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China Deepens Its Disclosure Regime

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Even as the Chinese Government continues to restrict freedom of expression and freedom of the press, it is gradually expanding the scope and depth of Chinese citizens' access to government-held information in potentially significant ways.

On March 17, 2014 China's State Council General Office, which oversees implementation of the Regulations of the People's Republic of China on Open Government Information (OGI), issued the third set of annual priorities for OGI work by central government departments and provinces throughout the country. They aim to enhance transparency of government's exercise of administrative powers, the management and use of public funds, the distribution of public resources, the delivery of public services and public supervision information including pollution data, industrial accidents, food safety and credit information, and require year-end reports to the General Office on how these priorities were implemented during 2014.[1]

Two Policy Trends

The State Council's 2014 OGI Priorities reflect at least two general policy trends.

One is the theme of releasing information of broad concern to the public quickly, comprehensively and accurately, while anticipating and managing public opinion so as to preserve social stability. The document repeats calls made by the Communist Party's Central Committee and the State Council over the past few years to help accomplish this goal of preserving social stability by releasing more information, including relevant background materials, accompanied by explanations and responses to public concerns, so that the public will "know and understand" the government's actions or decisions.

A second major trend reflected in this document is to provide more information concerning specific administrative actions that government takes in its daily work, including information concerning the government approval and licensing process and about administrative penalty decisions.

While such broad policy statements like those set forth in the 2014 OGI Priorities are important signals of leadership concerns and attention, the State Council also recently released a more specific instruction that calls for disclosure within 20 days of decisions to impose administrative penalties such as fines and license revocations on individuals and entities for violations relating to the manufacture and sale of counterfeit and substandard goods and infringement of intellectual property rights. [2]

This penalty disclosure instruction, called Trial Opinions, was issued by a "Leading Small Group" chaired by Vice Premier Wang Yang that coordinates the fight against counterfeiting and the infringement of intellectual property rights, particularly relating to food, drugs, cosmetics, agricultural and construction materials, mechanical and electrical equipment and auto parts, and appears to be the first specific central leadership guidance on disclosing penalty information.

The English language Xinhua News Service hailed this as a move to "improve China's market climate" and "step up government transparency," [3] while the official People's Daily listed multiple important benefits from disclosing such enforcement information, including: warning operators, protecting consumers, constraining enforcement agencies, promoting government credibility within society, creating a society of shared participation in fighting and curbing counterfeiting and IP infringement, and safeguarding the public's rights to know and supervise government. [4]

Regulatory Disclosures Emphasized

These policy rationales echo U.S. President Barack Obama's 2011 Presidential Memorandum on Regulatory Compliance, [5] which lists important benefits from disclosing information about regulatory compliance and enforcement activities, which in the United States include regulatory inspections, examinations, warnings, citations, and license revocations. Such disclosures, the Memorandum articulates, foster fair and consistent enforcement of

important regulatory obligations, increase public safety, provide information the public needs to make informed decisions and help level the playing field among regulated entities by ensuring that those that fail to comply with the law do not have an unfair advantage over their law-abiding competitors.

Since China's OGI Regulations took effect in 2008 (See FreedomInfo.org report in 2007 and anupdate in 2010), many Chinese requesters have sought disclosure of government penalty decisions in order to determine if they or their clients were being treated fairly as compared to other alleged wrongdoers or as a matter of public interest in how governments at various levels are exercising their discretionary authority to impose penalties, with mixed results. The OGI Regulations do not explicitly call for disclosure of the full text of decisions taken by government agencies in the daily course of business, nor does China's Administrative Penalty Law address the disclosure of final penalty decisions other than to the parties directly involved. Some central government ministries and local governments have provided penalty information in varying detail both proactively and when requested by Chinese lawyers and ordinary citizens, such as publishing recalls of and warnings about some products and at least summary information about violations and penalties imposed on restaurants, factories, and polluting enterprises.

Refusal of Information Common

However, many government agencies have refused such requests on grounds ranging from failure of the requester to demonstrate a direct "special need" for the information as required by the OGI Regulations; an asserted requirement to obtain prior consent from the penalized party, because such information implicates privacy or commercial secrets issues; concern that release of such information would negatively impact the local economy; and contending that such information is not within the scope of "government information."

Thus, the endorsement of proactive disclosure of enforcement decisions and details by the Chinese government reflects a major conceptual breakthrough in recognizing that such disclosure is a useful regulatory tool to both protect the public and incentivize regulated entities to comply with the law in order to preserve their market reputation and sales.

The 21-article Trial Opinions call for disclosure of the penalty decision or its contents including the document number; the names of the natural person or other entity being penalized; major facts about the violation of laws, regulations or rules; the category of and basis for the penalty; the method and time period for carrying out the penalty; and the name of the enforcement agency making and date of the penalty decision. Commercial secrets and private information such as the address, portrait, telephone number and assets of individual violators or officers are to be protected. The Trial Opinions also exempt from disclosure a penalty decision that would be deemed to leak state secrets, harm national politics or economic security, or influence social stability.

While these are very broad categories of exemptions, the Trial Opinions would at a minimum seem to preclude an enterprise or individual from claiming that information about and the actual penalty decision are by their very nature state secrets, commercial secrets or private information and to require some level of justification for any claim for exemption from disclosure.

The Trial Opinions thus represent an important advance over current views that penalty information, reflecting negatively on the penalized person, should be kept confidential so as to preserve the reputation of the violator and prevent market disruption or public "confusion" over what the penalty means.

Environmental Disclosures Ordered

In the midst of an environmental crisis with staggeringly unhealthy levels of air, water and soil forms of pollution, China's Ministry of Environmental Protection (MEP) similarly committed in 2013 to disclose at least summary details about actions taken against polluters. In fact, MEP's own administrative penalty measures issued in 2010 do call for disclosing penalty decisions, although not necessarily the decision document itself, and MEP has been publishing selected penalty decision documents since 2004 on its website at http://hjj.mep.gov.cn/hjzf/xzcf/index.htm, and has recently issued documents calling for increased disclosure of enforcement information, including inspections and penalties. [6]

Nonetheless, environmental activist Ma Jun, Director of the non-governmental Institute of Public and Environmental Affairs, has observed that most cities in China have not yet achieved substantial progress in disclosing key information such as penalties and records of environmental violations and enforcement actions that the public needs to hold polluting companies and government regulators accountable. [7]

Hopefully, implementation of the Trial Opinions against the policy backdrop articulated in the State Council 2014 OGI Priorities will help open the door for ever more daring disclosure of penalty and other enforcement information in the environmental as well as food and drug safety and other targeted fields. Hopefully, these documents will also give the

Chinese government at all levels the confidence to move forward with also disclosing decision documents and background materials relating to licensing approvals and revocations, [8] administrative reconsideration cases and other kinds of government decision documents, just as the Chinese Supreme People's Court has undertaken to disclose judicial decisions online, [9] to help give the Chinese public the information they need to protect themselves and comply with the law, to incentivize regulated enterprises to better understand and comply with the law, and to let Chinese citizens know what those regulated enterprises and their government are doing. China Daily article:

More info will improve China's market climate

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(Xinhua)

BEIJING – To improve the market climate in China, manufacture of counterfeit or shoddy goods and intellectual property rights (IPR) violations, will be made public.

According to a document endorsed by the State Council, China's Cabinet, information about the manufacture and sale of counterfeit or substandard products, as well as IPR infringements, will be disclosed to the public following legal procedures within 20 working days of an administrative decision.

The move is part of efforts to step up government transparency, and is expected to help promote development of a credit services market.

Case details, penalties and evidence will be made public via government websites, bulletins, press conferences, newspapers and magazines, radio and television.

Footnotes

[1] Didi Kirsten Tatlow, "Chinese Government Expands Freedom of Information, New York Times, April 2, 2014, at: http://sinosphere.blogs.nytimes.com/2014/04/02/chinese-government-expands-freedom-of-information; Chinese text of the document, 国务院办公厅关于 2014 年政府信息公开工作要点的通知 [State Council General Office Notice on 2014OGI Work Priorities], Doc. Guobanfa [2014] No. 12, at: http://www.gov.cn/zhengce/content/2014-04/01/content_8728.htm.

[2] Notice of Trial Opinions on Disclosing in Accordance with Law Information Concerning Administrative Penalty Cases of Manufacturing and Selling Counterfeit and Substandard Goods and Infringement of Intellectual Property Rights [国务院批转全国打击侵犯知识产权和制售假冒伪劣商品工作领导小组《关于依法公开制售假冒伪劣商品和侵犯知识产权行政处罚案件信息的意见(试行)》的通知], Doc. Guofa [2014] No. 6, February 4, 2014, at: http://www.gov.cn/zwgk/2014-02/19/content_2612388.htm.

[3] "More info will improve China's market climate," China Daily, February 20, 2104, at:

http://www.chinadaily.com.cn/business/2014-02/20/content_17294045.htm.

[4] 国务院批转意见规定: 假冒伪劣和侵权行政处罚案信息须公开, People's Daily, February 20, 2104,

at: http://politics.people.com.cn/n/2014/0220/c1001-24410436.html.

[5] January 18, 2011, at: http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance.

[6] See, e.g., "China urges improved environmental information disclosure," November 1, 2012, China Daily, at: http://www.chinadaily.com.cn/business/2012-11/01/content_15866125.htm, and Chinese text of MEP Notice on Strengthening Work on Environmental Regulatory Information Disclosure of Pollution Sources, July 12, 2013, at: http://www.zhb.gov.cn/gkml/hbb/bwj/201307/t20130717_255667.htm.

[7] Liu Wei, "一批城市污染源信息公开不进反退,"China Youth Daily, April 1, 2013, at: http://zqb.cyol.com/html/2013-04/01/nw.D110000zqqnb_20130401_1-05.htm.

[8] Article 40 of China's Administrative Licensing Law requires the licensing agency to disclose its decisions and gives the public the right to consult them. However, to date the increasingly available information about licensing decisions has been summary in nature, not disclosure of actual decision documents and backup materials.

[9] "Chinese courts to publish judgments online," China Daily, November 28, 2013,

at: http://usa.chinadaily.com.cn/china/2013-11/28/content_17138833.htm.

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