

RULE OF LAW

GUANGZHOU'S PIONEERING FORAY INTO OPEN GOVERNMENT

Jamie P. Horsley

New provisions

establish the people's

right to know

China's initial reticence in sharing information about the severe acute respiratory syndrome (SARS) epidemic highlighted anew the culture of secrecy that has for centuries shrouded the Chinese state and state-held information from not only the world but its own people as well.

Stung by strong domestic and international criticism, the central government ultimately directed governments at all levels to report information on SARS accurately, honestly, and in a timely manner, threatening harsh punishment for delay or cover-up.

The SARS episode is playing out against the backdrop of a movement for greater openness in government affairs, aimed at supporting China's economic development drive, helping curb official corruption, and providing a safety valve to dissatisfied citizens who increasingly demand more accountability from government at all levels. Bills calling for national legislation on government information transparency were submitted to several recent annual meetings of the National People's Congress. Indeed, a scholars' draft of national regulations to establish a Chinese-style "freedom of information" system is currently before the State Council for review. Ironically, given its subject matter, the draft's specific content is still not widely known and has been circulated only to selected scholars and government agencies for comment.

Guangzhou leads the way

Meanwhile, the Guangzhou municipal government made history by pioneering the first legislation aiming to institutionalize government transparency on a wide range of matters. Breaking the Chinese imperial and socialist traditions of government secrecy, the Guangzhou Municipal Provisions on Open Government Information (the provisions) establish a presumption that government-held information should be public, making nondisclosure the exception rather than the norm. Moreover, the provisions call on the government to release drafts of policies and regulations for public input before they are finalized and implemented.

The Chinese government has long been the primary repository, producer, and publisher of all kinds of information relating to social, economic, and political affairs. In recent years, as part of a drive toward what the Chinese call "informatization" (信息化, *xinxihua*), twin nationwide programs were launched to make government affairs more open to the people (政务公开, *zhengwu gongkai*) and to build "e-government" networks under which government agencies at the central and local levels would make an ever-increasing amount of information available, and provide administrative services, on the Internet. These projects

Information should be public, making nondisclosure the exception rather than the norm.

have made government more open—if not necessarily more accountable—to ordinary Chinese citizens. China's commitments under its World Trade Organization (WTO) entry agreement also require the country to make trade-related rules and requirements transparent.

But China lacks legislation in the area of government transparency and does not provide clearly for information rights. Efforts to promote greater transparency under the programs mentioned above have met with no small degree of resistance from officials accustomed to working behind a shield of secrecy. Statistics indicate that some 80 percent of all information is held by the government and that most of it is treated as non-public, thus impeding economic development. Chinese scholars point out that inaccessibility to relevant government-held information has led to economic losses and misallocations, corruption, and fraud, as well as policy-related constraints. Existing legislation, such as the 1988 Law on Guarding State Secrets, emphasizes confidentiality and secrecy, not disclosure of public information.

Guangzhou was one of the first jurisdictions to embrace the policy of making government affairs public, and undertook experiments in the late 1980s and adopted trial measures in 1992. To comply with WTO requirements and to gain even greater administrative efficiencies from enhanced transparency, the Guangzhou municipal government decided to formulate government information disclosure legislation that would standardize municipal practice and raise the standards for compliance. Drafted with the assistance of scholars from Guangzhou's Zhongshan University and taking account of international experience, the Guangzhou government announced the provisions to great public fanfare on October 30, 2002. They took effect on January 1, 2003.

This principle of openness reverses past practice, under which government agencies jealously guarded information about their functions, staff, expenditures, and programs, as well as many of their policies, regulations, and decisions, as "state secrets."

New information rights

The provisions contain two fundamental and novel ideas: that Chinese government agencies have an obligation to disseminate automatically, and disclose upon request, most of the information that they hold and that Chinese citizens have a right to access such information. The provisions aim to protect the "right to know" (知情权, *zhiqingquan*) of individuals and organizations. They refer to individuals and organizations as "persons with the right to access" (公开义务人, *gongkai quanliren*) and refer to all levels of government and its functional departments and organizations that carry out administrative powers as "persons with the obligation to make public" (公开权利人, *gongkai yiwuren*). The provisions establish unprecedented rights and obligations in the area of access to government information.

"Government information" covered by the provisions means information made, obtained, or possessed by all levels of government and its functional departments and related organizations in the course of managing or providing public services. It is unclear whether this definition covers every agency including, for example, the Ministry of Public Security and the People's Courts. Nonetheless, the provisions stipulate that government information shall in principle be made public, with nondisclosure only in exceptional cases. This principle of openness reverses past practice, under which government agencies jealously guarded information about their functions, staff, expenditures, and programs, as well as many of their policies, regulations, and decisions, as "state secrets." Moreover, the government must make such information available free of charge. Even foreigners are entitled under the provisions to access government information, subject to a reciprocity

clause.

The provisions diverge from comparable US legislation by describing in detail—possibly to drive home the point—the categories of information that the government must disseminate on its own initiative and in the ordinary course of managing or providing public services. This kind of information includes what is called "governance-related" information such as development plans, rules, and regulations; the functions and structure of government agencies and the resolution of major events; financial matters such as budget information and government expenses; government personnel-related information; and administrative procedures. Compared to the days when China first "opened up" in the early 1980s—when one could not obtain an organization chart of an agency, let alone a description of what various departments did, the names and telephone numbers of staff, or copies of laws and regulations in effect—the current openness in government information available online and the additional disclosure requirements of the provisions are nothing short of revolutionary.

The provisions also require agencies to notify persons in advance, and after a decision is made, of administrative actions concerning those persons in particular. The notice must include the name of the agency concerned; the procedures, basis, and reasons for making the decision; the decision itself; and the means and time period during which the person can take remedial action, if desired.

As for other types of information or information that should have been disclosed in the ordinary course of managing or providing public services but was not, citizens can file requests for disclosure. The relevant government agency must normally comply within 15-30 business days, depending on the type of information involved. One Guangzhou official illustrated the utility of this request procedure, noting that many Guangzhou citizens are now buying homes and want to know the development plans for various districts in the city where they are contemplating a purchase. Under the provisions, they can ask to see these and, if the government agency refuses to comply, they can turn to the courts for enforcement or seek administrative reconsideration.

The provisions further establish another new right: the right of any person to see information concerning himself or herself that a government agency possesses, as well as to request correction of any errors or inaccuracies in such information. Individuals have not had the right to review their personnel files, for example. This right is important to help establish the concept of and to protect privacy rights. The ability to correct personnel file information compiled by government employers is increasingly important as citizens seek to change jobs and as China begins to establish a credit reporting system that applies to consumers as well as to companies. Unfortunately, the provisions do not spell out time periods for correction or specific remedies if the government agency does not comply with the request. Nonetheless, the very articulation of this right is an important landmark.

Exceptions

The provisions set forth some general categories of information that are not subject to disclosure, including private information about individuals, commercial secrets, state secrets, information regarding matters under deliberation, and the catch-all categories of information relating to "social and public interests" and "other government information prohibited from being made public by law or regulation." One goal of international legislation in this area is to specify as precisely as possible the scope of necessary exceptions to the rule of openness, so as to prevent them from becoming huge loopholes for government nondisclosure. In China, the concept of a "commercial secret" has been under development for several years, although the precise contours are not yet well defined. But notions of individual privacy or the protection of personal data, nowhere clearly expressed in law, remain to be fleshed out (see *The CBR*, July-August 2002, p.36), and the determination of what constitutes a "state secret" is relatively broad under existing legislation and practice. Public health information—including information about diseases not yet listed as a contagion that should be announced to the public—is, for example, treated as a state secret under existing legislation. Certainly, the category of "social and public interests" also begs for clarification.

Public participation in decisionmaking

Another major innovation of the provisions is that of announcing "matters affecting important interests of individuals or organizations or that have a major social influence" before they are finalized and implemented for public input. Though the text of the article is unclear on this point, commentary about it by officials involved in drafting the provisions suggests that the "matters" include draft rules as well as policies and administrative decisions. The responsible government department is to publicize the proposed regulation, policy, or decision and its justification and make the final decision only after seeking "sufficient" public opinion and adjusting the proposal as appropriate. The concept, again, is revolutionary, but conforms to recent Chinese Communist Party calls for greater public participation in government affairs. Most of the media reports on the promulgation of the provisions praise this article, anticipating that it will permit "ordinary people" to participate in government decisionmaking and make governance more transparent and democratic.

Specific procedures on how to implement an advance disclosure system, which might include notice and comment procedures, advisory committees, and public hearings when called for, need to be worked out. Guangzhou might well look to the example set by the Shantou municipal government, also in Guangdong, which published its draft Open Government Information (OGI) Provisions on its website for public input. During a comment period of 14 days, comments could be directed either to the specified Shantou official at a given address or by e-mail. Shantou promulgated its OGI provisions, which are modeled generally on those of Guangzhou, with some substantive revisions made after initial publication on April 11, 2003.

Implementing openness

Under the provisions, "agencies in charge of openness in government affairs" implement the OGI system, and the legal agencies and supervisory departments supervise implementation. Reportedly, the Guangzhou municipal government has formed an Open Government Affairs Leadership Small Group (headed by the deputy mayor), the business office of which is located within the municipal government's powerful General Office. Presumably, this is the "agency in charge of openness in government affairs" in Guangzhou. The creation of new, specially designated and empowered institutions, independent of the bureaucracy holding the information, to implement the provisions might seem a preferable approach if Guangzhou wants to show it takes these new rights and obligations seriously. But new agencies require additional personnel and budgets, and by making use of existing entities, Guangzhou could move quickly to begin putting the new system in place.

The provisions require the relevant supervisory agencies to conduct periodic investigations, evaluations, and "democratic discussions" of; establish telephone and e-mail "hotlines" for citizen complaints about; and periodically appraise and assess the implementation of the OGI system at various levels of government.

Remedies

Those who are unhappy with a decision on making government information public have the right to request reconsideration, bring a lawsuit, or request compensation in accordance with the law. The provisions further stipulate that those who suffer economic injury because a government agency conceals information, provides false information, or reveals commercial secrets or private information concerning individuals should be compensated by that agency. The basis for civil recovery probably needs to be clarified before the courts will actually accept cases. Since Chinese law does not provide for any rights to information, or a "right to know," Chinese civil courts may, if past experience is any guide, feel uncomfortable dealing with uncharted new areas of law created by municipal-level rules before national legislation on the subject.

Toward greater openness

The Guangzhou provisions are an important first step on the road to a national open government information law and a broader system that empowers China's citizens to participate in the governance of their own lives and country. The provisions create new rights—the "right to know" and the right of access to government information. They fall short of what the national draft OGI regulations reportedly attempt to do—create new institutions to enforce these rights, such as a chief information officer or information commission to oversee implementation and handle complaints and a registry of information in an agency's possession. But as local legislation the Guangzhou provisions already face a considerable uphill battle in implementation, as vividly demonstrated by the recent struggle to obtain disclosure of accurate information about SARS, which is believed to have originated near Guangzhou and was initially treated as a state secret.

Public health crises lead to their own particular balancing of interest challenges around the world, but the SARS crisis revealed the depth of the problem of getting Chinese officialdom to share information fully and in a timely manner. Guangzhou and Guangdong provincial officials deserve praise for having held unprecedented press conferences to update the public about the disease within days of initial rumor-driven panic in February. Guangzhou's pioneering first legislative step to change an ingrained culture of secrecy also merits praise. It is important in and of itself and, in a country where local experimentation is often the precursor to national legislation, suggests that the central government may well soon follow.

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