**An Investigative Report on Judicial Review of Open Government Information Cases in China**

**Peking University Center for Public Participation Studies and Support**

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 An open government information (OGI) system embodies multiple institutional functions in modern public administrative systems. When state power is shifting to society, an OGI system is the pre-condition for public participation in state and social affairs management. In the process of reshaping administrative legality and paying more attention to democratic standards for legitimacy, OGI has the value of monitoring administrative agencies in discharging their duties lawfully and legitimately. OGI is the vehicle to achieve transparent governance in the sunshine.

 In the process of building and optimizing an OGI system, judicial review by courts over OGI cases plays an irreplaceable role. Therefore, it is urgent we rethink the status quo of judicial review of OGI cases through observing legal practices in China. It is paramount we understand the difficulties and solutions. Since June 2013, the Peking University Center for Public Participation Research and Supports (the Center) carried out surveys in Beijing, Shenzhen, Cangzhou and other places. The Center sorted out judicial review over OGI cases and studied and analyzed the difficulties of and solutions to OGI litigation.

1. Overview of judicial review of OGI cases
2. Rapid increase of OGI caseloads

 Since Regulations on OGI (the Regulations) were implemented in 2008, OGI caseloads have grown rapidly. For instance, in 2008, courts at all levels in Beijing Municipality tried only 10 OGI cases. In 2009, they heard 147 OGI cases. By 2010, the caseload grew 3.5 times to 503. The number continued to rise, reaching 578 and 551 in 2011 and 2012, respectively.

 A similar trend is seen in other places of the country. In 2008, courts in Sichuan province tried only one OGI case. The number of OGI cases heard by all levels of courts in that province grew to 15 in 2009, reflecting a rapid increase from a low level to a high number of OGI cases. In 2011, courts at all levels in Shenzhen Municipality tried only 33 OGI cases. The number jumped by 578.8% to 224 in 2012.

1. OGI cases often involve the basic welfare and benefits of the people

 Considering OGI case profiles over the last five years, the vast majority involve the basic welfare and benefits of the people. By way of example, In 2008 the courts at all levels in Guangzhou Municipality all together tried nine OGI cases, primarily addressing issues such as the rates of fees levied by the Municipal Utilities Bureau for digging up sections of roads; historical materials on property rights information; and the cost composition of the sales price for Ju De Hua Yuan Residence (a housing project for low-income families). In 2009, the city altogether tried three OGI cases, addressing dissatisfaction over information requested to be disclosed concerning administrative penalties, labor security, and historical materials on property rights. In 2010, the city tried six OGI cases, primarily addressing benefits for persons with disabilities, historical materials on property rights, urban-rural redevelopment etc. In 2012, the 17 OGI cases tried addressed issues such as compensation for appropriated lands, law enforcement by the Industry and Commerce Bureau, urban-rural redevelopment, education and environmental protection.

 A similar situation is seen in the judicial practice of all levels of courts in Zhejiang province. From May 1 2008 to May 31 2009, 87.04% of all OGI cases tried addressed issues such as land resources, planning, village and county governments, housing management, public security and other basic welfare and benefits matters.

1. Most court rulings resulted in “dismissal of the case”

 In practice, focusing on OGI cases, the court judgment results primarily include ruling to dismiss the case, deciding to dismiss the plaintiff’s claim, deciding to cancel the administrative act, deciding to find illegal behavior, or deciding to order the administrative organ to perform its duties. Data on court judicial review of OGI cases from the last five years show that, among the above results, most OGI cases resulted in dismissal of the case. Using as an example data on first-instance cases over the last three years in Beijing, out of 264 cases that were concluded by the courts at all levels in 2010, 234 cases were dismissed, constituting 88.6%. In 2011, the courts at all levels in Beijing dismissed 171 first-instance cases, which constituted 41.7% out of the 410 cases that were concluded, which was still the largest percentage among all types of judgment results. In 2012, out of 336 first-instance cases that were concluded in that Municipality, 131 cases were dismissed, constituting 39%, still the largest percentage among all types of judgment results.

1. Few cases where plaintiff prevails

 OGI cases grew rapidly after enactment of the Regulations. However, plaintiffs seldom prevailed. In Beijing, no plaintiff prevailed in all adjudicated first-instance OGI cases in 2008. Fourteen plaintiffs prevailed out of 264 cases in 2010 at the first instance (constituting 5.3%), and 59 plaintiffs prevailed among 336 cases in 2012 (constituting 17.6%).

1. Issues of judicial review in OGI cases

 Since enactment of the Regulations, the public had great expectations of promoting OGI. More citizens and civil society organizations began to request information from the government. Courts began to accept more OGI cases. The increase in OGI caseload is a new phenomenon and poses challenges.

1. Finding of “lawful rights and interests” in case acceptance

 Paragraph 2 of Article 33 in the Regulations allows citizens, legal persons and other organizations to apply for administrative reconsideration or to initiate litigation according to the law, if they believe the administrative agency has violated their lawful rights and interests through concrete acts in OGI work. This paragraph is the fundamental basis for accepting OGI cases. However, the Regulations do not further define “lawful rights and interests”. The *Supreme People’s Court’s Provisions on Certain Questions Concerning the Trial of Open Government Information Administrative Cases* do not define the term either. This abstract provision led to confusion over what constitutes “lawful rights and interests” in judicial practice. Some argue that “lawful rights” should be understood as provided in the Administrative Litigation Law, that is, “personal rights and property rights” (excluding a right to information). Hence, OGI cases are acceptable if “concrete administrative acts violate personal rights and property rights”. Some argue that the fundamental purpose of OGI litigation is to safeguard citizens’ right to information; hence cases are acceptable if citizens’ right to know is violated, irrespective of whether an agency’s OGI work violates the counterparty’s personal rights or property rights. For example, in Huang vs. Shanghai Pudong New District County X People’s Government (2010, appellate court), Huang failed to prove that County X People’s Government’s decision to deny disclosure had violated his personal and property rights. However, the court accepted the case and carried out a substantive trial. The case was dismissed but not on the ground of the case not being within the scope of acceptance.

1. Standing of the plaintiff

 Paragraph 2 of Article 33 of the Regulations grants plaintiffs’ standing in OGI cases to citizens, legal persons or other organizations, if they “believe concrete administrative acts by administrative organs in OGI work violate their lawful rights and interests.” Article 12 of the *Supreme People’s Court’s Interpretation of Several Issues Relating to the Administrative Litigation Law of the PRC*, stipulates: “citizens, legal persons or other organizations may initiate administrative litigation if their interests are related to concrete administrative acts and they do not agree with such acts”. Therefore, whether interests are related to OGI work and whether they constitute lawful rights and interests are the keys to granting plaintiffs’ standing. However, a problem will arise as a result: Is it a precondition to have “lawful rights and interests” violated and have “rights involved” as defined by the Administrative Litigation Law? The Supreme People’s Court’s Interpretation defines “involved rights” as violation of personal rights and property rights. It is not clear if a right to information can be considered as “rights involved”.

 Some argue that the counterparty shall meet two preconditions to enjoy plaintiff’s standing. Others argue that plaintiff’s standing shall be granted if either of the preconditions is met. In Shenzhen Huabanli Garden Residence Residents’ Committee vs. Shenzhen Municipal Planning Bureau Longgang Sub-bureau, the defendant was charged with inaction in OGI work. The Chaoyangli Yayuan Residence (which was under construction) was close by Huabanli Garden Residence. The plaintiff believed once the new residential buildings were constructed, municipal roads in-between the two residential complexes might be too narrow, fire-fighting roads blocked and buildings too close to each other. The plaintiff (representing 530 homeowners) filled out an OGI Request Form of the Shenzhen Longgang District Government, requesting the Shenzhen Municipal Planning Bureau Longgang Sub-bureau to disclose urban planning information in written form or on a CD-ROM. The court decided “the plaintiff request for planning information relating to two residential complexes for the purpose of assessing the legality and compliance of planning information kept by the defendant, so that the plaintiff may obtain evidence for seeking further remedies. The plaintiff’s right to information must be given due attention and guaranteed by the judicial organs to render such lawful rights real”. It is clear that in this case, the court paid attention to the violation of the right to information, i.e. violation of the counterparty’s lawful rights and interests grants plaintiff standing to the counterparty.

1. “Information does not exist”

 According to Paragraph 3 of Article 21 of the Regulations, an administrative organ may refuse to disclose requested information on grounds that it “does not exist.” In reality, “information does not exist” has been frequently used in carrying out OGI work and is even the primary reason for denying disclosure. For example, from January to May 2012, among 62 OGI cases accepted by the Shanghai Pudong New District Court, six were denied for “not government information”, two were denied straightforwardly, nine were denied for “not within the jurisdiction? of the organ”, 17 were disclosed proactively or upon request, two were denied for “request is not up to standard”, two were denied for “not for open disclosure”, two were denied for other reasons; and 22 were denied on the basis that the “information does not exist” (35.5% of total, the largest share among all reasons for denial). In the same vein, 16,468 OGI cases [requests?] were accepted and closed by Beijing government agencies in 2012. 4,130 were denied on the basis that the “information does not exist”, 297 were denied for “not government information”, 2016 were denied for “not within competence of the organ”, and 421 were denied straightforwardly.

 “Information does not exist” as raised by administrative agencies includes five scenarios: First, “government information does not exist” – the name of the government agency requested is not accurate so after search, no information conforming to the request was found. Second, “government information does not exist” – the agency does not have the competence over the creation or record keeping of the requested information. Third, “government information does not exist” – the agency has the competence over the requested information but did not create or keep the requested information. Fourth, the agency did create or access the information but due to destruction or failure to recording, the information no longer exists. Fifth, the information does exist but the agency claims its non-existence for certain purposes. The Regulations and the *Supreme People’s Court’s Interpretation on Several Issues Relating to Administrative Litigation Law of the PRC* do not provide solutions to the five scenarios above. How courts deal with these issues in judicial practice is debatable.

1. Scope of disclosure for deliberative information

 Article 8 of the Regulations says: “The disclosure of government information may not harm state security, public security, economic security or social stability.” Paragraph 4 of Article 14 says: “Administrative organs may not disclose government information relating to state secrets, commercial secrets or personal privacy.” The two clauses set the general boundaries for OGI. However, some practical issues arise, in particular, whether internal documents and deliberative information shall be disclosed. The Regulations does provide for the timing of disclosure of “information created or assessed by administrative agencies in discharging their duties”. Shall the information be disclosed after deliberation? Shall all links of deliberation be disclosed?

 Some argue that such information may not be disclosed. Once disclosed, the decision-making process will be affected and decision-makers will not speak their minds freely during deliberation. In Yuan Yulai vs. Anhui Provincial People’s Government (inaction in OGI work, appellate court), the court decided the requested information constituted internal reports, because the agency was not sure of certain legal and policy issues and consulted the opinions of the higher level agency for the purpose of appropriately handling administrative reconsideration cases. Since no final decision was reached for the case, the requested documents may affect the case. It was not certain if the documents may be kept confidential or issues as generally-binding decision. Therefore, such information should not be disclosed.

 Others argue that any government information not exempted by the Regulations shall be disclosed. In Yuan Yulai vs. Anhui Provincial People’s Government (inaction in OGI work, appellate court), the agency denied disclosure on the grounds that government internal documents were not open for reading and not within the scope of OGI. The court did not support the agency’s position and decided “the defendant failed to prove the documents are internal and accessible to small number of staff and not in the scope of OGI”. If the agency fails to prove the requested information involves state secrets, commercial secrets or personal privacy, it may not deny its legal duty by stating that such information is for internal reading only, and the people’s court will not support its defense.

1. OGI litigation and resolution of the substantive dispute

 One of the purposes of OGI litigation is to “close the case and resolve the issue” between administrative agencies and the counterparty, hence alleviating the plaintiff and defendant’s litigation burden, saving social and judicial resources, and preventing administrative disputes from escalating into social destabilizing factors. However, from the judicial practice in the last few years, such purpose was not realized. OGI litigation failed to resolve the substantive dispute. The plaintiff often starts litigation not intending to assess information only. Rather, the plaintiff intends to use it as a “tool” to safeguard compensation for appropriated property, to reveal government misconduct or to achieve other goals.

For instance, since 2008, 14 OGI cases were accepted since 2008. 12 were accepted in 2009-2020 (85.7% of total). Infrastructure construction sped up in 2009 and 2010. More administrative acts were taken such as land appropriation and property demolition and relocation, hence more OGI cases. Most of the cases accepted by the court arose from land appropriation acts. A similar trend was obvious in Nanjing. Among 49 OGI cases from 2008-2010, 34 (69.39% of total) were arising from land and property appropriation.

 Such phenomenon is common in individual OGI litigation. For example, in Huang vs. Shanghai Pudong New District County X People’s Government” (2010), Huang believed the retrofitting of nine groups of warehouses in Henggang Village violated the law and reported it to relevant agencies. Huang filed a case against the government not purely for obtaining information; rather, the plaintiff wished to determine the illegality of warehouse retrofitting. Again, in Wang Changbing etc. vs. Nanjing Jiangning District People’s Government on land appropriation, the plaintiff filed the case in order to protect lawful rights and interests, i.e. obtaining compensation for appropriated land. OGI litigation was only a tool to achieve the plaintiff’s goals.

 In similar OGI litigation, if the plaintiff does not believe his goals are achieved, the plaintiff may continue to adopt other measures even if OGI disputes are fully settled. This may explain why plaintiffs may continue to appeal or attempt to reopen a case even if the OGI disputes have been settled.

1. Recommendations for OGI judicial review
2. Broaden the definition of “lawful rights and interests” in Article 33 of the Regulations

 Paragraph 2 of Article 33 of the Regulations says: “Citizens, legal persons or other organizations may apply for administrative reconsideration or start litigation according to the law if they believe concrete administrative acts by administrative organs in OGI work violate their lawful rights and interests”. The definition of “lawful rights and interests” determines the scope of OGI case acceptance. It is critical for OGI judicial review. We hold that citizens’ right to know is the cornerstone for OGI system, the fundamental precondition for citizens’ participation in state and social affairs management, and the necessary tool for building a government under the “sunshine” and elevate administrative transparency. The purpose of the Regulations is to safeguard right to know, and encourage citizens to participate in state and social management and to supervise administrative organs in discharging lawful duties. Therefore, compared with common administrative litigation, OGI litigation gives more stress on the right to know. “Lawful rights and interests” should include the right to know. If “lawful rights and interests” in the Regulations exclude the right to know and are only limited to “personal rights and property rights” (as defined in Administrative Litigation Law), the Regulations would be devalued and inconsistent with the intention of the legislature.

1. Soundly define the standing of plaintiff

 The first question is to determine if the plaintiff’s “lawful rights and interests” are harmed and concurrently “at stake” (in a legal sense, i.e. Administrative Litigation Law). We hold that in reality, the counterparty’s right to know is often harmed in OGI cases. If the court reviews the plaintiff’s standing and assesses the “stake” in a legal sense, i.e. Administrative Litigation Law, the plaintiff’s right to know is not remediable, which does not conform to the purpose of the Regulations. Therefore, meeting either of the two preconditions (“lawful rights and interests harmed” and “legally at stake with OGI work”) shall grant plaintiff standing.

1. Differentially handle the “information does not exist” scenarios

 We believe that these scenarios must be handled differentially instead of uniformly. Scenario 1 – If the requester does not provide corrected information and sticks with the inaccurate request after the agency informed him of the inaccuracies, and the agency replies with “information does not exist”, the court shall find the information does not exist and dismiss the case. Scenario 2 – If the requested information truly does not fall into the competence of the agency, the agency may not reply with “information does not exist”; rather, “not within the agency’s competence”. The agency shall consult the Regulations and the Decision and determine which agency has competence over the information. If another agency is identified, the agency shall inform the requester the name of the competent agency and channel of application with it. Scenario 3 – If the defendant can provide evidence of its due cause in searching for the requested information and failure to locate the information, the court shall support its reply of the “information does not exist”. At the same time, the plaintiff may seek other remedies for the defendant’s “failure to create information which otherwise shall be created”. Scenario 4 – The agency may reply with “information does not exist”. However, it shall explain the reasons and undertake the burden of proof in OGI litigation. Scenario 5 – If the requested information exists but involves state secrets and personal privacy which are exempted from disclosure, the agency may reply with “exempted for involving state secrets” etc. instead of “information does not exist”. If dereliction of duty is found instead of exemption, the court shall revoke/overrule the reply or find the reply illegal.

1. Properly handle deliberative information

 Deliberative information is a borrowed concept from the U.S. Freedom of Information Act. The two arguments seen in judicial practice regarding this type of information are both reasonable. However, both arguments deviate from a fundamental fact – disclosure of deliberative information will prevent decision-makers in speaking their mind. If every link of government information collection is open, administrative acts cannot be carried out and efficiency is impaired. There are exceptions to this regulation. First, factual materials in deliberation may be disclosed since facts are not thoughts and facts collected in all links of the deliberation should be disclosed. Second, once elevated to laws, policies or judicial interpretation, thoughts of the decision-makers should be open and disclosed as general legal or policy opinions, with specific names and personal identifiers redacted. Therefore, the court must differentiate government information. While considering the principle of the “three securities and one stability”, the court should not allow the agency to simply refuse to disclose “deliberative information”. The court should first differentiate various types of information and facts and thoughts which elevated to laws should be open.

1. Mediate substantive disputes within the court’s competence

 If some plaintiff wishes to use OGI litigation as a “tool” to resolve land appropriation disputes or other substantive matters, the court may adjudicate the OGI case according to the law. At the same time, the court may within its competence mediate the substantive disputes behind the OGI litigation in order to “close the case and resolve the issue”. Courts in Nanjing and other localities already experimented with this approach and obtained good results. OGI and substantive disputes are mediated and judicial resources are saved. Society is more stable. In Nanjing, 30 [OGI] cases were withdrawn between 2008 and 2010. Among them, nine cases were mediated by the courts (30% of all withdrawn cases). The substantive disputes were resolved and all matters settled during case closure.