 Ni Hongtao, 'Yi shenqing xinxi gongkai susong zhounian niandu tiaocha baogao...' (Report on a year-end investigation of requests for information over the year), <<http://articlechinalawinfo.com/Article-Detail.asp?ArticleId=51570>>. Accessed 20 August, 2011.
- 36 See James Areddy, 'Beijing defines "commercial secret" in aftermath of Rio Tinto trial', *The Wall Street Journal*, 27 April 2010; and Lucy Hornby, 'China defines secrets after Rio Tinto trial', *Reuters*, 27 April 2010.
- 37 People's Republic of China, *Zhonghua remin gongheguo xingfa* (China's criminal law) (Beijing: Zhongguo fazhi chubanshe, 2011), p. 37.
- 38 *Ibid.*, p. 78.

- 39 Article 1, *Provisions for Several Issues Concerning Hearings of Administrative Cases Related to Government Information Disclosure*, Supreme People's Court, 12 December 2010, Covington & Burling LLP translation.
- 40 Ibid, Article 1 pp. 1–5.
- 41 Ibid, Article 5(3).
- 42 Eric Carlson, 'China's top court issues interpretations on transparency regulation', <http://www.fcpablog.com/blog/2011/8/25/chinas-top-court-issues-interpretation-on-transparency-regul.html>, accessed 30 August 2011.
- 43 Ibid.
- 44 Ibid.