

Shanghai Advances the Cause of Open Government Information in China

Jamie P. Horsley
The China Law Center, Yale Law School

April 15, 2004

While the Chinese State Council mulls over a draft of China's first freedom of information legislation, the bustling metropolis of Shanghai, home to some 16 million people, adopted China's first provincial-level open information legislation on January 20, 2004. The Provisions of Shanghai Municipality on Open Government Information (the Shanghai Provisions) represent the most comprehensive framework to date in China for accessing government-held information, containing more detail than the pioneering Guangzhou Municipal Open Government Information Provisions adopted in 2003¹ and other lower-level local Chinese legislation to date.² The Shanghai Provisions are scheduled to go into effect May 1, the same day that Shanghai will launch its "Transparent Government Program."

The Shanghai Provisions are significant in at least three respects. First, they represent the latest and most sophisticated approach to open government information (OGI) in China. Second, they were formulated through a relatively open process that included posting a draft for public comment, inviting diverse input and publishing

¹ See, Jamie P. Horsley, "China's Pioneering Foray into Open Government: A Tale of Two Cities," <http://www.freedominfo.org/news/guangzhou> (posted July 14, 2003). Shanghai, unlike Guangzhou, the capital of Guangdong province, enjoys special status as a provincial-level city directly under the central government.

² In addition to the Guangzhou Provisions, Shantou Municipality promulgated Open Government Affairs Information Provisions on April 11, 2003, effective June 1, 2003, *Shantou shi zhengwu xinxi gongkai guiding*, <http://www.shantou.gov.cn/script/ReadNews3.asp?gfwjid=133>; and the progressive business center of Shenzhen in Guangdong province adopted what is reportedly the first OGI legislation in China on so-called "online OGI," the Measures of Shenzhen Municipality for Online Open Government Information, on February 25, 2004, *Shenzhen shi zhengfu xinxi wangshang gongkai banfa*, http://www.chinacourt.org.flwk/show1.php?file_id=92369. The Shenzhen Measures, which went into effect April 1, 2004, require government agencies to disseminate and post online on their own initiative some 35 items of information, but do not provide a mechanism for requesting information that is not disseminated. Beijing, another special municipality directly under the central government like Shanghai, published draft Measures for Managing Open Government Information for public comment on February 20, 2004, *Beijing shi zhengfu xinxi gongkai guanli banfa (zhengqiu yijian gao)*, http://www.beijing.gov.cn/fg/zxfggzjwj/t20040220_108994.htm. Those measures, on which comments are due by the end of April, are much more skeletal than other local legislation, although they enunciate important general principles including the right of natural persons, legal persons and other organizations to request government information, the advance publication of draft documents for public comment, limited exemptions for state secrets, commercial secrets and individual privacy, the no-cost principle for information that should be disseminated, and designation of a Chief Information Officer for each government agency.

together with the final rule an explanation of the drafting process and comments received and considered. Third, the Shanghai government has launched unprecedented organizational, training and preparatory work to help ensure the effective implementation of these Provisions, a process which China's central government and other provinces are watching closely.

Like many countries, China has a long and well-entrenched tradition of government secrecy. Chinese scholars estimate that some 80 percent of useful information in China languishes in government files. China's culture of secrecy has meant that government acts as a bottleneck to a free flow of economic, social and other information that would facilitate continued dynamic growth and development. Officials and scholars alike have noted that the lack of transparency contributes to corruption, misallocation of resources and distrust of public institutions.

Shanghai has worked hard to transform itself into an international financial, trade and shipping center, with a goal to become a "global metropolis." Shanghai was an early proponent of E-government and the nationwide movement for more "open government affairs," recognizing that making more information available to its citizens would stimulate economic activity, help curb corruption and ensure more efficient and effective governance. Frustrated by uneven implementation of these policies and spurred on by China's commitments to the World Trade Organization to introduce greater transparency, Shanghai determined to institutionalize these programs within a legal framework.

The Shanghai Provisions build on the innovative concepts introduced by the Guangzhou Provisions that revolutionize the way information is to be handled. They establish a presumption of disclosure, making secrecy the exception rather than the rule. They provide that citizens, legal persons and other organizations have the *right* to request government information from government agencies, including information about individuals themselves, and refer to the recently articulated "right to know."³ Conversely, they impose a legal *obligation* on government agencies to disclose all information not covered by a specified exemption. The Shanghai Provisions do not on their face apply to foreigners, but government officials have announced that foreign individuals, legal persons, organizations and news media will be given equal access to government information in Shanghai.⁴

What Information Can be Accessed?

The Shanghai Provisions define "government information" as information held in physical form by government agencies that is related to economic and social management

³ The "right to know," does not appear in China's Constitution or any national law to date. This concept first appeared in scholarly literature in the early 1990s, and recently was enunciated as one of the civil and political rights China is protecting as part of its human rights program, in China's "white paper" on Progress in China's Human Rights Cause in 2003, released by the State Council Information Office on March 30, 2004, available in English at <http://english.peopledaily.com.cn/whitepaper/hr2004/hr2004.html> (March 31, 2003). That white paper further states that Chinese citizens enjoy freedom of information, another right not mentioned to date in any Chinese law.

⁴ "Shanghai Turns Spotlight on Local Practice," *China Daily*, April 7, 2004, http://www.chinadaily.com/english/doc/2004-04/07/content_321335.htm.

and public services. Reportedly the intent of adding reference to “economic and social management and public services” was to distinguish government-held information that should be made public from information relating purely to internal agency matters of little interest to the public. Hopefully these qualifiers will not be used as grounds to carve out unintended additional exemptions from disclosure by recalcitrant agency bureaucrats, who might argue that a given piece of information does not relate to “economic and social management and public services.”

The Shanghai Provisions specify a non-exhaustive list of broad categories of information that must be disseminated on their own initiative by government agencies, a useful device in a country where government is not accustomed to sharing information in the ordinary course. In addition to general matters relating to development plans, municipal rules and regulations, budgets and actual expenditures and information about each government agency, the list requires publication of information on several issues of particular public concern, such as information on epidemics (like last year’s SARS outbreak), natural disasters and other emergencies and urban land use plans and approval documents relating to redevelopment involving demolition of existing structures and relocation of residents. The sometimes forcible relocation of urban residents due to rapid urban redevelopment in Shanghai has led to protests, litigation and a general public outcry for more transparency in the process and what Westerners might refer to as procedural due process.⁵ Making the urban planning and redevelopment process subject to mandatory public disclosure should help regularize this often controversial process.

All government information is to be accessible by the public, unless it falls within one of six listed exemptions from disclosure for information that is (1) a state secret; (2) a commercial secret; (3) an individual’s private information; (4) related to a matter that is in the course of being investigated, discussed or processed; (5) related to an administrative enforcement action that might influence the enforcement activity or endanger an individual’s life or safety; or (6) otherwise exempted from disclosure by law or regulation. All but the state secrets exemption may be subjected to a balancing test. In the case of commercial secrets and individual privacy, the Shanghai Provisions stipulate not only that the rightsholder may waive exemption from disclosure, but that the rule of exemption may also be overcome if the public interest in disclosure outweighs the possible harm, or if laws and regulations otherwise require disclosure. Information covered by exemptions (4) and (5) may be disclosed if government agencies determine disclosure would clearly be in the public interest and not cause substantial harm. Further, if a request is made for information involving commercial secrets or privacy that might affect the rights and interests of a third party, unless the third party has already agreed in writing to its disclosure, the government agency is to seek the third party’s opinion; failure to reply will be deemed to constitute refusal to disclose.

⁵Roughly 100,000 Shanghai houses were reportedly demolished in 2003, and Shanghai has demolished 40 million square meters of old housing since 1990, forcibly evicting about 2.5 million people in the process. “Forced Eviction and Demolition Continues After New Year, *The Epoch Times*, January 13, 2004, <http://english.epochtimes.com/news/4-1-13/18307.html> ; “Arrested Shanghai property protestors go on hunger strike,” October 1, 2003, http://quickstart.clari.net/qs_se/webnews/wed/ca/Qchina-property-protest.Re5P_DO2.html

While legal development is still needed in order to determine the scope of exemptions for “commercial secrets”⁶ and “individual privacy,”⁷ the most troublesome exemption is that for “state secrets.” Invocation of the overly broad Law on Safeguarding State Secrets, adopted in 1988, can still basically eviscerate the disclosure mandate of all OGI legislation in China. This law defines “state secrets” generally as being “matters that affect the security and interests of the state,” which is further illustrated with broad categories of information including secrets concerning “important policy decisions on state affairs,” “economic and social development,” science and technology development and criminal investigations, as well as the more conventional areas such as national defense and diplomatic affairs. Chinese officials and scholars have called for revision of the law to more clearly distinguish between what should be kept confidential and what can and should be disclosed. Although work on a comprehensive revision is in fact underway, a revised State Secrets Law is not yet on the National People’s Congress legislative plan for the 2003-07 period. Pending national action, local governments like Shanghai will be challenged to find ways to narrow its reach.

A potential conflict also arises under China’s Archives Law, which governs the handling of agency documents and reference materials. That law stipulates the general rule that archived government information is not to be disclosed to the public for at least 30 years without special approval (and is under state copyright). Nonetheless, local authorities have recently started to implement a more open access policy to their unclassified documents,⁸ and Shanghai has announced plans to open by May 1 a new wing of the municipal archives, which is to provide OGI services for the public.

How is Information Accessed?

Government information is to be made public in one of two ways: disseminated on the government’s own initiative or provided in response to a specific request. China and its local governments do not yet have any publication as comprehensive and regular as the U.S. Federal Register, to which the public is accustomed to turning for information on federal rules and policies. Instead, the Shanghai Provisions call for most government information to be disseminated, through periodic government gazettes, newspapers and other media, in reading rooms to be established in government agencies, on government websites and by other means, free of charge. In addition, each government agency is to

⁶ Article 10 of the Law of the People’s Republic of China Against Unfair Competition defines “commercial secrets” broadly to mean “technical information or operating information that is not known by the public, can bring about economic benefits to the rightsholder, has practical utility and about which the rightsholder has adopted secrecy measures.”

⁷ Although privacy rights have been asserted in some cases, there is no law clearly establishing such rights. Instead, the Constitution, Article 38, protects “personal dignity” and Article 40 protects the freedom and privacy of correspondence. The General Principles of Civil Law, Article 101, protects the right of reputation, without defining the concept. Recently, regulations on the use of computers and the Internet prohibit damaging “privacy,” again without defining the term. See, Yingxi Fu-Tomlinson, “Personal Data Protection in China,” *The China Business Review* (2002).

⁸ See, e.g., *Hongtou wenjian jinqi peng zhengming zai sheng dang'anguang chasun*, [‘Red-header’ documents to be available for investigation in the provincial Archive Bureau against identification starting this year], online at: http://gz.gov.cn/_webnews/view.asp?id=XW200304251513557402, December 11, 2002.

compile and update a catalogue of government information that it holds, setting forth the title, a simple description of the basic contents and date of the relevant document, as well as a guide to how to access that agency's information.

The Shanghai Provisions further contain fairly detailed provisions on how to request government information that is not already disseminated to the public. The right to request government information, and the agency's obligation to provide the requested information, are among the most revolutionary concepts in the Shanghai Provisions. It may take some time before Shanghainese begin to actually use this tool, and for agencies to feel comfortable in disclosing requested information not already available to the public. Requests are to identify the requester, which may make the requester feel awkward, as well as to describe the requested information. Requests may be submitted by E-mail, letter, fax or in person. In general, the relevant government agency is to respond within 15 business days, and explain the reasons for any denial based on an exemption, a partial disclosure, a third party objection or a transfer of the request to another agency that holds the requested information. Agencies may charge cost-based fees for providing requested information.

Citizens, companies and other organizations are given the specific right to request information about themselves relating to such matters as their registration, tax payments and social security and also to request that any errors therein be corrected in a timely manner. Moreover, agency officials who fail to correct such information as requested are subject to administrative penalties. This provision does not, however, explicitly give citizens the right of access to their personnel files, which traditionally have been kept secret from the individuals involved but are often of great importance when seeking to change jobs, apply for credit and the like.

One unique article in the Shanghai Provisions forbids a government agency from trying to profit from the sale of information that it has refused to disseminate or to disclose to requesters. This appears to reflect a current problem with cash-strapped agencies trying to earn money by selling commercially information that should be public record or accessible upon request.

Public Participation and OGI

Following a trend set by the Guangzhou Provisions, the Shanghai Provisions also require the advance publication for comment of draft decisions, municipal rules and regulations and programs or plans that affect the major interests of Shanghai residents or have a major social influence. The Shanghai Office of Legal Affairs itself adopted such a procedure in formulating the Shanghai Provisions, publishing a draft for public comment in two local newspapers and on the official Shanghai government website, as well as consulting various legal scholars, government officials, foreign experts, enterprises and non-governmental organizations. This was the first time the government had published a draft regulation for public input prior to adoption, although the Shanghai Municipal People's Congress had made public several draft laws for comment, and occasionally held hearings on them, in the recent past.

The Shanghai government took the further step to publish concurrently with the final Provisions an explanation of the drafting process and the general categories of comments that had been received, as well as their disposition. This practice is similar to the so-called “notice and comment” procedure in the U.S. Administrative Procedure Act, which calls for an explanation to accompany all final rules that are subject to public notification and input. Such explanations serve to let the public know that their comments were received and considered, even if they were not ultimately incorporated in the final rule, thus enhancing the credibility of the process. While in the United States this advance notice and comment procedure is not part of the Freedom of Information Act, it certainly can be considered an important component of open government information. Shanghai and other local governments including such a provision in their OGI legislation are breaking additional new ground in terms of public participation and open government generally.

Making it All Work

Institutionally, Shanghai has tried to do a better job than earlier OGI legislation in designating the responsibilities of and providing incentives for government agencies to implement an OGI system. The Shanghai Provisions establish an Open Government Information Joint Conference comprised of the powerful municipal General Office, the Shanghai Informatization Commission (SIC), the Supervision Commission, the Office of Legal Affairs, the News Office, the State Secrets Bureau and Municipal Archives, as well as other municipal agencies, to be responsible for research and coordination of major policy issues involved in promoting OGI in Shanghai.

The SIC is designated as the executive agency of the Joint Committee, in charge of organizing, guiding and promoting implementation of the OGI system. The SIC may order an agency to comply with the Shanghai Provisions but has no enforcement authority. Given its existing functions related to building the technical capacity for government agencies to provide web-based information and E-government services to Shanghainese, the SIC was a reasonable choice to take on this important new task. Since its functions have been more technical than policy-oriented, however, its powers and personnel may need to be supplemented so that it can gain the stature and have the resources to carry out this new and important task.

Each government agency is to designate its own special office to disseminate government information, handle requests, maintain and update that agency’s information, and prepare information catalogues, guides to requesting information and annual reports for that agency. Agencies are to formulate their own implementing rules and appoint an internal office to supervise OGI work, handle any complaints, and send copies of information that is disseminated to the public to the relevant government archives. Each agency is also to publish contact information for its OGI office and establish a public reading room or facility when conditions permit, as well as, according to media reports, a hotline for handling public inquiries.

Lastly, the Shanghai Office of Legal Affairs (SOLA) and the Supervision Commission are to share the task of supervising and evaluating OGI activities of the

various government agencies. It is not clear from the text of the Shanghai Provisions if the SIC, SOLA or some other body will provide advisory opinions to government agencies and requesters that are uncertain about their rights and obligations under the new system. Designating an authoritative institution to provide such opinions might help smooth the introduction of the OGI system and avoid contentious disputes over rights and responsibilities.

Passing a good law and designing the institutional structure for implementation are not sufficient, of course, to ensure that Shanghai residents will actually use the law or that government agencies will be willing to provide the required access to information. Legislative implementation is a huge problem in China, as elsewhere in the world, especially when the legislation creates new rights and responsibilities. Recognizing the challenges it faces, Shanghai is gearing up to ensure the new OGI system will truly work in practice.

Over 50 officials are busy helping to set up OGI offices within government agencies, sort through existing information records, formulate agency guides to information, compile information catalogues, train personnel and hold meetings for both the public and government officials to explain the importance of the Shanghai Provisions and the methods of obtaining government information. On April 7, 2004, the General Office published guidance on issues of implementation, which were drafted by the SIC and SOLA.⁹ As of May 1, the official Shanghai website is to be revamped to link to each government agency's open government information and guide thereto.

The introduction of annual reports, due from each agency by January 31 and from the SIC each March 31, is another important mechanism, adopted from U.S. practice, to ensure the government will actually take steps to implement the OGI system. These reports are to address compliance by government agencies with dissemination requirements, statistics on disclosure requests and on the types of information that was disclosed or denied based on an exemption, statistics on any lawsuits or complaints received, major problems and plans for improvement and the like. For the first year, the government has set a goal for each agency to make public the information that should be disseminated and an agency guide to requesting government information by May 1, the effective date of the Shanghai Provisions. Even more complete information about each agency, all of their relevant rules and regulations and a catalogue of government information in its possession, are to be available for public inspection, including on the agency's website, by November 1, 2004. The first annual report on OGI work in the entire municipality is due from the SIC on March 31, 2005.

The most effective way to ensure implementation is to give Shanghai's residents the remedies to compel government agencies to make government information public. As a local government, Shanghai has to balance its license to venture into the relatively uncharted legal territory of information rights against the constraints of existing national

⁹ Guanyu "Shanghai shi zhengfu xinxi gongkai guiding" de shishi yijian [the Opinions on Implementing the Shanghai Municipal Government Open Government Information Provisions], <http://www.shanghai.gov.cn/gb/shanghai/node2314/node2315/node4411/userobject21ai31744.html>.

law. Although Shanghai might have experimented with new institutions such as an information commission with adjudicatory powers, whose decisions could still be appealed to the courts, such commissions are relatively expensive to maintain and would have been yet an additional innovation to deal with as Shanghai works to introduce the OGI system. Nothing in the Shanghai Provisions would preclude the establishment of such a commission down the road, however. For the time being, Shanghainese are afforded only the traditional remedies of administrative punishment, complaint, administrative reconsideration, administrative litigation over concrete government action or inaction, and requests for compensation in the event a violation of the Provisions results in direct economic loss. Administrative litigation is available under existing law only in cases of infringement of personal or property rights. Whether the Shanghai courts will accept cases involving new information rights that are not endorsed by a national law passed by the National People's Congress, and how they will enforce the Shanghai Provisions, thus remain to be tested.

Implications for National OGI Legislation

In the wake of widespread criticism of the Chinese government's secretive handling of the 2003 SARS crisis, many observers predicted that the central government would move quickly to adopt national legislation on open information that it has been considering since July 2002.¹⁰ Promulgation of such legislation has been postponed, however, to give local experiments –such as those in Guangzhou and Shanghai -- time to flesh out the many challenging issues of implementation and regulation in this unprecedented area. For example, determination of what agency or new body should be in charge of policy and coordinating the implementation of a national OGI system is one of the thorny issues confronting the central government. Beijing will be watching closely how the SIC performs its new OGI executive functions under the guidance of the Joint Conference.

Meanwhile, the drafting of a national law on open government information has been placed on the National People's Congress (NPC) legislative agenda for the current session running through 2007, and open government clearly is part of the current Chinese leadership's drive to "administer the country in accordance with the law." In his work report to the NPC annual meeting in March 2004, Premier Wen Jiabao set as a task for government self-improvement in 2004 the establishment of an open government information system and increased transparency of government work, to facilitate the people's knowledge and their supervision of the government.¹¹ Moreover, the State Council's "white paper" on China's human rights situation, issued March 30, 2004, specifically cited "freedom of information," work to perfect the open government information system and increased transparency to better permit the people to exercise

¹⁰ *Woguo zhuoshou zhiding "Zhengfu xinxi gongkai taioli* [Our Country Grasps the Formulation of Open Government Information Regulations], *China Youth Daily* online at: <http://news.gznet.gov.cn/hot/xxhgk/20030203/200211200073.asp> (November 20, 2002); Sun Yafei, *Feidian: Jiasu xinxi gongkai bufa* [SARS: Increasing the Pace of Information Openness], *Nanfang Zhoumo*, April 31, 2003, <http://www.nanfangdaily.com.cn/zm/20030501/xw/tzs/200304300462.asp>.

¹¹ The Chinese text of the Premier's Report on the Work of Government, delivered March 5, 2003, is available at: <http://www.peopledaily.com.cn/GB/shizheng/1024/2394441.html>. The official English translation available at: http://english.peopledaily.com.cn/200403/16/eng20040316_137651.shtml.

their right to know, right to supervise government and right of participation in public affairs as important elements in China's improving human rights situation.¹²

High-level policy statements are important, but only when information rights are granted status under a national law will they be certain of protection. National OGI legislation will also spur necessary work on complementary legislation, such as revising the State Secrets Law and the Archives Law, drafting a Personal Data Protection Law and expanding the scope of administrative and judicial relief explicitly to cover information rights. Shanghai's carefully crafted Provisions on Open Government Information and experience with serious implementation should help the central government gain the confidence to enact much-needed national legislation in this area.

¹² Translating from the Chinese text of the Civil and Political Rights section, *2003 nian zhongguo renquan shiye de jinzhan (quanwen)* [Progress in China's Human Rights in 2003], <http://www.people.com.cn/GB/shizheng/1026/2418866.html> (March 31, 2003); an English translation of which appears at [http://english.peopledaily.co.cn/whitepaper/hr2004/hr2004\(2\).html](http://english.peopledaily.co.cn/whitepaper/hr2004/hr2004(2).html).