

Some Thoughts on Typical Exemptions from Government Information Disclosure

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Most “freedom of information” (FOI) or “access to information” (ATI) laws around the world are drafted so as to encourage and require as full disclosure as possible of government-held records. This is referred to as the principle of maximum disclosure¹ or the “presumption of disclosure.” Under this approach, government typically bears the onus or “burden of proof” to justify non-disclosure of information by showing that the information which it wishes to withhold comes within the scope of the limited regime of exceptions that are set forth in the applicable ATI law.

Even if a law or regulation does not establish a clear presumption of disclosure, as is the case with China’s recent State Council Regulations on Open Government Information, the adoption of an information disclosure law raises public expectations of a much greater degree of transparency and of the public’s right to receive government-held information. In China, rhetoric from high-level Party and Government officials about the people’s “right to know” and news concerning the new OGI Regulations generated sufficient public enthusiasm that, as soon as the OGI Regulations took effect on May 1, 2008, retired workers and farmers, as well as lawyers and law professors, were quick to file information requests and bring appeals from refusals to disclose government-held information.

ATI laws around the world universally recognize that the duty of governments to disclose information that they produce and maintain, and the public’s right to information, are subject to certain legitimate and understandable limitations, keyed to overriding social policy interests. Information disclosure duties and rights have “to be balanced against the need to protect other rights and freedoms, or to protect the wider public interest. Such restrictions are known as exceptions to the general principle that all information should be released.”²

Nonetheless, it is important for building both official and public acceptance of and trust in an ATI regime that the exceptions to disclosure should be as clearly delineated in the law as possible, so that government officials have guidance on what should or should not be disclosed and the public’s expectations can be effectively managed. The precise definition of such exceptions is, of course, a political decision for each country and its people to make.

¹ Article 19, “The Public’s Right to Know: Principles on Freedom of Information Legislation” (June 1999), posted at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.

² United Nations Development Programme, “Right To Information: Practical Guidance Note,” 2004, at 21; http://www.undp.org/governance/docs/A2I_Guides_RighttoInformation.pdf (hereafter “UNDP”).

The United States Freedom of Information Act (“FOIA), which is one of the earliest of the modern ATI laws, establishes a statutory presumption that all federal records are available to “any person.” That presumption can be overcome by a valid showing that the record is covered by one of nine statutory exemptions.³ Under FOIA, exemptions from disclosure are discretionary, not mandatory. There is no penalty for an agency decision *not* to invoke an exemption.

China’s OGI Regulations not only do not articulate a clear presumption of disclosure,⁴ they caution that, as a general principle, “The government information disclosed by administrative agencies may not endanger state security, public security, economic security and social stability” (Article 8). These so-called “three securities and one stability” are all broad categories that are not defined in law and are therefore difficult to implement. Moreover, the OGI Regulations in Article 35(5) make government officials potentially criminally liable for “disclosing government information that should not be disclosed”. Taken together, the OGI Regulations seem to establish more of a presumption of non-disclosure, which does not seem to be in line with the general purposes set forth in Article 1, which are to ensure that the public can “obtain government information in accordance with the law, to enhance transparency of the work of government, to promote administration in accordance with the law, and to bring into full play the role of government information in serving the people’s production and livelihood and their economic and social activities.

Given the uncertainty of the disclosure mandate provided by the OGI Regulations, it will be even more important that government officials and the public are given additional guidance on the kinds of information that may not be disclosed and the policy reasons for withholding that information.

The OGI Regulations specify in Article 14 only three categories of information that are specifically exempted from disclosure, providing: “Administrative organs may not disclose government information that involves state secrets, commercial secrets or individual privacy”. These are similar to exemptions found in most or all ATI regimes around the world, although with slightly different formulations. For example, instead of

³ 5 USCA Sec. 552(b)(1)-(9). This showing requires evidence, usually in the form of agency employee affidavits, presented by the agency that has custody of the record.

⁴ Many local OGI provisions introduced throughout China prior to implementation of the OGI Regulations did establish a presumption of disclosure, some like the Guangzhou Municipal OGI Provisions stating explicitly in Article 6 that “disclosure shall be the principle, non-disclosure shall be the exception [,]” and others, such as the 2004 Shanghai OGI Provisions, framing the presumption along the lines of “all government information shall be disclosed, unless subject to one of the exemptions specified herein.” In March 2005, the General Offices of the Communist Party of China and the State Council issued a document establishing as national policy the presumption that information concerning “administrative management and public services, except that involving state or commercial secrets and individual privacy that is protected by law, shall be disclosed strictly according to facts and in strict compliance with the provisions of laws, regulations and relevant policies” Opinions of the General Office of the Central Committee of the Chinese Communist Party and of the State Council on Further Promoting Open Government Affairs, March 24, 2005, available online in Chinese at: http://news.xinhuanet.com/newscenter/2005-04/26/content_2877607.htm.

“state secrets,” the United States FOIA exempts information that is to be kept secret in the interest of *national defense or foreign policy*.

This article discusses three other common exceptions to information disclosure contained in ATI legislation around the world,⁵ spending the most time on the so-called “deliberative exemption,” and how these exceptions might be useful for China to consider adopting, either through an amendment to the OGI Regulations or in administrative guidance that is shared with the public, to permit some experimentation before formal adoption.

Other Statutes

A common exception to disclosure found in ATI laws around the world is for information that is to be kept confidential pursuant to other laws. This common-sense principle may be implied under Chinese law even without specific mention, but it is helpful to spell it out in ATI legislation. In addition to the Law on Safeguarding State Secrets, which is mentioned in the OGI Regulations, other relevant Chinese laws that contain information confidentiality provisions include the Archives Law, the laws on civil servants, judges and prosecutors, who are respectively required to keep “work secrets” confidential, and banking and other laws that require certain financial information to be kept confidential.

In some countries, the disclosure mandate of new ATI laws is intended to preempt, or take precedence over, certain pre-existing legislation and lower-level rules. In China, since the OGI Regulations do not have the status of a law, the relationship between its disclosure provisions and other laws, as well as potentially conflicting administrative regulations and local regulations, could usefully be clarified to avoid any confusion or dispute.

The Deliberative Exemption.

Another typical exception from disclosure is for documents that reflect the internal deliberations, especially opinions and ideas, leading to governmental rules and decisions. This exception is sometimes phrased as the “inter-agency and intra-agency communications” exemption⁶ and is also commonly referred to in the United States as the “deliberative exemption” or “privilege.” The social policy goal of the deliberative exemption involves balancing accountability of government with the reasonable operation of a creative, candid mechanism for the development of policy and rules within a government agency.⁷

The theory behind this exception is that government decisions benefit from receiving free and frank internal discussion, but government officials and advisors may

⁵ See, e.g., UNDP, 21-22.

⁶ See, e.g., FOIA, 5 U.S.C. § 552(b)(5).

⁷ O'REILLY, JAMES T., FEDERAL INFORMATION DISCLOSURE (3rd Edition, December 2000), Section 15:71 (hereafter FEDERAL INFORMATION DISCLOSURE).

not be totally candid if they believe internal debates and preliminary ideas and opinions may be made known and possibly questioned publicly. Exempting pre-decisional advice, opinions and recommendations from disclosure protects subordinates who can make recommendations freely, agencies that wish to avoid premature disclosure of proposed policies, and the public that avoids confusion about ideas that are not made final.⁸

Thus, memoranda, letters or e-mails transmitted from an official of one agency to an official of another, or between officials within the same agency, may be protected from disclosure, so long as the communications (or portions thereof) are *advisory* in nature and *do not contain information upon which the agency relies in reaching a decision or carrying out its duties*. For example, an opinion prepared by staff that may be rejected or accepted by the head of an agency need not be made public. In the United States, reports under the control of the agency that were prepared by and contain recommendations of outside experts and other contractors may also be exempted under the theory that the function of such consultants hired by government is the same as that of an agency insider.⁹

Exempt pre-decisional documents, or portions thereof, typically remain confidential even after the decision is made in order to protect frank exchanges of opinion, unless the agency determines that the public interest in such information outweighs the benefits of keeping it confidential. For example, if a decision affects a very controversial matter, disclosure of the internal debate may help the public better understand the final decision. Moreover, the archival laws of many countries provide for the disclosure of deliberative records for historical purposes after a considerable number of years, or after the death of the officials concerned.

However, the facts, analyses of facts, technical data, statistical information, policies and determinations upon which an agency relies in reaching the final decision or rule or carrying out its duties should normally be made public once the decision is reached or action taken. Such factual information might include expert names, technical, economic and scientific data, and factual portions of internal recommendations that can be separated from deliberative portions.

In addition, if an agency releases a draft of a proposed rule or decision for public comment during the deliberative process, background information the agency relied on in formulating the draft (including data that has been compiled, studies that were prepared and the like) would typically also be made available to the public so that it can better understand the rationale for the draft.

An example of how the “deliberative exception” has been formulated, taken from a “Model Freedom of Information Law” prepared by a non-governmental organization called Article 19 based on “best” international practices suggests:

“Article 32. Policy Making and Operations of Public Bodies

⁸FEDERAL INFORMATION DISCLOSURE, *supra* note 7, Section 15:1.

⁹FEDERAL INFORMATION DISCLOSURE, *supra* note 7, at Section 15:27.

- (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to:
- (a) cause serious prejudice to the effective formulation or development of government policy;
 - (b) seriously frustrate the success of a policy, by premature disclosure of that policy;
 - (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
 - (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body.

(2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.”¹⁰

In similar fashion, in the United States, New York State’s Freedom of Information Law provides that a government agency may deny access to inter-agency or intra-agency communications, but only to the extent that the communications are not (1) statistical or factual tabulations or data; (2) instructions to staff that affect the public; (3) final agency policy or determinations; or (4) external audits, including but not limited to audits performed by the comptroller and the federal government.¹¹

Regardless of the precise formulation, it would seem that China would also benefit from having an explicit exemption for information concerning government decision-making processes and deliberative opinions, drafts and other pre-decisional information. Moreover, this would seem to be a concept that the Chinese public would understand and accept.

It may be that this concept of the “deliberative exemption” is similar to that of “work secrets” that is found in the Civil Servants Law of 2005, which requires all government personnel to protect “work secrets” as well as state secrets.¹² Accordingly, one way to introduce this exemption without actually amending the OGI Regulations at this time might be to issue a public interpretation that explains how “work secrets” are to be defined in a manner similar to that of the deliberative exemption and taken into account when deciding whether to disclose certain government information either on the government’s own initiative or upon request.

¹⁰ Article 32, A Model Freedom of Information Law, July 2001, posted at:

<http://www.article19.org/pdfs/standards/modelfoilaw.pdf> (hereafter “Model FOI Law”).

¹¹ As amended as of August 2008, Section 87(2)(g), posted at <http://www.dos.state.ny.us/coog/foil2.htm>.

¹² *Zhonghua ren min gongheguo gongwuyuan fa* [Civil Servant Law of the People’s Republic of China], Article 12(6), adopted April 27, 2005, Chinese version available at: <http://politics.people.com.cn/GB/1026/3354665.html>. This provision seems to track similar provisions in the PRC Judges Law, which in Article 8 requires judges to safeguard work secrets, *see* Chinese text at: <http://www.cecc.gov/pages/newLaws/judgesLaw.php>, and in the PRC Procurators Law, which in Article 8 requires procurators to preserve procuracy work secrets, *see* the Chinese text at: <http://www.chinainnovations.org/read.asp?type01=3&type02=1&type03=1&articleid=964>.

The Law Enforcement Exemption

A third common exception typically provided in ATI laws around the world is for information the disclosure of which is detrimental to the pursuit of a criminal case or law enforcement more generally. The protection of the public from criminal activity, terrorism and other unlawful activities is a strong social policy interest. However, protection of the necessary confidentiality of police and other law enforcement activities clashes with the principle of openness underlying ATI laws, and law enforcement secrecy around the world has often been susceptible of some abuse.¹³

Under the United States FOIA, “records or information compiled for law enforcement purposes” are exempted from disclosure, but only to the extent that disclosure of such law enforcement records or information would have specified unfavorable results, including (1) interfering with enforcement proceedings; (2) depriving a person of the right to a fair trial or an impartial adjudication; (3) disclosing the identity of a confidential source; (4) disclosing law enforcement techniques and procedures; or (5) reasonably expected to endanger the life or physical safety of an individual.¹⁴ The U.S. Supreme Court has stated the bottom line: if there is a legitimate law enforcement investigation and disclosure would reasonably be expected to lead to one of the statutory classes of harm described above, the government information is exempt from disclosure. However, the extent of this exemption as applied to the civil activities of federal regulatory agencies is less than that of criminal law enforcement agencies.¹⁵

Article 19’s Model FOI Law has a somewhat different formulation for its “law enforcement” exception. It provides that a government agency may, as a threshold matter, “refuse to indicate whether or not it holds a record” as well as “refuse to communicate information,” where to do so would, or would be likely to, cause serious prejudice to:

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;
- (c) the administration of justice;
- (d) the assessment or collection of any tax or duty;
- (e) the operation of immigration controls; or
- (f) the assessment by a public body of whether civil or criminal proceedings, or regulatory action pursuant to any enactment, would be justified.¹⁶

The law enforcement exemption reflects a complex balancing of competing interests of accountability and openness on the one hand and protection of the confidentiality of important police and regulatory investigative and crime-prevention activities. Police activity, in particular, is often the government’s “most controversial

¹³ FEDERAL INFORMATION DISCLOSURE, *supra* note 7, Section 17:1.

¹⁴ 5 U.S.C. § 552(b)(7).

¹⁵ FEDERAL INFORMATION DISCLOSURE, *supra* note 7, Section 17:1.

¹⁶ Article 29, Model FOI Law, *supra* note 10.

point of impact on the public.”¹⁷ The scope of this exemption is one that the public likely will continue to examine and test, even though it accepts the basic premise.

The Treatment of these Additional Exemptions in Chinese Law

As mentioned above, China’s OGI Regulations identify only three common exemptions from disclosure in Article 14, government information involving state secrets, commercial secrets and individual privacy. Having only those three exemptions to disclosure makes it difficult for government officials to justify withholding information that may not seem to fall within one of those, but which could be justified on the basis of the “deliberative” or “law enforcement exemptions, or because it is subject to confidentiality under another law that is not specified in the OGI Regulations. This kind of situation could end up frustrating the public and undermining confidence in both the OGI Regulations and the government.

In China, many local open government information (OGI) provisions adopted prior to promulgation of the OGI Regulations contained the above three additional exemptions. For example, the 2004 Shanghai OGI Provisions in Article 10 (Exemptions to the Scope of Open Government Information) provided for exemption of:

- (d) Information that is in the course of being investigated, discussed or processed, except then the laws, regulations or these Provisions otherwise stipulate;
- (e) Information relating to administrative enforcement, the disclosure of which might influence enforcement activities such as examination, investigation or gathering of evidence or might endanger an individual’s life or safety;
- (f) Other information exempted from disclosure by the provisions of laws and regulations.¹⁸

However, those additional exemptions were deleted from the final revision.¹⁹ The same is true, for example, of the 2005 Hebei Provincial Open Government Information Provisions, which originally in Article 7 included similar deliberative, law enforcement and “other statutes” exemptions, which were deleted from the 2008 Hebei Provincial Measures Implementing the OGI Regulations.²⁰

¹⁷ FEDERAL INFORMATION DISCLOSURE, *supra* note 7, Section 17:1

¹⁸ *Shanghaishi zhengfu xinxi gongkai guiding*

<http://www.shanghai.gov.cn/shanghai/node2314/node2319/node2407/node12938/userobject26ai983.html>.

¹⁹ *Shanghaishi zhengfu xinxi gongkai guiding*, Adopted April 7, 2008 and effective May 1, 2008,

<http://www.shanghai.gov.cn/shanghai/node2314/node2319/node13013/userobject21ai52732.html>. However, the final revisions did include language taken from the deliberative exemption and include it under Article 10 (“For government information that is still under investigation, discussion or processing and whose contents are indefinite, if its disclosure may adversely impact the national security, public security, economic security or social stability, its disclosure is prohibited, except for draft documents disclosed to seek opinions.”)

²⁰ Effective July 1, 2008, at: http://www.gov.cn/flfg/2008-06/23/content_1024851.htm.

Interestingly, however, some of the implementing provisions that have been adopted after the OGI Regulations were promulgated do contain some or all of these additional, internationally accepted exemptions. For example, the State Tax Administration in Article 7 of its State Tax Administration Work Procedures on Government Information Disclosure Upon Request exempts from disclosure information relating to the “course of internal research, discussion or approval,” as well as “information on tax collection enforcement activities such as investigations, obtaining evidence and examination and “other government information that is prohibited from disclosure by laws, regulations and other provisions.” (Unfortunately, those Work Procedures also exempt the broad and undefined category of “internal documents,” which would seem to undermine the intent of the OGI Regulations to abolish secret “internal documents.”)²¹ The National Audit Administration also includes similar exemptions in Article 11 of its interim open government information provisions.²²

As China transitions into the new “open information” age, it will be important for both government officials and the public to understand the policy objectives of and concerns relating to the new OGI Regulations. Having clearly crafted exemptions from disclosure that achieve generally accepted policy objectives makes it easier for the public to understand why certain government information is not being disclosed. Especially with regard to certain sensitive issues left over from history, it may be helpful for government to be able to justify certain information withholding with more than the response that the requested information constitutes a “state secret.” Having just the three exemptions of state secrets, commercial secrets and individual privacy does not make the OGI Regulations easier to implement. Indeed, the opposite may be true.

This article has discussed three additional exemptions that are commonly found in ATI laws around the world -- the “deliberative exemption,” the “law enforcement exemption” and the exemption for information that is to be kept confidential under other laws, that China might consider adopting as national policy. China already has some experience with implementing these additional exemptions under local legislation that preceded adoption of the OGI Regulations, and there is much international experience with these kinds of exemptions that can be consulted. China might usefully consider adopting similar exemptions, either through an amendment to the OGI Regulations or in administrative guidance that is shared with the public as well as with government agencies, to permit some experimentation before formal adoption at the national level.

²¹国家税务总局依申请公开政府信息工作规程 [Work Procedures of the State Taxation Administration on Disclosure of Government Information Upon Request], effective May 1, 2008, posted at: http://www.gov.cn/gzdt/2008-04/17/content_946887_4.htm.

²² At: <http://www.lawinfochina.com/Law/Display.asp?Id=7118>.

