

# IMPLEMENTATION OF CHINA'S 2007 OPEN GOVERNMENT INFORMATION REGULATION

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## I. INTRODUCTION

In 2007, the People's Republic of China adopted the Open Government Information Regulation, China's first nationwide regulation designed to make government information more accessible to the public.<sup>1</sup> This regulation takes a dual approach to greater transparency. First, it requires government agencies to disseminate certain information on their own initiative.<sup>2</sup> Second, it requires government agencies to make disclosures in response to requests for information by "citizens, legal persons and other organizations" within 15 to 30 days.<sup>3</sup> The government's actions under the regulation are subject to judicial review.<sup>4</sup> This paper will review the law's implementation both in and outside the courts. Overall, China's 2007 Open Government Information Regulation is an important step in China's move towards greater transparency, but needs broader judicial application to be an effective tool in tough cases.

## II. IMPLEMENTATION OF SELF-INITIATED DISCLOSURES

Articles nine through twelve of the Open Government Regulation provide certain requirements for government self-initiated disclosures. Each article emphasizes different objectives of what should be opened depending on the level of government, whether an administrative organ (Article 9), county-level or higher (Article 10), county-level and city-

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\* University of California, Hastings College of the Law, Class of 2012. I dedicate this article to my maternal grandparents, William R. and Alma C. Spidell, in appreciation of their generous and unwavering love and support.

1. Zheng fu xin xi gong kai tiao li (政府信息公开条例, 国务院令 (第492号)) [Regulation on Open Government Information] (promulgated by the St. Council, Apr. 24, 2007, effective May 1, 2008), (Lawinfochina) (China) [hereinafter OGI Regulation]; Horsey, Jamie P., *China Adopts First Nationwide Open Government Information Regulations*, FREEDOMINFO.ORG (May 9, 2007), [http://www.law.yale.edu/documents/pdf/Intellectual\\_Life/Ch\\_China\\_Adopts\\_1st\\_OGI\\_Regulations.pdf](http://www.law.yale.edu/documents/pdf/Intellectual_Life/Ch_China_Adopts_1st_OGI_Regulations.pdf).

2. See OGI Regulation, *supra* note 1 at arts. 9–12.

3. See *id.* at arts. 13, 21.

4. See *id.* at art. 33.

divided-into-districts-level (Article 11), or township-level (Article 12). Each level of government formulates its own OGI plan or implementing statute under the regulations. Accordingly, governments have enacted such statutes.<sup>5</sup> According to jurists at the Zhengzhou Intermediate Administrative Court, the lower the level of government, the more openness is required, because it is more likely that the issue relates to individual need: For example, land takings compensation or one-child policy information.<sup>6</sup>

The implementation of government self-initiated disclosures in cities like Shanghai demonstrates the many challenges and sheer magnitude of such an undertaking. From May 1, 2008, to December 13, 2009, Shanghai established 641 locations to provide information and handle information requests.<sup>7</sup> As of the end of June 2009, Shanghai opened nearly 450,000 items of self-disclosed government information, 95 percent of which was done electronically.<sup>8</sup> In other places, statistics from 2008 indicate that year that Hubei Province opened 1,890,000 documents, Shandong Province 1,749,478 documents, Jilin Province 679,225 documents, and Hunan Province 223,256 documents.<sup>9</sup>

In their implementation of the OGI Regulation, some local governments have included open government information performance as part of their formal work unit evaluations. Fuyang City, Anhui Province's most populous city, population 9.5 million,<sup>10</sup> published an order granting the public rights to appraise whether the OGI enactment of various

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5. For an example of a provincial government's implementation statute, see, e.g., Hunan Sheng shi shi "guo zheng fu xin xi gong kai tiao li" ban fa (湖南省实施《国政府信息公开条例》办法, 湖南省人民政府令(第245号)) [Hunan Province's Method for Implementing the Open Government Information Regulation] (promulgated by the Standing Comm. Provincial People's Gov't Oct. 27, 2009, effective Jan. 1, 2010) (Lawinfochina) (China). For a city's, see Haikou Shi zheng fu xin xi gong kai gui ding (海口市政府信息公开规定, 海口市人民政府令(第75号)) [Haikou City Government Information Disclosure Provisions] (promulgated by the Haiku Municipal People's Gov't Sept. 10, 2009, effective Nov. 1, 2009) (Lawinfochina) (China).

6. Wei Liping & He Shijun, *Zheng fu xin xi gong kai an jian yi nan wen ti chu tan* (政府信息公开案件疑难问题初探) [*Beginning Explorations into Difficult Government Information Disclosure Cases*], Zhengzhou Intermediate Court Administrative Chamber, at section 1.2, ¶ 8 (Apr. 28, 2009), <http://hnfy.chinacourt.org/public/detail.php?id=81031>.

7. *Shanghai zhu dong gong kai zheng fu xin xi jin 45 wan tiao* (上海主动公开政府信息近45万条) [*Shanghai Self-Initiates Disclosure of Nearly 450,000 Items of Government Information*], FAZHI RIBAO (法制日报) [LEGAL DAILY], ¶ 2 (Dec. 14, 2009), [http://www.ahfzb.gov.cn/common/content\\_view.php?filename=0912151026030](http://www.ahfzb.gov.cn/common/content_view.php?filename=0912151026030) [hereinafter *Shanghai Self-Initiates Disclosure*].

8. *Id.* at ¶ 3.

9. Zhou Hanhua (周汉华), *Zheng fu xin xi gong kai tiao li shi shi de wen ti yu due ce shen tao* (政府信息公开条例实施的问题与对策探讨) [*Problems and Countermeasures of the Implementation of Open Government Information Ordinance*], Fazhi Ribao (法制日报) [LEGAL DAILY], § (2)(C) (Feb. 21, 2010), [http://www.legaldaily.com.cn/government/content/2010-02/21/content\\_2060728.htm?node=21494](http://www.legaldaily.com.cn/government/content/2010-02/21/content_2060728.htm?node=21494) [hereinafter *Problems and Countermeasures*].

10. Fuyang Shi ren min zheng fu zou jin Fuyang shi zhang zhi ci (阜阳市人民政府走进阜阳市长致辞) [Fuyang City People's Government Homepage, Mayor's Introduction to the City], <http://www.fy.gov.cn/MrMayor> (last visited Mar. 4, 2010).

government departments in the city are accurate, timely, and compliant with applicable law.<sup>11</sup> If the satisfaction rating is low, that departmental work unit will lose that year's "appraised excellent" distinction.<sup>12</sup> If a work unit receives low ratings two consecutive years in a row, the work unit's leaders could be subject to Party discipline.<sup>13</sup>

Fuyang City had a good first year of implementation. Under OGI Regulation Articles 31 and 32, a government must publish annual reports containing certain statutorily required information.<sup>14</sup> According to its report, Fuyang City opened 45,000 items on its own and received 16 requested disclosures (fifteen online, one in person).<sup>15</sup> Most requested information dealt with medical treatment and public health, residential building razing, and employment examination results.<sup>16</sup> Of the requests, two had already been disclosed by self-initiative and six were opened as requested.<sup>17</sup> The requests were granted in a timely manner and without levying fees.<sup>18</sup> At the time of publication, the city had executed its OGI policy with no complaints, no petitions for administrative reconsideration, and no lawsuits.<sup>19</sup>

Some government entities are also self-initiating disclosure without necessarily being required to by the OGI Regulation. Specifically, some courts in China have begun publishing their judicial opinions online in a way that is open to the public. For example, Sha'anxi Province courts at all levels began publishing their opinions online starting January 1, 2010.<sup>20</sup> Most cases will be opened, except those involving state secrets, personal privacy, commercial secrets, juvenile crime, and cases where the hearings are not open.<sup>21</sup> Death penalty cases, settlements, and withdrawn cases will

11. *Fuyang Shi chu tai zheng fu xin xi gong kai she hui ping yi zhi du* (阜阳市出台《政府信息公开社会评议制度}) [Fuyang City Unveils its 'Government Open Information Social Appraisal System'], 安徽省人民政府法制办公室 [ANHUI PROVINCE PEOPLE'S GOVERNMENT OFFICE OF LEGISLATIVE AFFAIRS], ¶ 1 (Jan. 4, 2010), [http://www.zwgk.fy.gov.cn/KA001\\_ACTIVILY/article.jsp?articleId=59350](http://www.zwgk.fy.gov.cn/KA001_ACTIVILY/article.jsp?articleId=59350) [hereinafter *Fuyang City Unveils*].

12. *Id.* at ¶ 3.

13. *Id.*

14. OGI Regulation, *supra* note 1, at arts. 31, 32.

15. Fuyang City Government (阜阳市政府), *Fuyang Shi zheng fu xin xi gong kai gong zuo nian du bao gao* (2008) (阜阳市政府信息公开工作年度报告) [Fuyang City Government Information Disclosure Annual Work Report for 2008], Feb. 19, 2009, at § 6.1.2, available at [http://www.zwgk.fy.gov.cn/xxnb\\_Xilan.jsp?xxnb\\_id=20&orgcode=KA00101](http://www.zwgk.fy.gov.cn/xxnb_Xilan.jsp?xxnb_id=20&orgcode=KA00101) [hereinafter *Fuyang Report 2008*].

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Sha'anxi fa yuan yuan dan qi wang shang gong kai cai pan wen shu* (陕西法院元旦起网上公开裁判文书) [*Shanxi Open Magistrate Court Documents Online New Year's Day*], SHA'ANXI COURT WEB (Dec. 31, 2009), <http://www.66law.cn/archive/news/2009-12-31/36597.aspx> (stating that 103 courts already had websites where they could post the information, and the remaining 15 courts were poised to open theirs on January first).

21. Yang Chenghui (杨成会), *Sha'anxi Sheng fa yuan ming nian qi jiang tui xing cai pan wen shu wang luo gong kai zhi du* (陕西省法院明年起将推行裁判文书网络公开制度) [*Sha'anxi Province*

generally not be opened; marriage, family, neighborhood, labor, medical treatment, and reputation rights cases will only be opened after taking the opinions of the parties involved as to whether they should be opened.<sup>22</sup>

Self-initiated disclosures have not engendered much controversy. The main controversy comes from unfulfilled requested disclosures.

### III. IMPLEMENTATION OF REQUESTED DISCLOSURES

Article 13 of the OGI Regulation permits qualified applicants to make information disclosure requests to the government.<sup>23</sup> The government must fulfill their requests subject to certain limitations.

First, there are limitations based on the content of the information: governments may not disclose any information that would endanger state security, public security, economic security, or social stability.<sup>24</sup> Specifically, administrative organs may not disclose government information that involves state secrets, commercial secrets, or individual privacy.<sup>25</sup> However, government information involving commercial secrets or individual privacy may be disclosed by administrative organs with the consent of the rightholder(s) or if administrative organs believe that non-disclosure might give rise to a major impact on the public interest.<sup>26</sup>

In one case that caught media attention, an information request was denied because the request involved commercial secrets, but was resolved when the affected third party joined the suit and settled by giving the requester the relevant report with some portions redacted.<sup>27</sup> That case arose in Zhangjiagang City, where the expansion of a textile printing and dyeing company and a waste water treatment plant placed the plant within a mere 60 meters of residential dwellings.<sup>28</sup> The environment where the nearby residents lived was seriously affected by the noise, waste water, and waste gas emanating from the plant. The affected residents became curious about whether the government had accounted for the problems in its environmental survey before approving the expansion of the facilities.<sup>29</sup> The residents requested the environmental impact report of the expansion, did not receive it, and then sued the Suzhou City Environmental Protection

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*Courts Will Begin Implementing a System For Opening Judicial Opinions Online Next Year],* CHINACOURT.ORG (Dec. 7, 2009), <http://www.chinacourt.org/html/article/200912/07/384406.shtml>.

22. Yang Chenghui, *supra* note 21.

23. OGI Regulation, *supra* note 1, at art. 13.

24. *Id.* at art. 8.

25. *Id.* at art. 14.

26. *Id.*

27. See generally Liu Weiwei (刘巍巍), *Suzhou shouli shi min yao qiu zhengfu xin xi gong kai su song jie an* (苏州首例市民要求政府信息公开诉讼结案) [Suzhou's First City Resident Open Government Information Request Lawsuit Settles], CHINACOURT.ORG (Dec. 28, 2009), <http://www.chinacourt.org/html/article/200912/28/388259.shtml>.

28. *Id.*

29. *Id.*

Bureau.<sup>30</sup> The textile printing and dyeing company joined the suit as a third party.<sup>31</sup> With the support of the presiding judge of the Suzhou City Canlang District People's Court Administrative Division, the parties entered "round table" discussions and settled the case.<sup>32</sup> The textile company agreed to provide the residents with a copy of the sections of the environmental report that did not involve commercial secrets; in exchange, the resident's withdrew their lawsuit.<sup>33</sup>

Second, there are limitations on the qualifications of who may request disclosure: only citizens, legal persons or other organizations may make requests, and those requests must be based on a special need for information that affects the requester's own production, livelihood, or scientific and technological research.<sup>34</sup> "Citizen" means Chinese citizen; foreigners may not make government information disclosure requests.<sup>35</sup>

Finally, there are some limitations on who constitutes the proper defendant if a lawsuit arises because information is not disclosed. Article 25(1) of the Administrative Litigation Act provides that the defendant in a case is the "administrative agency that performs the concrete administrative act."<sup>36</sup> "Performs" covers both omissions and commissions.<sup>37</sup> Responsibility for acts of omission are assigned to the agency that had a duty to perform the act.<sup>38</sup>

At least one court has looked both to the OGI Regulation's division of duties and whether the evidence in a case showed government involvement within a particular document to determine whether the defendant was the proper subject of the inquiry.<sup>39</sup> Requiring proof of government involvement stems from OGI Regulation Article 17, which states: "The administrative agency that makes the government information is the agency responsible for opening it."<sup>40</sup> Following this rule, the Shandong Province appellate court held that a city district government was not the proper subject for a land requisition information request because the requisition

30. Liu Weiwei, *supra* note 27.

31. *Id.*

32. *Id.*

33. *Id.*

34. OGI Regulation, *supra* note 1, at art. 13.

35. Zhang Chuanyi (张传毅), *Zheng fu xin xi gong kai xing zheng xing wei si fa shen cha ruo gan wen ti* (政府信息公开行政行为司法审查若干问题) [*Particularity in Judicial Review of Government Information Publicity*], XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.], no. 2, 2009, at 120.

36. *Id.*

37. *Id.*

38. *Id.*

39. Bi Mijia su Qingdao Shi Huangdao Qu ren min zheng fu bu lvxing zheng fu xin xi gong kai yi wu shang shu an (薛密家诉青岛市黄岛区人民政府不履行政府信息公开义务上诉案) [Bi Mijia Sues Qingdao City Huangdao Dist. People's Gov't. For Not Fulfilling Its Government Info. Disclosure Duty App. Case], QING XING ZHONG ZI DI 106 HAO (青行终字第106号), at ¶ 9, §§ 2.2-3 (ChinaCourt.org 2009) [hereinafter *The Bi Mijia Case*].

40. OGI Regulation, *supra* note 1, at art. 17 (the article also provides that the agency that stores the information is responsible for opening the information as well).

was decided by the provincial government, and thus, the provincial government was the proper subject.<sup>41</sup> As to related relocation subsidy information in the same lawsuit, the evidence indicated that the alleged undisclosed portions of the document were the autonomous readjustments of a government official; the department itself had not been involved in the alteration of the paperwork and so was not responsible for providing the information it had not produced.<sup>42</sup>

The government office that receives a request is the first to decide whether the request is within the scope of what can be admitted under the Regulation.<sup>43</sup> If it is within the scope, the government must inform the requester of the methods and channels for obtaining the information;<sup>44</sup> if outside the scope, it must inform the requester that such information cannot be disclosed and must provide an explanation for the denial.<sup>45</sup>

Besides not disclosing the information based on one of the limitations listed above, one frequent reason for not fulfilling a disclosure request is that the information does not exist. The statistics vary widely as to how often this reason is provided, with certain entities giving such a reply 45 times more than other entities.<sup>46</sup> Beijing governments provided this reason 27.8 percent of the time, Shanghai 11.4 percent, Shandong 7 percent, Jilin 0.9 percent, and Sichuan 0.6 percent.<sup>47</sup>

A requester who has been denied information has several options for appealing. The requester may petition a higher level administrative organ or department in charge of opening information to investigate and handle the matter.<sup>48</sup> Second, the requester may apply for administrative reconsideration or directly file an administrative lawsuit in a court of law.<sup>49</sup> A requester who is not satisfied with the outcome of administrative reconsideration can appeal the result to a court of law.<sup>50</sup>

There is no requirement that the citizen must apply for administrative reconsideration before filing an administrative lawsuit;<sup>51</sup> however, at least one court has insisted that specific information must have been requested and denied before it can be considered by a court.<sup>52</sup> This can be frustrating for plaintiffs who may not necessarily know what they are looking for, or

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41. *The Bi Mijia Case*, *supra* note 39, at ¶ 9, § 2.2.

42. *Id.* at ¶ 9, § 2.3.

43. OGI Regulation, *supra* note 1, at art. 21.

44. *Id.* at art. 21.1.

45. *Id.* at arts. 21.2, 21.3.

46. Zhou Hanhua, *supra* note 9, at § (2)(C).

47. *Id.*

48. OGI Regulation, *supra* note 1, at art. 33 ¶ 1.

49. *Id.* at art. 33 ¶ 2.

50. Xing zheng su song fa (行政诉讼法, 主席令 (第16号)) [Administrative Procedure Law] (promulgated by the National People's Congress, Apr. 4, 1989, effective Oct. 1, 1990), (Lawinfochina) (China), at art. 37.

51. *See id.*

52. *The Bi Mijia Case*, *supra* note 39, at ¶ 9, § 2.1.

for plaintiffs who wish to add requests to an existing lawsuit. In that case, the Bi Mijia Case, the plaintiffs originally requested two documents: a land requisition document and a building demolition relocation subsidy.<sup>53</sup> During the administrative lawsuit, the plaintiffs added documents which were not in their original request, including a land use plan and site establishment information.<sup>54</sup> On appeal, court refused to consider these additional requests because they exceeded the scope of the request made to defendant before litigation.<sup>55</sup>

In 2008, statistics showed that Shanghai government departments at all levels received 683 petitions for reconsideration and 258 lawsuits, Beijing 37 petitions and 10 lawsuits, Fujian 12 petitions and 3 lawsuits, Sichuan 3 petitions and 1 lawsuit. Other provinces and areas reported zero or one of each.<sup>56</sup>

The divergence in the reporting statistics may indicate variation in the implementation across the country, or they may indicate, as Zhou Hanhua has indicated, that the statistics are not trustworthy.<sup>57</sup> In 2008, all levels of government in the Yunnan Province received 17,955 requests for disclosure: 17,537 at the provincial level and a mere 418 at the Prefecture and City level. Shandong received a similar amount of requests, totaling 16,368, but distributed the opposite way: 16,200 were at the City level and a mere 168 were sent to the provincial level. Finally, as opposed to the two extremes, Henan Province's 15,749 information requests split relatively evenly, with 6,803 requests going to the provincial level and 8,946 going to the local level.<sup>58</sup>

Perhaps the numbers are accurate and indicate different tendencies by region. If the numbers are in fact more or less accurate, one wonders whether the tendency not to sue the provincial-level government in Shandong Province animated the court in the Bi Mijia Case to rule firmly that the plaintiffs had to sue the correct department level (in that case the provincial government) to receive the information that had been in the plaintiff's original request.

In any event, although the statistics are uneven, the sheer number of self-initiated disclosures and fulfilled orders of requested disclosures suggests that the availability of government-produced information is increasing, which is a positive step for the role the OGI Regulation plays in opening the Chinese government's activities to the people it governs.

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53. *The Bi Mijia Case*, *supra* note 39, at ¶ 9, § 2.1.

54. *Id.*

55. *Id.*

56. Zhou Hanhua, *supra* note 9, at § (2)(A)(2).

57. *Id.* at § (2)(C).

58. *Id.*

#### IV. JUDICIAL SUPERVISION OF REQUESTED DISCLOSURES

One of the first issues to be settled regarding judicial enforcement of the OGI Regulations was whether and under what circumstances courts should take up Open Government Information lawsuits. In China, lawsuits are filed with a court and then the court clerks, themselves judges, decide whether to submit the case to the court or notify the party that their suit was refused. At first, many courts were unclear which cases to take and generally refused to take OGI cases on political-question-type grounds. In November of 2009, the Supreme People's Court issued a provisional, but generally authoritative interpretation of the law delineating the circumstances under which courts should take the cases.<sup>59</sup>

A remaining issue arising in the judicial supervision of the OGI Regulation is the extent to which courts will side with the government when the government does not want to disclose information. Considering the low percentage of government denials, courts may just be upholding the conclusions of the government that the request was truly outside the scope of what the government needed to disclose. On the other hand, if courts side too readily with the government, true supervision is not supplied when perhaps it is the most needed.

Governments provide reasons for not disclosing information when they deny requests, but in some cases citizens are concerned that they might be being misled. In one 2007-08 case in Shanghai based on the Shanghai regional OGI Regulation, the government provided one reason to the people and another reason to the courts.<sup>60</sup> There, residents, with the help of lawyer Yuan Yulai, requested maps of their locale from the Shanghai City Bureau for Municipal Design because the residents suspected that the construction of certain onerous high-voltage power lines near their homes deviated from the drawings originally laid out for the project.<sup>61</sup> The Bureau supplied the residents with some copies, but they did not purport to be official copies and no power lines were visible.<sup>62</sup> The residents complained, and the Bureau explained that the maps were so large it was impracticable to send anything else. In court, however, the government unexpectedly raised the defense that it could not give the

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59. Zui gao ren min fa yuan guan yu shen li zheng fu xin xi gong kai xing zheng an jian ruo gan wen ti de gui ding (zheng qiu yi jian gao) (最高人民法院关于审理政府信息公开行政案件若干问题的规定 (征求意见稿)) [Supreme People's Court's Provisions Concerning Certain Questions About Courts Taking On Open Government Information Cases (Public Comment Draft)] (Nov. 2, 2009), <http://politics.people.com.cn/GB/1026/10309068.html>.

60. Zheng fu xin xi gong kai zao yu 'guo jia mi mi' ping jing (政府信息公开遭遇《国家秘密》瓶颈) [Government Information Disclosure Meets the "State Secret" Bottleneck], FAZHI RIBAO (法制日报) [LEGAL DAILY] (June 29, 2008), <http://www.deheng.com.cn/asp/newsSql/html/200862913580240.htm> [hereinafter *The State Secret Bottleneck*].

61. *Id.* at ¶4.

62. *Id.*

information because the information was a state secret.<sup>63</sup> The court deferred to the government that the power line map information contained state secrets, and did not consider the late addition of the defense as an issue.

Of course, if the routes of high voltage power lines are state secrets, it does not make practical sense for a court to require the information to be opened based on a technicality, such as losing a defense for not raising it in a timely manner. However, neither does it make much practical sense to rule that the route above the houses of these people was a state secret with respect to plaintiffs that could see and hear the power lines from their homes. It is likely that the issue at the heart of the case was not really the location of the power lines, but rather whether the government had either unfairly, improperly, or even illegally deviated from the original route chosen for the placement of the power lines. Under the “state secrets” defense as accepted by the court here, not only did the government successfully avoid disclosing where the power line route was, but it also avoided disclosing whether the route changed and why it changed.

This case was possibly a missed opportunity for better governance through more disclosure. If there was no improper conduct with respect to the power line route change, disclosure would have proven to residents that there was none. If there were unfair practices or even corruption, then the court’s application of the Open Government Information would have been lauded for exposing it. Either way, disclosure would have been beneficial. In this case, the residents’ suspicions were only reinforced.

Besides the state secrets exception, courts sometimes even find exceptions to disclosure that are not found in the text of the OGI Regulation. This is demonstrated in several cases, such as the cases brought by Yuan Yulai and Li Xin. I include their cases and experiences at length, because both of them have had extensive experience, both successful and unsuccessful, with the OGI Regulation.

#### A. YUAN YULAI

Some residents of Jixi County in Anhui Province were ordered to tear down their residences on the basis that they had been unlawfully constructed in violation of urban planning regulations. The residents were unwilling, and suspected that the government only found such a violation because the government had decided to establish an industrial park on the land they then occupied.<sup>64</sup> Were this true, the government action would

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63. *The State Secret Bottleneck*, *supra* note 60, at ¶ 5.

64. Qin Xudong (秦旭东), *Anhui Sheng zheng fu yin xin xi gong kai an bei gao* (安徽省政府因信息公开案被告) [Information Disclosure Case Against Anhui Provincial Government], CAIJING (July 28, 2008), <http://www.caijing.com.cn/2008-07-28/100076619.html>; Qin Xudong (秦旭东); *Lv shi zhuang gao Anhui Sheng zhengfu xin xi gong kai an bai su*

have been illegal, and whoever was involved within the government would have a motive for not disclosing any relevant information.

Four residents, lead by resident Zhang Xiaobin, first applied for administrative reconsideration of Xuancheng City People's Government decision to approve an ecological industrial park in Jixi County, which Mr. Zhang submitted to the Anhui People's Government on May 10, 2007.<sup>65</sup> The government began reviewing the application, but published notice on August 30, 2007 that it would suspend administrative reconsideration.<sup>66</sup> It gave the following reason: "Because we need to advance our understanding of the legal and policy regulations of the establishment of the Open Area and Industrial Park area related to this case, we are asking instructions from the relevant authorities."<sup>67</sup> The residents challenged the suspension, and sought to sue the government under the Administrative Litigation Law, but no court would take the case.<sup>68</sup>

Their lawyer, Yuan Yulai, who lays claim to being the first and, at present, only lawyer in China whose practice is solely dedicated to administrative lawsuits,<sup>69</sup> then decided to try advancing the case using the Open Government Information Regulation.<sup>70</sup> Based on his research, Yuan Yulai did not believe that the government's supposed need for further legal inquiry was well-founded, and that the government was just attempting to delay fulfilling its legal responsibilities regarding the petition. On June 11, 2008, Yuan Yulai applied to the government under the OGI Regulation for the government to disclose in writing which legal policy provisions it asked about, which authorities it asked, and whether the authorities had answered. The government announced its refusal to provide the information by a phone call, stating that it thought the information being requested was outside the scope of request-able disclosures. On July 18, 2008, Yuan Yulai submitted the case to the Hefei People's Intermediate Court.

The Intermediate Court held that the information did not need to be opened.<sup>71</sup> First, the information did not belong to the category of

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(律师状告安徽省政府信息公开案败诉) [Lawyers suing Anhui Provincial Government for Information Disclosure Lose Case], CAIJING (Oct. 22, 2008), <http://www.caijing.com.cn/2008-10-22/110022182.html>; Donald C. Clarke, *Court Takes Freedom-of-Information Case Against Anhui Provincial Government*, CHINESE LAW PROF BLOG (October 9, 2008), [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2008/10/court-takes-fre.html](http://lawprofessors.typepad.com/china_law_prof_blog/2008/10/court-takes-fre.html).

65. He xing chu zi di 12 hao (合行初字第12号) [Anhui Province Hefei City Intermediate-Level People's Court, *Administrative Judgment*], FYFZ.CN (Oct. 21, 2008, 11:35 AM), <http://yuanyulai.fyfz.cn/blog/yuanyulai/index.aspx?blogid=396484>, at ¶ 3.

66. *Id.*

67. *Id.*

68. Clarke, *supra* note 64, ¶ 6.

69. See YUAN YULAI LV SHI FA LV BO KE (袁裕来律师法律博客) [THE LAW BLOG OF LAWYER YUAN YULAI], <http://yuanyulai.fyfz.cn/> (last visited Mar. 4, 2010).

70. Clarke, *supra* note 64, ¶ 7.

71. *Anhui Province Hefei City Intermediate-Level People's Court, Administrative Judgment*, *supra* note 65, at ¶ 9.

government self-initiated disclosures. Second, it also exceeded the scope of what needed to be released as a requested disclosure. The court ruled that the internal processing of an administrative reconsideration case was unrelated to the plaintiff's special requirements for personal production, life, or research, and was therefore outside the scope of OGI Regulation Article 13. For the intermediate court, the government met its legal responsibility under the OGI Regulation when the government phoned Yuan Yulai and told him that it believed the information was outside the scope of the OGI Regulation, but that Yuan Yulai was welcome to look up and copy the existing published information on the case. Yuan Yulai appealed to the Anhui Supreme People's Court.

On appeal, Yuan Yulai argued that the information should be released because OGI Article 2 implicates "the records that are made by an administrative agency while in the process of carrying out its responsibilities."<sup>72</sup> Yuan Yulai further argued that the refusal to give information should have been in writing, according to Articles 26's instructions that "[when] an administrative agency [complies with] a requested disclosure, it should furnish [the information] according to the form in which the applicant requested it." Finally, Yuan Yulai argued that the court's declaration that the information he requested did not address a concern of his personal production, life, or research was in his words "unprincipled and absurd." As a lawyer representing a client, the information he sought constituted a part of his production.

The Anhui High Court affirmed the outcome of the decision below, essentially by creating a new exception to the OGI Regulation for mid-process administrative reconsideration information. The Court did not fully address Yuan Yulai's appellate arguments.

The court framed the issue as one concerning which law applied: the Administrative Reconsideration Law or the OGI Regulations.<sup>73</sup> The court found the language of the OGI Regulation Article 2 was not clear about whether it required the opening of finished government information or the opening of every step in a process. The court considered requiring every step to be open would not only be unhelpful to the development of government activity, but it would also affect administrative efficiency.<sup>74</sup> This prompted the court to hold that the OGI Regulation does not require

72. Yuan Yulai su Anhui Sheng ren min zheng fu bu lv xing zheng fu xin xi gong kai fa ding zhi ze an (袁裕来诉安徽省政府不履行政府信息公开法定职责案) [The Case of Yuan Yulai Suing Anhui Province People's Government for Not Carrying Out Its Legal Responsibility to Open Government Information] Wan xing zhong zi di 0136 hao (皖行终字第0136号) [Anhui Province High-Level People's Court, Administrative [Law] Judgment 0136], ANHUI COURT NETWORK, at ¶ 4 (Dec. 9, 2008), [http://www.ahcourt.gov.cn/gb/ahgy\\_2004/cpws/xz/userobject1ai16600.html](http://www.ahcourt.gov.cn/gb/ahgy_2004/cpws/xz/userobject1ai16600.html) [hereinafter *The Yuan Yulai Case*].

73. *Id.* at ¶ 7 (the court framed the case this way after it considered and rejected the government's defense that it was not the proper defendant in the case).

74. *Id.* at ¶ 9.

the publication of information regarding administrative reconsideration cases that have not reached their final conclusion. Rather, the Administrative Reconsideration Law applies, which gives some file access and copying rights. The court accepted the government's phone call for its method of refusal, or at least held that suing for the method of refusal is not permitted if the information falls outside the scope of the OGI Regulation.<sup>75</sup>

The Anhui High Court decision was novel for inventing a limitation to opening information that was not listed in the Regulation. Yuan Yulai believed that the High Court's decision was incorrect. After the case was decided, he noted in his blog that the information in the middle of reconsideration did not fall within the statutorily listed exceptions of state secrets, trade secrets, or personal privacy, and so should have been opened.<sup>76</sup>

Nevertheless, the Court raised a good point about the burdens to administrative agencies associated with opening every step in a reconsideration case. Indeed, like attorney-client privilege in United States law, an administrative agency may need some privacy so it can weigh its course of action to the fullest extent, even considering possibilities inflammatory to the overall case. Second, keeping and providing publishable records at every step could affect administrative efficiency.

On the other hand, the Court never addressed Yuan Yulai's basic concern that the agency request for instructions was possibly a farce and delay tactic. By using a broad brush to create an "intermediate step" exception to opening information, the High Court essentially sanctioned an inscrutable method by which government bureaus could easily delay, or de facto deny, providing information. In my view, the better rule would have been to recognize that the suspension of reconsideration was like an end-result step. As noted by Yuan Yulai, the information does go to the petitioner's legal rights and interests. The Court could have at least required the opening of who the relevant agency was and whether they responded, even if it did not require the other questions asked to be published.

## B. THE LI XIN CASES

Li Xin is described in *Orient Today* as a "citizen who for a long-time has paid close attention to agricultural production and the protection of

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75. *The Yuan Yulai Case*, *supra* note 72, ¶ 10.

76. Yuan Yulai (袁裕来), *Anhui Sheng gao ji ren min fa yuan xing zheng pan jue shu: Yuan Yulai su Anhui Sheng ren min zheng fu* (安徽省高级人民法院行政判决书：袁裕来诉安徽省政府) [Anhui Province High People's Court Administrative Law Judgment: Yuan Yulai Sues Anhui Province People's Government] FYFZ.COM (June 3, 2009, 11:19:00), <http://yuanyulai.fyfz.cn/blog/yuanyulai/index.aspx?blogid=482334>.

farmer's rights and interests.<sup>77</sup> After the May 1, 2008 implementation of the OGI Regulation, he sent disclosure requests to more than ten provincial, city, and county-level governmental departments. Li Xin met with some success, mostly because the entities disclosed beyond what was required.<sup>78</sup>

On May 9, 2008, he made his first request: He asked the Henan Province Department of Finance to disclose the Yuxi Area Water Conservancy Establishment Project financial preparation circumstances from 2005 to the present, including the financial sums to be expended on human and livestock water allocation, drought-affected land improvement, and the farm plot irrigation plan; the project time period; and other information.<sup>79</sup> His reason for the request: "To understand the situation of the government's support and assistance to the Yuxi Drought-Afflicted Area."<sup>80</sup> One week later, the government provided him with all the requested information in detail.<sup>81</sup>

His next request met mixed results. He requested the Xihua County Agricultural Bureau to disclose its implementation plan and recipient list of cotton improved-type subsidies for 2007 and 2008. The bureau's deputy director general of policy management personally met with Li Xin and provided him summary tables of the information, but reported that he could not disclose the detailed recipient list, because the county did not make one.<sup>82</sup> The county admitted that not making a list was a breach of its departmental duties. Li Xin left the Agricultural Bureau and contacted the County Government Information Division, which said it would coordinate with the County Finance Bureau to get the list. Later, the Finance Bureau contacted Li Xin to tell him that it had not instituted any Open Government Information work and that it had not confirmed who had responsibility over the matter, saying "The County Finance Bureau personnel still does not know what it is that is called government information disclosure."<sup>83</sup> Thus, although the relevant entities showed cooperation at first, ultimately he did not get the information because the relevant bureaus either did not have the information or they had not yet implemented open government information procedures.

Li Xin's next request, to Xinyang City's Pingqiao District for information about its 2007 sow propagation subsidy implementation plan and list of recipients, was that District's first OGI request. Uncertain how to exactly handle the request, the staff forwarded the request to the relevant

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77. Yang Tong (杨桐), *Yi wei gong min shen qing zheng fu xin xi gong kai zhi lu* (一位公民申请政府信息公开之路) [A Citizen's Experience Applying for Government Information Disclosures], DONGFANG JINBAO (东方今报) [ORIENT TODAY], June 27, 2008.

78. *Id.* at ¶ 2.

79. *Id.* at ¶ 4.

80. *Id.* at ¶ 4.

81. *Id.* at ¶ 5.

82. *Id.* at ¶ 8.

83. *Id.* at ¶ 10.

leaders, who sent the request on to the Livestock Office. None of the offices in the District made an issue of the fact that Li Xin was not a Pingqiao District resident. Soon after receiving the request, the District emailed Li Xin the subsidy implementation plan and a summary table of money awarded, but not the detailed list of recipients. Li Xin was not satisfied, so he went to the relevant bureau in person. The bureau retrieved the list from its computer and gave him a 30-plus-page detailed list of subsidy recipients.<sup>84</sup>

Li Xin made a similar detailed list of subsidy recipients request to Xuchang City, but it was denied because the City believed the name list to have the private information of third parties in it, and therefore the City had no right to open the information.<sup>85</sup> Li Xin explained to Xuchang City that other government entities had opened similar information, but the argument was unavailing. One entity's disclosure beyond what it was required to do was not grounds for another entity to do what it was not required to do.

It is not known whether Li Xin ever sued Xuchang City. But in the published lawsuits in which Li Xin is the plaintiff, the courts provided local government entities with simple grounds for not releasing information: lack of residency.

One of Li Xin's OGI lawsuits was taken up by the Henan Province Shangqiu City Intermediate People's Court on March 3, 2009.<sup>86</sup> On May 21, 2008, Li Xin had requested Yucheng County in Henan Province to disclose its cotton improved-crop-strain subsidy project implementation plan and various inventory/detailed lists for 2007 and 2008.<sup>87</sup> The County responded the next day by email with its plan for 2008, but never released the plan for 2007 or the detailed list for either year.<sup>88</sup> At trial, the County offered six defenses for not disclosing the information.<sup>89</sup> The court accepted one of them: Li Xin could not compel the information because he was a resident of Zhengzhou City, not Yucheng County.<sup>90</sup> The court held that Li Xin's basis for requesting the information was to monitor the implementation of cotton subsidies, not on the basis of the special needs of his personal production, life, or research.<sup>91</sup> As such, Li Xin lacked a legal stake in the information disclosure conduct of Yucheng County.<sup>92</sup>

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84. Yang Tong, *supra* note 77, at ¶ 13.

85. *Id.* at ¶¶ 15, 17.

86. *Li Xin su Yucheng Xian ren min zheng fu xin xi gong kai jiu fen an* (李鑫诉虞城县人民政府信息公开纠纷案) [*Li Xin Sues Yucheng County People's Government Information Disclosure Dispute Case*], SHANG XING CHU ZI (商行初字第2号) 2 (2009) (Lexis NexisChina) [hereinafter *The Li Xin Case*].

87. *Id.* at ¶ 2.

88. *Id.*

89. *Id.* at ¶ 3.

90. *Id.* at ¶ 4.

91. *Id.*

92. *Id.* at ¶ 2.

Therefore, his lawsuit lacked subject qualifications and was rejected.<sup>93</sup>

Li Xin also had a similar suit against Shangqiu City for not disclosing its cotton and wheat subsidy plan and recipients.<sup>94</sup> The same judges as the Yucheng County case presided over the case and meted out the same result.<sup>95</sup>

Not all judges agree with the interpretation of the Shangqiu court. The State Council Office Opinion on Certain OGI Regulation Questions Part 5.14 provides that an administrative agency can refuse to open information if the party has no special need of the information for his person production, life, and scientific research.<sup>96</sup> As pointed out by Shandong High Court judge Zhang Chuanyi, this provision provides a justification for not opening information, and does not address a plaintiff's subject qualifications, an issue of standing.<sup>97</sup> A justification means a victory for the defense, but the lack of qualifications means that the court should refuse to rule any further and should reject the lawsuit as if the court had never agreed to take to the case. Other judges may be persuaded that Judge Zhang is correct, and deny on the basis of justification and still hear the suit, rather than deny the plaintiff standing.

In all, Li Xin was able to get information from some entities because they did not raise the issue of his qualifications. When the issue was raised, Li Xin lost. Although this is an uneven application of the law, it worked to his benefit because some entities gave him information when, by the law, they did not have to. Many people are likely experiencing a similar benefit just because most OGI disclosures are processed through requests over the Internet, a practice which tends to weaken the requirements that a person specially needs the information,<sup>98</sup> and by extension also weaken any supposed requirements of residency. Thus, much information is being disclosed, which, in my opinion, is a good thing. But, if the government entity does not want to give up the information for whatever reason, it can look deeper into the requester's "subject qualifications" as a means for rejecting a request.

93. See Zui gao ren min fa yuan guan yu zhi xing "zhong hua ren min gong he guo xing zheng su song fa" ruo gan wen ti de jie shi, at art. 44 ¶ 1 item 2 (最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释, 法释 [2000] 8号) [Supreme People's Court Interpretation of Certain Issues Concerning the Implementation of the "Administrative Procedure Law"] art. 44, ¶ 1 (2000) (Lawinfochina) (mandates that a court must rule the dismissal of a case it has accepted and heard if it finds that the complainant lacks a plaintiff's lawsuit subject qualifications).

94. *The Li Xin Case*, *supra* note 86 at ¶ 2.

95. *Id.* at ¶ 4.

96. Guo wu yuan ban gong ting 'guan yu shi shi 'zhong hua ren min gong he guo zheng fu xin xi gong kai tiao li' ruo gan wen ti de yi jian' (国务院办公厅《关于实施<中华人民共和国政府信息公开条例>若干问题的意见》) [State Council Clerical Office Opinion on Certain Questions About Implementing the Open Government Information Regulation], St. Council, Apr. 29, 2008 at part 5 §14.

97. Zhang Chuanyi, *supra* note 35, at §1, ¶ 6.

98. Zhou Hanhua, *supra* note 9, at §1.2, ¶ 2.

## V. CONCLUSION

The Open Government Information Regulation is a step in the right direction for an authoritarian country that is typically viewed as secretive. As noted by the Sha'anxi courts when they opened their opinions, increased information about the workings of government promotes fairness, higher quality government work, civic participation, and faith in the system.<sup>99</sup> Besides these benefits, one author has suggested that a more open government is unavoidable in the information and Internet age, where accessible knowledge is a staple of modern living.<sup>100</sup>

It is generally not surprising to observe some bureaucratic backlash against initial, expansive OGI principles, notes Mitchell Pearlman, who has more than 30 years' experience in freedom of information work at the state level in the United States and is frequently consulted by foreign governments seeking to develop information access regimes.<sup>101</sup> Thus, it should not be surprising to see some hiccoughs in the initial implementation of China's OGI Regulation. In many parts of China, however, the sheer numbers of both self-initiated disclosures and fulfilled requested disclosures indicate that most government offices are making positive efforts to comply with the OGI Regulation. Open government is likely to become an expectation, and at least one author has cited "today's expectation of open government" as a keystone to the resolution of several public controversies with government behavior as the subject, such as the traffic fine "fishing" scheme that occurred in Shanghai in 2009.<sup>102</sup>

One area to watch as OGI Regulation implementation matures is judicial enforcement of the regulation. So far, from my own survey of cases, I have not found a single published case that has ordered the opening of government information when the government has refused to give it.

Like the residents in the high-power voltage line case in Shanghai or the land requisition document petitioner in the *Bi Mijia* case, in some of the cases, it appears that plaintiffs are trying to look under a stone that the government does not want turned over. Plaintiffs in these cases have often already tried other means of getting cooperation from their government

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99. Sha'anxi fa yuan yuan dan qi wang shang gong kai cai pan wen shu (陕西法院元旦起网上公开裁判文书) [Shaanxi Opens Magistrate Court Documents Online New Year's Day], SHA'ANXI COURT WEB, at ¶ 1 (Dec. 31, 2009), <http://www.66law.cn/archive/news/2009-12-31/36597.aspx>.

100. Lin Hua (林华), *Yin can yu, tou ming er jin bu: Hu lian wang shi dai xia de gong zhong can yu he zheng fu xin xi gong kai* (因参与、透明而进步：互联网时代的公众参与和政府信息公开) [*The Internet Era of Public Participation and Open Gov't Information*], XINZHENG FAXUE YANJIU (《行政法学研究》2009年第2期) (Sept. 7, 2009), [http://law.china.cn/features/2010-04/12/content\\_3458147.htm](http://law.china.cn/features/2010-04/12/content_3458147.htm).

101. Horsey, *supra* note 1, at 8.

102. *Pan dian 2009 nian re dian fa zhi shi jian* (盘点 2009 年热点法制事件) [*Taking Stock of 2009's Hot Legal Incidents*], GUO FA BAN ZHI CHUANG (国法办之窗) (Jan 4, 2010), [http://www.ahfzb.gov.cn/common/content\\_view.php?filename=10010408545118](http://www.ahfzb.gov.cn/common/content_view.php?filename=10010408545118).

agencies, such as by petitioning for administrative reconsideration, and turn to the Open Government Information Regulation as another means to find some answer to the situations they face. For now it seems that their efforts will be met with uneven results, based on the choices of government officials who appear to be in a “no lose” situation. If the government wants to open information, no one in the public will fault the government for opening information even if it technically, legally may not have needed to be opened. At the same time, if the government does not want to open it, the government will find support in the courts. Perhaps such plaintiffs are taking the law too far; perhaps the government is unfairly hiding something. Hopefully, the courts will maintain and strengthen their role in resolving tough cases and addressing the arguments made by both sides.

In all, only two years into its implementation, the OGI Regulation has already become an important channel for accessing government information in China. Hopefully, as the practice of the regulation matures, the regulation’s enforcement will be strengthened both inside and outside the courts, leading to even greater access and government transparency.

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