

Paul Tsai China Center

耶鲁大学法学院蔡中曾中国中心

**China's Information Enterprise:  
From Freedom of Information to Social Credit to  
Data Governance**

Jamie P. Horsley

April 22, 2022

Paul Tsai China Center  
耶鲁大学法学院蔡中曾中国中心

**China's Information Enterprise:  
Outline**

- Chinese history of archiving and managing records within a culture of official secrecy
- China's FOIA: Launched nationwide in 2008 as part of larger open government project
- China's Social Credit System: Launched nationally in 2014 as disclosure-based regulatory initiative
- China's data governance regime: Development and Open Data vs. data sovereignty and security

Paul Tsai China Center  
耶鲁大学法学院蔡中曾中国中心

2

## Historical Antecedents

- China has a long history of keeping official records, dating back to writings found on oracle bones of the Shang Dynasty (1600 to 1046 B.C.)
- A common written language linked far-flung regions and diverse dynasties over time
- World's first FOI law, Sweden's Freedom of Press and Right of Access to Public Records Act of 1766, reportedly inspired by Tang dynasty's Imperial Censorate
  - Recorded official decisions and correspondence and also expected to criticize and expose misgovernance and corruption

## Historical Antecedents

- But most of the population was not very literate and generally no notion of "open government" or **freedom of information (FOIA)**, a technical term referring to public access to government-held records
- Also no concept of "right to know" (知情权)
- Confucian maxim that one should "let the people do things; do not let the people know things" (民可使由之，不可使知之) often quoted when discussing antecedents to China's FOIA
- Secrecy, rather than openness, characterized the traditional governance model
  - Early PRC legislation on **archives** management and safeguarding **state secrets** emphasized secrecy vs. disclosure
- With launch of "Reform and Opening" to the outside world [改革开放] in December 1979, China began promoting increased openness domestically, to support economic and social development

## China's Revolutionary FOIA

- The first transparency law may well have been the 1987 Trial Villager Committees Law
  - Called for directly elected villager committees to publish financial information so villagers could supervise village finances
- 13th Party Congress in 1987 called for an “open system” [开放制度], letting the people know about major matters and discuss major issues [重大情况让人民知道)
- Policy for “**open government affairs** [政务公开],” along with open factory, school, legislative and other affairs, gradually evolved through the 1990s, expanding from rural grassroots upward through the political hierarchy

## China's Revolutionary FOIA

- Why would authoritarian, secretive CCP promote transparency?
- The openness project was driven by multiple factors:
  - Transition from planned economy to more market-oriented mixed economy required public assume more economic and social responsibility
  - They needed information on which to base their decisions and 80% of information was said to lie in inaccessible government files
  - Growing foreign trade and investment, financial markets demanded transparency
  - Corruption concerns
  - Effective, responsive governance considerations: social stability
  - WTO requirements
- Enabled by Internet, “informatization” [信息化] and E-government

## China's Revolutionary FOIA

- China's first nationwide FOIA, State Council Open Government Information (**OGI** [政府信息公开]) Regulations, effective May 2008
  - Drew on experience under local legislation (Guangzhou 2002, Shanghai 2004, etc.), departmental rules, research of foreign legislation, etc.
  - Accelerated after international SARS crisis of 2003
  - Gave Chinese public unprecedented right to request government-held records made or obtained performing official duties ("**government information**"), and
  - Imposed obligation for government to disclose proactively and on request
- So-called "freedom of information" technically not same as freedom of expression, of speech, of the media, or a general "right to know"

## China's Revolutionary FOIA

- OGI Regulations, substantially revised in 2019, establish a *presumption of disclosure* of all government information, unless it:
  - Involves state secrets, commercial secrets, personal privacy, internal administrative affairs, or administrative law enforcement case files;
  - Involves in-process type information, such as pre-decisional drafts;
  - Might endanger *national security, public security, economic security, or social stability*; or
  - Is prohibited by other laws and administrative regulations from being disclosed
- They emphasize duty to *proactively disclose* wide range of information
- Public can *request* disclosable information not already made public
- Public can *appeal administratively* or *sue in court* when dissatisfied

## China's Revolutionary FOIA

- OGI a relative success:
- The public continues to use the OGI Regulations to file OGI requests and take agencies to court when they fail to deliver adequate information
- The project arguably has helped spur congressional, judicial, charitable, and even limited CCP transparency regarding its meetings and documents
- Scope of disclosable information has expanded over time
  - Example of administrative punishment decisions – imposing fines, license revocations, factory closures for legal violations
  - Early lawsuits seeking disclosure of such decisions to ensure fair treatment failed due to asserted privacy, commercial secrets concerns
  - Slowly recognized disclosure of **regulatory information** can incentivize compliance, help consumers and business partners make informed decisions, constrain agency abuse and promote government credibility

## China's Revolutionary FOIA

Disclosure of regulatory information is a major pillar of the controversial social credit system, our next topic

### Social Credit as Disclosure-based Regulatory Mechanism

- State Council establishing comprehensive social credit system (SCS, 社会信用体系) to build trust in economy and society riddled by fraud, counterfeiting and illegality:
  - “A market economy is a trust economy”
  - “Trust” is same term in Chinese as “credit” - *xinyong*, 信用
- “**Social credit**” of individual, company, organization, government refers to status of *compliance with legally prescribed obligations and performance of contractual obligations* in social and economic activities
- “**Social credit information**” is *objective data and materials* that reflect the status of a person’s compliance with law and performance of agreements
- Chinese leadership does also want to cultivate a culture of “credit- or trust-worthiness,” through promoting a culture of compliance

11

### Social Credit as Disclosure-based Regulatory Mechanism: What is SCS?

- I. **An information aggregation and sharing service** -- a “massive national API” in tech terms -- where the social credit platform aggregates [social] credit information uploaded by agencies, courts, companies, etc.
- Built around three distinct, pre-existing national databases:
    - Central bank financial credit reporting (征信) database on companies and individuals –not currently shared outside financial system
    - Market regulator corporate credit information publicity system (企业信用信息公示系统)
    - Court judgment defaulter blacklist database (失信被执行人名单)
  - Credit information fed into and available through national database, so regulatory agencies can determine where (which companies, sectors) to focus scarce regulatory enforcement resources

12

### **Social Credit as Disclosure-based Regulatory Mechanism: What is SCS?**

- Makes “public credit information” (PCI) available through public-facing Credit China platform for the general public to use in making purchase, business, investment and other decisions
- PCI (公共信用信息): credit information made or obtained by government through official duties – similar to “government information”
- Includes regulatory information on registration; enforcement judicial, administrative decisions; administrative licensing, punishment, inspection results; compliance with laws and regulations
- Disclosure to the public must comply with OGI Regulations
- In sum, SCS enables both regulators and the public to know more about the entities and individuals with which they deal

13

### **Social Credit as Disclosure-based Regulatory Mechanism: What is SCS?**

**II. A regulatory enforcement instrument** to incentivize compliance with laws and regulations, through

- **Publishing blacklists** of serious or serial violators of laws, regulations, contractual obligations, as determined through court judgments, administrative decisions
  - Earliest example Supreme People’s Court judgement defaulter blacklist (失信被执行人名单)
  - Market regulator 2 lists: abnormal operations, serious illegal and untrustworthy acts
- **Joint discipline (联合惩戒)** imposed by other agencies that agree to *enforce their own rules* relating to treatment of blacklisted persons for violating other relevant laws, regulations, contractual obligations
  - Ex.: disqualification from government procurement or listing securities for serious legal violations (that led to blacklisting)

14

## Social Credit as Disclosure-based Regulatory Mechanism: What is SCS?

**II. A regulatory enforcement instrument** to incentivize compliance with laws and regulations, through

- **Corporate public credit appraisal (公共信用综合评价)**: using PCI to classify/grade companies based on credit risk
  - Those with higher grades get relaxed supervision (e.g., fewer audits, inspections)
  - Those with lower grades subject to increased scrutiny
- Referred to as credit-based regulation (信用监管)

15

## Social Credit as Disclosure-based Regulatory Mechanism: What is SCS?

**III. Other aspects of this complex “system:”**

- Regulatory *incentives and conveniences* (redlisting) for those with good compliance records
- Basic safeguards: gradual “legalization” of SCS mechanisms
  - Public input on draft social credit-related rules,
  - Right to advance notice of proposed blacklisting
  - Right to file objection and complaint
  - Right to correct or delete erroneous information
  - Non-listing or removal from blacklist
  - Credit repair and credit commitments
  - Right to administrative appeals and litigation
- But still no SCS law *per se*, only legislation related to aspects of SCS

16



### **Social Credit as Disclosure-based Regulatory Mechanism: What SCS is *NOT***

- Contrary to many media analyses, SCS does *not*:
  - Aggregate data about each Chinese citizen's social, consumption and financial behavior
  - Generate social credit scores that could affect access to important services and opportunities
  - Use automated data collection; most information is manually input
  - Connect to facial recognition or real-time surveillance systems
  - Support direct input from sources other than government records relating to legal compliance, apart from voluntarily uploaded information
    - Private credit programs like Sesame Credit not part of SCS
  - Target or apply unfairly to foreign firms
- Also no evidence China is exporting the SCS, although cross-border financial credit reporting and rating cooperation reported

17

### **Social Credit as Disclosure-based Regulatory Mechanism:**

- To summarize, SCS is a massive information aggregation and sharing system, with implications for all the information protection issues identified in the OGI Regulations
  - Inter-bureaucratic competition, interoperability issues, understaffing, etc. stymying effort to build out interconnected, comprehensive SCS
  - Controversial aspects: blacklisting, joint punishment, public "shaming"
- Passing legislation on personal information protection and information security identified as important to completing the legal system for the SCS
- Indeed, critical to comprehensive information management, governance
- These issues often expressed as part of information or data governance, our next topic

18

## Developing Data Governance

- Data is the new information
- But how is “data” different from “information”?
- And does that distinction matter when trying to understand China’s emerging approach to regulating data and information?

19

## Developing Data Governance: Legislative Framework

- **OGI Regulations:** presumption of government information disclosure, with secrecy, security as exemptions
- **Cybersecurity Law:** equally stress cybersecurity and informatization development
  - Strong protection personal information and important data, including storage within China
  - Any sharing outside China subject to security assessment (CSL) or other measures, international treaties, agreements, reciprocity (DSL)
  - China to participate in international data security and exploitation cooperation, promoting cross-border security and free data flow
- **Data Security Law:** data security and protection vs. development
- **Personal Information Protection Law:** implements “fair information principles” permitting individuals generally to control use of, and obligates government and companies to reasonably use, their information

20

## Developing Data Governance

- From the perspective of legislation and policy relating to China’s emerging “data governance” system, data and information generally used interchangeably
  - Data Security Law defines “**data**” as used in that law as any record of *information* in electronic or other forms
  - Cybersecurity Law uses “**network data**” and “**important data**,” but “**personal information**,” defined as specified kinds of recorded information
  - PIPL similarly retains definition of **personal information** as recorded information that can identify natural persons
- These terms refer to recorded material, similar to concept in OGI Regulations of “government information” as records

21

## What is Data Governance?

- **Macro level** data governance is governing cross-border data flows by countries with norms, principles, rules on various types of data
  - China’s approach is described as **data sovereignty** - linking control of data and national security
    - Sharing of data within its borders to benefit development
    - Limiting cross-border data flows: cybersecurity and data security reviews and approval required
- PRC’s proposed **Global Initiative on Data Security**:
  - States to equally emphasize development and security, take balanced approach
  - Responsibility and right to ensure security of important data and personal information bearing on their *national, public and economic security and social stability* (OGI exception)

22

### What is Data Governance?

- At **micro level** is process of managing availability, usability, integrity and security of data in enterprise systems
- Same concept can apply to governments, like China, managing data and information
- Pending issues include ownership of data: are large data aggregations “public goods” to be owned by the whole people, like land?
  - Different from other country notions of data as property or intellectual property?

23

### Developing Data Governance

- Recall that public demands and experience under OGI Regulations and within social credit context prompted gradual expansion of more kinds of government information that are viewed as disclosable in ordinary course, and codification of a presumption of disclosure
- Gradual clarifications and legislation require government and other actors to observe principles of fairness, legality, necessity and minimization when processing personal information and to protect other confidential information as well as state secrets
- After establishing clear principles of data sovereignty and security, including data export controls, some experiments are underway with data exchanges within China and cross-border, under pressure for economic development and global commerce
  - DSL promotes “opening government affairs data” [政务数据开放], although without presumption of openness

24

## Developing Data Governance

- Reasonable expectation that China will eventually liberalize its data sovereignty approach to more reasonably balance security against demands of development and global commerce
- Current efforts include identifying what kinds of data should be opened and shared, since identifying data that should *not* be opened is more generic and complex; potential similarity to use of OGI to gradually narrow scope of state secrets
- But legislation puts CCP, not state, entities in overall charge of cyber and data governance
  - DSL makes data security assessment reviews final, by CCP entities, with no appeals or judicial review, which may slow the process of liberalization

25

## The Future of China's Information Enterprise

- PRC decisionmakers struggle with balancing data security and development, secrecy and transparency, in quest for social stability and economic development
- Lack of transparency of an increasingly intrusive CCP and proactive efforts to control information and silence voices on subjects and in situations deemed sensitive -- witnessed in increasing content regulation and evident in Shanghai's ongoing COVID battle -- illustrate tenacity of China's official culture of secrecy and control
- Nonetheless, China's evolving information enterprise, largely conforming to international principles, is bringing present benefits to its people, changing government and private expectations and practices, and laying a foundation for better governance whatever the future might hold

26