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ASSESSING ACCESS TO INFORMATION IN CHINA
——*LEGAL DEVELOPMENT AND*
INTERNATIONAL STANDARDS

评析中国的政府信息公开制度
——从法律发展和国际标准的角度

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ABSTRACT

The recent enactment of the Open Government Information Regulations (OGI Regulations) is the latest and most important among a series of developments implying greater government transparency in the People's Republic of China, signaling a transformation of the Chinese way of government. This development coincides with an international trend of adopting disclosure legislation, and the evolution of corresponding international standards. Relying mainly on international human rights law, but also finding support in other areas of international law, this thesis assesses the OGI Regulations' compliance with international standards.

The first part of the thesis concretizes international standards into *minimum standards* and *best practices*, through examining both hard and soft sources of law. Next, the Chinese OGI Regulations' legislative history is mapped, and different stages of reform are compared to international standards through an in-depth analysis of the law-making process. The last part of the thesis provides a thorough comparison between the Chinese Regulations and international standards.

The thesis concludes that while international standards were an important inspiration during the drafting process, they are paid less attention to in the final OGI Regulations, resulting in significant shortcomings in Chinese practice, and inadequate protection of the people's right to access government-held information. These weaknesses should not,

however, be taken to exist because of opposition to, or lack of want to comply with, international standards. Rather, the thesis argues that the Chinese government seems highly committed to gradually providing stronger protection of the people's right to access information. Lack of compliance with international standards is therefore found to be largely due to fear of too rapid change, and a firm belief in gradual reform, coherent with the central leadership's social stability mantra.

Keywords: Access to information, open government, right to know, international law, human rights, legal development

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摘要

中国政府最近颁布的政府信息公开条例（以下简称《条例》）是一系列政府改革措施中表示政府透明度的进一步增的最新的、最重要的举措，表明中国政府执政方式的改变。这一发展符合国际披露立法的趋势和相应的国际标准的演变。本文将根据国际标准（主要是国际人权法，也包括国际法的其它领域）对《条例》进行评估。

本文每一部分通过对硬法和软法的研究，将国际标准具体化为最低标准和最佳做法。然后，本文对中国政府信息公开立法的历史进行了回顾，并通过对立法过程的深入分析，将不同时期的立法和国标标准进行比较。最后一部分对中国政府信息公开条例和国际标准进行了详细比较。

本文结论认为，国际标准是立法过程中的重要考虑因素，然而最终的《条例》却没有充分采纳国际标准，导致中国在实际中的重大缺陷，不能充分保障公民获得政府信息的权利。这些缺点不应因为《条例》与国际标准相违背，或者没有与国际标准保持一致而存在。而本文认为中国政府高度承诺逐渐加强对公民获得政府信息权利的保障。因此《条例》与国际标准缺乏一致性，主要是要因担心改革过于迅速，并政府坚信渐近式的改革方式，这与中央领导要求社会稳定的方针是一致的。

关键词：获取信息，政府信息公开，知情权，国际法，人权，法律发展

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Acronyms and abbreviations

Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters	ICESRC	International Covenant on Economical, Social, and Cultural Rights
ACHR	American Convention on Human Rights	ICJ	International Court of Justice
ALL	Administrative Litigation Law	IPE	Institute for Public and Environmental Affairs
APL	Administrative Procedural Law	NGO	Non Government Organization
ARL	Administrative Reconsideration Law	NPC	National People’s Congress
ASEAN	Association of South East Asian Nations	NRDC	National Resources Defense Council
ASL	Administrative Supervision Law	OAS	Organization of American States
CASS	Chinese Academy of Social Sciences	OGI	Open Government Information
CCP	Chinese Communist Party	OGIPS	Open Government Information and Public Support program, Peking University
CESCR	Committee on Economic, Social and Cultural Rights	OGIR	Open Government Information Regulations
CoE	Council of Europe	OP	Optional Protocols
CUPL	China University of Political Science and Law	OSCE	Organization for Security and Cooperation in Europe
ECHR	European Convention on Human Right	PRC	People’s Republic of China
ECtHR	European Court of Human Rights	RTI	Right to Information
EU	European Union	SSL	Protection of State Secrets Law
FOI	Freedom of Information	TRIPS	Trade-related Intellectual Property Issues
GA	General Assembly	UDHR	Universal Declaration of Human Rights
GATT	General Agreement on Trade and Tariffs	UN	United Nations
GC	General Comments	UNCAC	United Nations Convention against Corruption
HRIC	Human Rights in China	UNECE	United Nations Economic Commission for Europe
IACHR	Inter-American Commission on Human Rights	UNHRC	UN Human Rights Council
IACtHR	Inter-American Court of Human Rights	WTO	World Trade Organization

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Chapter 1 Introduction

1 Open Government Information

The Chinese government has in recent years taken gigantic strides away from its tradition of being one of the most secretive governments of the world. The foremost result of this development is so far the Open Government Information Regulations (the OGI Regulations),¹ promulgated by the State Council on 5 April 2007 and effective as of 1 May 2008. These Regulations give citizens the right to access – and government officials the duty to disclose – all government held information, except information pertaining to state secrets, commercial confidentiality and personal privacy. The legal framework of procedural and remedial rules supporting this right of access to information (ATI)² is fairly comprehensive, even when compared to far more advanced legal systems. Contrasted to the situation twenty years ago when virtually no disclosure requirements existed, or only two years ago when such requirements were limited to semi-obligations to disclose certain unclear categories of information, the change is

1 中华人民共和国政府信息公开条例(2007). Alternative translations exist, such as Regulations on Disclosure of Government Information. This text uses the OGI Regulations, as this is the term used in the only (unofficial) English translation available, courtesy of the China Law Center, Yale Law School. http://www.law.yale.edu/documents/pdf/Intellectual_Life/CL-OGI-Regs-English.pdf, visited 2009.11.05. While this version is used in most direct quotes from the OGI Regulations, the translation has been double-checked, and in some instances slight corrections were seen necessary. Translation errors are therefore my own.

² I will in this thesis use the term access to information (ATI) as meaning *access to government-held information*. Other alternative terms describing largely the same concept, such as *freedom of information (FOI)*, *the right to know*, and *the right to information (RTI)*, will not be used. There are, however, two exceptions to this: First, FOI is used in discussing the human right of access to government-held information, as this is the preferred term in a majority of human rights documents. FOI as used in human rights instruments has, as will be explained, different connotations than ATI. See *infra* Chapter 2 for a thorough discussion on the use and meaning of FOI in this context. Second, *the right to know* (知情权) is the favored term in discussions on the *constitutional* right to access government information in China. Translating the Chinese term into anything but *the right to know* would be inaccurate, and I therefore use this designation when discussing the right of ATI under the Chinese Constitution in Chapter 3. *The right to know* will also be used to emphasize the *right* of ATI, as opposed to the *concept* of ATI.

substantial. The OGI system has therefore been said to signify “a thorough farewell with the traditional way of administration [by domination]”,³ implying that the new way of government is a participatory one where the people are given increased voice and where government accountability has gained significant importance.

2 Development of access to information

The reform towards increased government openness is part of two important developments; one domestic and one international. The first development is the gradually increased importance placed on so-called *administration according to law* (依法行政) as an integral part of (socialist) rule of law. Over the past decade or so, the Chinese government has realized that strengthening the OGI system is, in turn, key to attaining – and therefore an essential element of – administration according to law.⁴

The second development is the emerging protection of information rights under international law, paralleled by the global trend of adopting access to information legislation.⁵ So far at least 90 countries have disclosure laws or administrative

³ Zhou Hanhua, *The Significance and Peculiarities of Promoting a System of Information Openness in My Country* [我国推行信息公开制度的意义与特点], 30 *China Today Forum* [今日中国论坛] 29, 29 (2007).

⁴ See esp. State Council, *Outlines of Advancing All Aspects of Administrative Rule of Law*. Guofa [2004] No. 10, 《全面推进依法行政实施纲要. 国发[2004]10号》. See generally Cao Kangtai & Zhang Qiong (eds), *Booklet on the Regulations of the PRC on Open Government Information* [中华人民共和国政府信息公开条例读本] (People Press 2007); Cheng Jie, *A Study of Issues Concerning Application of Law in Open Government Information* [政府信息公开的法律适用问题研究], 3 *Political Science and Law* [政治与法律] 28, (2009); Jamie Horsley, *Toward a More Open China?*, in Ann Florini (ed), *The Right to Know: transparency for an open world* (Columbia University Press, 2007); Mo Yuchuan & Lin Hongchao (eds), *Interpretation of the Open Government Information Regulations of the People's Republic of China* [中华人民共和国政府信息公开条例释义] (China Legal Publishing House 2008); Zhou Hanhua (ed), *My Country's Experience with and Consideration of Open Government Affairs* [我国政务公开的实践与探索] (China Law Publishers 2003); Zhou Hanhua, *Open Government in China: practice and problems*, in Ann Florini (ed), *The right to know: transparency for an open world* (Columbia University Press, 2007); Zhou Hanhua, 30 *China Today Forum* (cited in note 3).

⁵ See generally David Banisar, *Freedom of Information Around the World 2006 - a global survey of access to government information laws* (Privacy International 2006); David Banisar, *Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating*

regulations in effect, and several more have legislation pending entrance into force.⁶ 75 of the 90 effective laws, or close to 85 percent, have been enacted in the last 20 years. Most countries enacted legislation after concerted pressure from the general public, the media, and civil society, who sought to realize their democratic and human rights.⁷ These national developments are reflected in the gradual development of international standards. Creation of international law is inherently slow, but the right of ATI is now increasingly interpreted to be a human right of its own, most importantly as part of article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) concerning freedom of expression and information.⁸ Additional signs of the right's recognition include the existence of comprehensive ATI standards in Europe⁹ and America,¹⁰ and global standards concerning information on certain specific issues such as corruption¹¹ and the environment.¹²

States (Privacy International 2007); Ann Florini (ed), *The Right to Know: transparency for an open world* (Columbia University Press 2007); Toby Mendel, *Freedom of Information - A comparative legal survey* (UNESCO 2008); Open Society Justice Initiative, *Transparency & Silence : a survey of access to information laws and practices in fourteen countries* (Open Society Institute: Distributed by Central European University Press 2006); Alasdair Roberts, *Blacked Out: government secrecy in the information age* (Cambridge University Press 2006).

⁶ Roger Vleugels, *Overview of All 90 FOIA Countries & Territories* (2009), <http://www.wobsite.be/uploads/documentenbank/9448824f6eaa30591ef096d6d073497f.pdf>, visited 2009.09.07.. See also Privacy International, *FOI Map* (2009), at <http://www.privacyinternational.org/foi/foi-laws.jpg>, visited 2009.10.28. See generally Banisar, *Freedom of Information* (cited in note 5); Mendel, *Freedom of Information* (cited in note 5).

⁷ See generally Florini (ed), *The Right to Know* (cited in note 5); Roberts, *Blacked Out* (cited in note 5).

⁸ See *infra*, Chapter 2.

⁹ See *esp.* Council of Europe Convention on Access to Official Documents, at <https://wcd.coe.int/ViewDoc.jsp?id=1377737>, visited 2009.10.30

¹⁰ American Convention on Human Rights, at <http://www.oas.org/juridico/english/treaties/b-32.html>, visited 2009.10.28. See *esp.* *Claude Reyes et. al v Chile* (IACtHR 2006), at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf, visited 2009.03.05.

¹¹ United Nations Convention against Corruption, at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, visited 2009.10.30

This thesis sets out to assess the interrelatedness of these two developments through examining the Chinese OGI reform's place in the international ATI development, by comparing the OGI system to international legal standards.

Prior research is limited both when it comes to the development of Chinese ATI, and the development of international standards. Even though vast amounts of scholarly research have been produced on virtually all issues concerning ATI in China,¹³ this research is almost exclusively in Chinese and about China. Comparative studies have been conducted, but these are either general comparisons of ATI legislation around the world,¹⁴ or compare Chinese practice with one or more countries.¹⁵ No studies attempt comparison with international standards as such. Virtually all studies of Chinese OGI in

¹² Especially The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), at <http://www.unece.org/env/pp/documents/cep43e.pdf>, visited 2009.10.30

¹³ The amount of academic papers and monographs published is far too extensive to be listed here. For some of the most authoritative studies, see *supra* note 4. See also Jiang Bixin & Li Guangyu, *An Exploration of Certain Issues Concerning Open Government Information Litigation*, 3 *Political Science and Law* 12, (2009); Li Guangyu, *Open Government Information Litigation [政府信息公开诉讼 - 理念、方法与案例]* (Law Press China 2009); Mo Yuchuan & Lin Hongchao (eds), *Open Government Information Regulations - implementation guide [政府信息公开条例 - 实施指南]* (China Legal Publishing House 2008); Mo Yuchuan & Lin Hongchao, *Research Report on Preparations to Implement the Open Government Information Regulations: investigating in particular the experience of Jiangsu, Fujian, Sichuan and Yunnan Provinces [机遇和挑战并存: 《政府信息公开条例》实施准备调研报告 - 以苏闽川滇数省作为考察重点]*, 6 *Legal Science [法学]* 113, (2008); Wang Xixin, *An Exploration of "State Secrets" in the Context of Open Government Information [政府信息公开语境中的“国家秘密”探讨]*, 3 *Political Science and Law*, 2, (2009); Zhou Hanhua, *Fundamental considerations of drafting the "Open Government Information Regulations" (expert opinion draft)* *Chinese Journal of Law* (2002); Zhou Hanhua (ed), *Open Government Information Regulations - Expert Opinion Draft [政府信息公开条例专家意见稿]* (China Legal Publishing House 2003).

¹⁴ Zhou Hanhua (ed), *Comparison of Foreign Open Government Information Systems [外国政府信息公开制度比较]* (China Legal Publishing House 2003).

¹⁵ This is common practice in the bulk of research done on the Chinese OGI system. See e.g. Megan Patricia Carter, *Comparative Research on the System of Access to Government Information in the EU and China [中欧政府信息公开制度比较研究]* (Law Press China 2008); Cheng Jie, 3 *Political Science and Law* (cited in note 4); Li Guangyu, *Open Government Information Litigation* (cited in note 13); Wang Xixin, 3 *Political Science and Law* (cited in note 13); Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13).

English were conducted prior to the OGI Regulations enactment, and are general introductions to the developing OGI system with little in-depth analysis,¹⁶ the only exception being a study by the EU-China Information Society Project, which compares ATI in Europe and China.¹⁷

The comparative study of ATI is fairly new. While significant research has been carried out in recent years, this compares practice and problems in different countries either generally,¹⁸ or on the basis of ATI being a human right.¹⁹ Studies of the former category provide standards based on their respective selection of countries (not on international law), while studies of the latter category primarily have been conducted by human rights advocates who claim that the right of ATI is protected under international law, without being able to substantiate this adequately. A few studies have searched more critically for the human right of ATI in general,²⁰ in the ICCPR,²¹ and under the

¹⁶ Jamie Horsley, *Shanghai Advances the Cause of Open Government Information in China* (2004), Yale Law School China Law Center, http://www.law.yale.edu/documents/pdf/Shanghai_Advances.pdf; Jamie Horsley, *China Adopts First Nationwide Open Government Information Regulations* (2007), Yale Law School China Law Center, http://www.law.yale.edu/documents/pdf/Intellectual_Life/Ch_China_Adopts_1st_OGI_Regulations.pdf; Horsley, *Toward a More Open China* (cited in note 4); Zhou Hanhua, *Open Government in China* (cited in note 4). On local OGI initiatives, see Government Information Quarterly No 23, 2006, special issue on implementation of local OGI legislation in China.

¹⁷ Megan Patricia Carter & Lü Yabin (eds), *Access to Government Information in Europe and China: what lessons to be learned?* (EU-China Information Society Project 2007).

¹⁸ Banisar, *Freedom of Information* (cited in note 5); Florini (ed), *The Right to Know* (cited in note 5); Roberts, *Blacked Out* (cited in note 5).

¹⁹ Toby Mendel, *The Johannesburg Principles: overview and implementation* (2003), ARTICLE 19, <http://www.article19.org/pdfs/publications/jo-burg-principles-overview.pdf>, visited 2003.02.07; Mendel, *Freedom of Information* (cited in note 5); Open Society Justice Initiative, *Transparency & Silence* (cited in note 5).

²⁰ Jack Beatson & Yvonne Cripps, *Freedom of Expression and Freedom of Information: essays in honour of Sir David Williams* (Oxford University Press 2000); Patrick Birkinshaw, *Freedom of Information and Openness: fundamental human rights?*, 58 *Administrative Law Review* 177, (2006).

²¹ Cheryl Ann Bishop, *Access to Information as a Human Right: Analysis of the United Nations Human Rights Committee Documents* (2006), International Communication Association, http://www.allacademic.com/meta/p_mla_apa_research_citation/0/9/1/6/4/p91640_index.html, visited 2006.06.16.

European Convention on Human Rights (ECHR),²² but have come up with only limited results.²³ Previous research on the right of ATI under international law is consequently either overly innovative and comes up with standards that have minimal legal basis, or are exceedingly formalistic and produces no standards at all.

3 Focus and significance of the thesis

The core question examined by this thesis is *to what extent the Chinese OGI system adheres to international standards*. In analyzing this question, I attempt to fill some of the blanks left by the lack of in-depth research on the Chinese OGI system as found today, as well as the general lack of critical study of ATI standards under international law. Comparing Chinese practice to international standards exposes strengths and weaknesses of the system, thus providing an overview of where the right of ATI stands in China today.

The second question that will be addressed is *how the OGI Regulations came into being*. The significance of examining this issue is twofold. First, while comparison with international standards exposes strengths and weaknesses of the OGI system, it has limited explanatory power as to why these strengths and weaknesses exist. Investigating the OGI Regulations' legislative history and the political and legal backdrop against which they were created provides important insights into this "why". Both through shedding light on the interrelated issues of why the Regulations were seen as necessary in the first place, and why they turned out as they did, including how much attention drafters paid to international standards. Second, studying the OGI Regulations' legislative history also provides insights into the little explored area of lawmaking in China, especially the making of laws aiming at protecting rights of individuals. These

²² Wouter Hins & Dirk Voorhoof, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, 3 *European Constitutional Law Review* 114, (2007).

²³ The cited studies find no general right to access all government information, but find a limited right of access to some types of information, e.g. personal information, as well as a trend towards the inclusion of the general right of ATI in an increasing amount of international instruments.

general insights on the lawmaking process are also beneficial to understanding why the OGI Regulations turned out as they did, as the insights explain who exerts pressure to push legislation forward (or alternatively to stall the process).

Increased understanding of how the Regulations were created, and how the reform process works, also limits the dichotomization that easily arises with comparative studies. The goal of thesis is not to point fingers or portray China as “the bad guy”, but to provide a constructive assessment of where the right of ATI stands in China today, as well as providing some explanation to why the situation is as it is.

4 Structure and key findings

The status of ATI under international law is somewhat ambiguous, and while there are binding standards, hard law, in some regions of the world and in some specific areas of law, the current situation is still that binding international standards stipulate only a very limited right of ATI. However, if a less formalist approach is adopted and also soft law is taken into consideration, one finds that the concept of ATI is recognized in a number of international instruments. Through comparing the core elements of the right of ATI in these instruments, Chapter 2 constructs a comprehensive framework of what fundamental parts, or minimum standards, the right consists of. It will be showed that minimum standards include *inter alia* that; the right of ATI is a human right of its own; everyone should have access to all government held information apart from a limited and narrowly defined set of exceptions; there should be a presumption of openness, i.e. disclosure should be the principle and nondisclosure the exception; and there should be access to independent review of nondisclosure decisions. The minimum standards formulated through this analysis make up the first half of the comparative framework for analyzing Chinese practice.

The second half of the comparative framework is found at the end of Chapter 2. It consists of a set of best practices that are based on the minimum standards, but goes beyond what is recognized in international instruments by also taking into account

national legislative practices from around the world. As the minimum standards form the foundation for these principles, best practice is for the purpose of this thesis defined as that practice which best protects the right of ATI (as set out by the minimum standards). The best practice standards are more detailed than the minimum requirements, and therefore provide basis for a more exhaustive assessment of the OGI Regulations.

Chapter 3 provides the political and legal context in which the OGI regulations were created, as well as the Regulations' legislative history, and compares the different stages of reform with international standards. The first part of the chapter traces the development of the OGI reform back to the early 1980s and the grassroots initiated Open Village Affairs (村务公开) reform, which in turn led to the evolution of the concept of Open Government Affairs (政务公开). These two systems were, however, highly unregulated and their importance lies therefore mostly in them sparking the development of a consciousness around ATI and the individual right to know. The second part of the chapter provides an overview of the legal framework in place prior to the enactment of the OGI Regulations. It includes discussions on the Regulations' constitutional basis, as well an overview of the laws influencing the Regulations, such as the Protection of State Secrets Law and the Administrative Litigation Law.

The third and last part of Chapter 3 examines the legislative history of the OGI Regulations. Here the process from initiation of the drafting proves by a research group at Chinese Academy of Social Sciences (CASS), via local experimentation and continued drafting of national regulations, to final promulgation, will be analyzed, while continuously comparing different stages with international standards.

Chapter 4 continues the analysis of Chinese OGI legislation through comparing the OGI Regulations with minimum standards and best practices. From this comparison I conclude that the OGI system complies with a number of minimum requirements, for instance by confirming people's right to know, granting ATI through both active dissemination and upon request, and providing for the right to legal remedy. In some

areas the OGI Regulations also meet with best practice requirements, through e.g. having rigid time limits for disclosure, and imposing only minimal fees on information requests. The OGI Regulations' extensive proactive disclosure requirements are found to even go beyond what is required by best practice.

However, there are still significant shortcomings. These include that: (1) the right to know, even though being confirmed by other authoritative documents, is not explicitly provided for in the OGI Regulations; (2) there is no stipulation for the presumption of openness; (3) exceptions are overly broad and vague; and (4) there are important shortcomings as regards the review of nondisclosure decisions, related to e.g. the lack of judicial independence. As compared to best practices, the OGI Regulations come up short of complying with all requirements except those concerning time limits, fees, and proactive disclosure.

Furthermore, I conclude that there has been a gradual development away from focusing on international standards. While the initial CASS draft complied fundamentally with international standards, local legislation from Guangzhou and Shanghai took one step away from international standards, as they adapted the OGI system more to the Chinese setting. Consecutive drafts of national Regulations continued this trend.

Main sources relied upon include for the international part of the thesis international and regional treaties, their *travaux préparatoires* and authoritative interpretations, declarations of intergovernmental organizations, and authoritative academic writings. For the assessment of the Chinese OGI system, I rely mainly on Chinese language sources, as little is available in English. I make use of relevant legislation and other official documents, as well as academic writings by a selection of influential academics. In addition, I have conducted interviews with academics involved in the drafting process. These interviews are on file with the author, and have for the interest of the interviewees been rendered anonymous.

Chapter 2 International Law and Practice

1 Conceptualization

Formal, or ‘hard’, sources of international law are widely recognized to include, as set out by Article 38 (1) of the Statutes of the International Court of Justice (ICJ):

- a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b. *international custom, as evidence of a general practice accepted as law;*
- c. *the general principles of law recognized by civilized nations;*
- d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations.*

The first part of this chapter examines the right of ATI under international law by assessing various sources of law and compiling the results into a set of minimum standards. I discuss standards not only related to ‘hard law’, but also ‘soft law’ such as e.g. UN resolutions, declarations and other authoritative – but non-binding – documents,²⁴ as well as regional and field-specific standards. Even though these standards impose no legally binding obligations, they “lay the ground, or constitute the building blocks, for the gradual formation of customary rules or treaty provisions. In other words, gradually ‘soft law’ may turn into law proper.”²⁵

Additional support for reliance on soft law is found in the notion of “law as process” as formulated by Rosalyn Higgins, where international law is seen as “a continuing process of authoritative decisions ... [not] merely as the impartial application of rules”.²⁶ Soft law is according to this theory more important than in a formalist view of

²⁴ See generally Dinah L. Shelton, *Soft Law*, in David Armstrong (ed), *Routledge handbook of international law* (Routledge, 2009). While no universally accepted definition of soft law exists, I herein use the term as “any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior”. *Id.* at 69

²⁵ Antonio Cassese, *International Law*, at 196 (Oxford University Press 2005).

²⁶ Rosalyn Higgins, *Problems and Process : international law and how we use it*, at 2 (Clarendon Press 1994).

international law, and the distinction between *lex lata* and *lex ferenda* – the law as it is and the law as it ought to be – is seen as less important.²⁷

Focusing on soft law and finding support in the theory of law-as-process does not mean I leave the formalist framework set out by the ICJ Statutes article 38 completely. On the contrary, this framework forms the basis for my discussion. More specifically, the minimum standards I formulate are founded on provisions in international treaty law, supported by its interpretation in soft law sources. Even though the right of access to information might evolve into customary international law or a general principle of law, I do not imply that it already has. Such claims are still premature, and will consequently not be discussed further than in the following paragraph.

Most arguments for ATI being customary law are based on the Universal Declaration of Human Rights' (UDHR) article 19, which provides for the “freedom to ... seek, receive and impart information” (freedom of information, FOI),²⁸ supported by a view that the UDHR is customary law.²⁹ First of all, the notion of entire UDHR being customary international law is highly contentious. Even though the UDHR has had tremendous influence over the development of human rights and some of the its rights now are commonly seen as having evolved into customary international law,³⁰ no authoritative sources mention FOI as customary international law.³¹ More importantly, however, I will show that the human right of FOI has traditionally not included access to government-held information, and the legal status of the UDHR's article 19 is therefore of little consequence. Even so, as I argue that the right of ATI is developing under the FOI provision in the ICCPR it seems inevitable that this development will

²⁷ *Id.* at 10

²⁸ I here use FOI as meaning the human right of freedom of information. The denotation of FOI is in this sense, as will be explained below, not the same as ATI. *See also supra* note 2, and *infra* pp. 14 ff.

²⁹ *See e.g.* Sandra Coliver, et al. (eds), *Secrecy and Liberty: national security, freedom of expression, and access to information* (M. Nijhoff 1999); Mendel, *Freedom of Information* (cited in note 5).

³⁰ Ian Brownlie, *Principles of Public International Law*, at 534-537 (Oxford University Press 2003).

³¹ *See e.g.* *Id.* at 525-557, Cassese, *International Law* (cited in note 25), at 393-396.

influence the meaning of the UDHR's FOI provision, as the two instruments' FOI provisions are virtually identical.

The bulk of this chapter concerns ATI as a human right, and assesses the right under the two core human rights covenants; the ICCPR, and the International Covenant on Economical, Social, and Cultural Rights (ICESCR).³² The general right to access *all* government-held information is based on the right to freedom of expression of the ICCPR's article 19, which will be given most attention, but I also find ATI to be part of the right to privacy and as part of several rights in the ICESCR, most prominently the right to health.³³ Regional and field-specific standards support all three elements of access to information (right to freedom of expression and information, right to privacy, and right to health). I choose to draw on the more developed standards of the Americas and Europe,³⁴ as well as the more advanced thematic fields of environmental information as exemplified by the Aarhus Convention,³⁵ information about corruption represented by the United Nations Convention against Corruption (UNCAC), and trade related information as provided in the World Trade Organization's (WTO) regulations.

³² Other human rights treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, also touch upon the right of ATI. They are not included in this analysis because they do not contribute anything substantial to the formulation of minimum standards, as ATI requirements in both conventions are based on those of the ICCPR.

³³ C. G. Weeramantry, *Access to Information: a new human right. The right to know*, in Foundation for the Development of International Law in Asia (ed), Asian yearbook of international law Vol. 4, 1994 (Martinus Nijhoff, 1994)., *see also* Cheryl Ann Bishop, *Internationalizing the Right to Know: conceptualizations of access to information in human rights law* (2009) (PhD, University of North Carolina).. ATI as part of the right to privacy is a fairly uncomplicated matter, and I will therefore treat it only superficially at the end of the section on freedom of expression.

³⁴ The right of ATI is also evolving in other regions, especially in the African Union, but also the League of Arab States, the Commonwealth (countries previously part of the British Empire), and the Commonwealth of Independent States (previous Soviet Republics). Standards in these regions are comparatively less developed than in Europe and the Americas. The Association of South East Asian Nations (ASEAN), where China is a part member (in ASEAN+3, the +3 being China, Japan and South Korea), has recently taken probing steps to promote human rights, but is yet to formulate ATI standards.

³⁵ The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)

As the UNCAC and the regulations of the WTO are formulated with pragmatic goals in mind (anti-corruption and free trade, respectively), they do not fit into the three categories of access to information as part of freedom of expression, the right to privacy, and the right to health, and will be treated as a separate category. Even so, it should still be noted that the link between anti-corruption work and human rights is well established,³⁶ and free flow of trade related information is commonly seen as beneficial for economic development, which is also related to human rights.³⁷

The second part of the chapter sets out international best practices, based on the minimum standards, but incorporating also evolving state practice. Best practice will, as mentioned above, be defined as that which best ensures the realization of the minimum standards.

³⁶ See e.g. Thusitha Pilapitiya, *The Impact of Corruption on the Human Rights Based Approach to Development* (UNDP Oslo Governance Centre 2004); The International Council on Human Rights Policy & Transparency International, *Corruption and Human Rights - making the connection* (International Council on Human Rights Policy 2009).

³⁷ See e.g. Amartya Sen, *Development as Freedom* (Oxford University Press 1999); Joseph Stiglitz, *On Liberty, the Right to Know, and Public Discourse: the role of transparency in public life*, in Matthew J. Gibney (ed), *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford University Press, 1999).

2 ATI under international law

2.1 Civil and political rights

An overview

The broadest base for a general right of ATI is found in the right to freedom of expression, under the designation ‘freedom of information’ (FOI). The logic behind subordinating FOI to freedom of expression, and also behind including a right of ATI in FOI, is that one cannot freely express one’s opinion without access to relevant information.³⁸

FOI was recognized as a human right already by the UN General Assembly’s (GA) first session, Resolution 59(1), which states that: “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated.”³⁹ The UDHR subsequently subordinated FOI to freedom of expression in its article 19, by declaring that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to ... seek, receive and impart information and ideas through any media and regardless of frontiers.

Even though advocates for transparency have taken the FOI provisions of the UN GA Resolution 59(1) and the UDHR article 19 as confirmation of the right of ATI’s existence,⁴⁰ the intended meaning of FOI at the time of both these documents was *free flow of already publicized information*, mainly related to press freedom, unrelated to the specific right of access to *government-held* information.⁴¹ FOI provisions in the ICCPR

³⁸ See e.g. Anthony Mason, *The Relationship Between Freedom of Expression and Freedom of Information*, in Jack Beatson, et al. (eds), *Freedom of expression and freedom of information : essays in honour of Sir David Williams* (Oxford University Press, 2000).

³⁹ UN Doc A/RES/59(1) 1946.12.14

⁴⁰ See e.g. Mendel, *Freedom of Information* (cited in note 5), at 1-2.

⁴¹ Birkinshaw, *58 Administrative Law Review* (cited in note 20); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel 2005). The UN GA was also considering the adoption of a Convention on Freedom of Information in successive sessions from the 13th to the 17th, and produced a draft Convention for that purpose, before the issue was dropped. The draft Convention clearly shows that the intended meaning of FOI was unobstructed flow of information, and no intention was

have traditionally been interpreted similarly,⁴² and the conventional meaning of the human right of FOI should therefore be taken to not include the right of ATI. However, recent developments under the ICCPR point to FOI evolving towards including also access to information, indicating the general evolution of the human right of FOI, which in turn influences the meaning of UDHR's article 19.

2.1.1 International Covenant on Civil and Political Rights (1966)

Main Provisions

With China's ratification of the ICCPR still pending, the treaty's binding force is limited to the rather enigmatic "obligation not to defeat the object and purpose" of the treaty, as set out by the 1964 Vienna Convention on the Law of Treaties article 18.⁴³ As the conventional interpretation of the human right of FOI does not include the right of ATI, it seems clear that ATI is not part of the *object and purpose* of the ICCPR.

Article 19 on freedom of opinion and expression echoes the UDHR in including explicit provisions on freedom of information. Paragraph 1 concerns freedom of opinion, while paragraph 2 deals with expression and information. It reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Most significant in relation to access to information is the 'freedom to seek, receive and impart information'. This freedom has, as noted above, traditionally been interpreted to impose an obligation on states only to not interfere with sharing of

showed to include provisions on access to government-held information. See GA Resolutions <http://www.un.org/documents/resga.htm> and Draft Convention, UN Document A/AC.42/7 and Corr.1.

⁴² See e.g. Nowak, *CCPR Commentary* (cited in note 41), at 335-358.

⁴³ See. Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: making sense of an enigma*, 25 *The George Washington Journal of International Law and Economics* 71, (1991). Charme concludes that "article 18 is [legally] binding to a *certain degree*" (emphasis added) and that "because of the obligation attached to signature, courts ... allow article 18 to contribute derivatively to the development of customary international law" (at 71).

available information, as opposed to an obligation to provide access to government-held information.⁴⁴ It has imposed, in other words, an obligation to *respect* and *protect*, but not necessarily to *fulfill* the right of FOI.⁴⁵ That does nevertheless not imply that such an obligation cannot develop over time. Central to this issue is the word ‘seek’, which was subject to considerable discussion during the drafting of the Covenant.⁴⁶ Some perceived the word as too aggressive, and would rather have used ‘gather’. ‘Seek’ was finally chosen because “it implied the right to active inquiry”.⁴⁷ The development of a right to access government information has for a large part been based on this implicit right to active inquiry.⁴⁸

The right to freedom of expression and information, as opposed to freedom of opinion, is not an unrestrained right, but carries with it, according to article 19(3), “special duties and responsibilities”. It can therefore be subject to restrictions either “for respect of the rights or reputations of others”, or “for the protection of national security or of public order (*ordre public*), or of public health and morals”. These restrictions must be provided by law, serve one of the listed purposes, and be necessary for attaining this purpose.⁴⁹ The required necessity implies that “the restrictions must be *proportional* in severity and intensity to the purpose being sought and may not become the rule. Therefore, as an exception to the rule, interference must be interpreted narrowly in cases of doubt.”⁵⁰ These limitations have with ATI’s developing status as part of article 19 also been extended to apply to the right of ATI. As we will see, all references to ATI as a

⁴⁴ Nowak, *CCPR Commentary* (cited in note 41), at 437-467. Mason, *The Relationship Between Freedom of Expression and Freedom of Information* (cited in note 38).

⁴⁵ Nowak, *CCPR Commentary* (cited in note 41), at 446-447. On the different natures of state obligations (respect, protect, and fulfill), see e.g. Manfred Nowak, *Introduction to the International Human Rights Regime*, at 48 ff. (Martinus Nijhoff Publishers 2003).

⁴⁶ Marc J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*, at 384 (M. Nijhoff 1987).

⁴⁷ *Id.* at 384.

⁴⁸ Nowak, *CCPR Commentary* (cited in note 41), at 447-448. Mason, *The Relationship Between Freedom of Expression and Freedom of Information* (cited in note 38).

⁴⁹ Nowak, *CCPR Commentary* (cited in note 41), at 458.

⁵⁰ *Id.*, at 460.

human right either provides explicitly that limitations to the right of ATI must comply with the limitations posed by article 19(3), or does so implicitly. The legitimate restrictions on the right of ATI must therefore, according to international minimum standards, comply with ICCPR article 19(3).

The Human Rights Committee

Interpretation of the ICCPR is entrusted mainly with the Human Rights Committee, as part of the Committee's responsibility to oversee implementation of the Covenant and its Optional Protocols (OP). Interpretation is done through General Comments (GC),⁵¹ i.e. general interpretations of the Covenant's articles, as well as in case law of individual complaints under the first OP, and Concluding Observations on country reports. In addition, the Committee has the authority to consider inter-state complaints, even though this is yet to happen.⁵²

In its General Comment number 10 pertaining to freedom of opinion, expression, and information, the Committee did not indicate in any way that article 19 contains the right of access to government information.⁵³ It should be noted that the GC was issued in 1983, at which time only a handful of established democracies had enacted disclosure legislation. One could speculate that the situation would be different had the GC come today. As literally all international developments related to ATI have happened starting from the end of the 1980s, and as these developments now have led to detailed and wide ranging requirements both in the form of regional and field-specific standards, the Committee's interpretation would in all probability have had significantly stronger ATI provisions today.

⁵¹ The GCs are available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> visited 2009.11.02

⁵² UN Office of the High Commissioner of Human Rights fact sheet 15: "Civil and Political Rights: The Human Rights Committee" available at: <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> visited 13 January 2009

⁵³ Human Rights Committee GC 10 (1983)

The right of ATI has, however, not been entirely absent from the Committee's reports, and there are indications implying that the right to access government information is, or at least should be, included in the Committee's interpretation of Article 19. In particular, several Concluding Observations have commended countries' adoption of, or intent to adopt, disclosure legislation,⁵⁴ while some have included concern regarding lack of such legislation. For instance, the Concluding Observations on Ireland in 1993, stating that: "with respect to freedom of expression and the right of access to information, the committee notes with concern that the exercise of those rights is unduly restricted under present law concerning censorship, blasphemy and information on abortion".⁵⁵ In the Concluding Observations concerning Azerbaijan, the Committee went even further, and suggested that "the authorities of the State party should introduce legislation guaranteeing freedom of information."⁵⁶

Only one individual complaint deals directly with the right to information under article 19, namely *Gauthier v Canada*.⁵⁷ A private company in charge of issuing access permits to parliamentary hearings granted journalist Robert W. Gauthier only temporary, and thus unequal, access to the hearings. Even though the Human Rights Committee found that this could possibly be covered by one of the exceptions set out in article 19(3), the Committee found a breach of the right to information due to lack of procedural transparency. Importantly, the Committee noted that article 19 read together with article 25 on public participation "implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members."⁵⁸ The issue relates, however, to *parliamentary* information, and not regular *government*

⁵⁴ Reports on Ukraine (UN Doc. CCPR/C/79/add.52, 26 July 1995), Lithuania (UN Doc. CCPR/C/79/Add.87, 19 November 1997), India (U.N. Doc. CCPR/C/79/Add.81, 30 July 1997), Ireland (UN Doc. A/55/40, 24 July 2000), Russia (UN Doc. CCPR/C/RUS/2002/5, 9 December 2002)

⁵⁵ UN Doc. CCPR/C/79/Add.21.

⁵⁶ UN Doc. CCPR/C/79/Add.38, 3 Aug 1994

⁵⁷ UN Doc. CCPR/C/65/D/663/1995, 5 May 1999

⁵⁸ Id. para.13(4)

information, which normally excludes information from the legislative and judiciary branches of government. Note also that the Committee implies that journalists possibly have special rights (and duties) when it comes to information access.⁵⁹

ICCPR article 19 as interpreted by the Human Rights Council in sum provides only budding signs of the right of ATIs recognition. These signs nevertheless provide the foundation of the minimum standards, as they have been utilized by a wide range of actors in creation of soft law standards with ICCPR article 19 as their base.

UN resolutions and reports

In addition to the Human Rights Committee's statements, important soft sources for interpretation of the ICCPR include UN Resolutions, Declarations and Reports. The UN General Assembly is yet to adopt any Resolutions or Declarations with substantive provisions on ATI,⁶⁰ but the UN Human Rights Council (UNHRC)⁶¹ have dealt extensively with the issue. This practice is evolving, and the topic has gotten substantially more attention in the last decade.

The UNHRC's active involvement in ATI issues started with the creation of the Special Rapporteur on Freedom of Opinion and Expression (hereinafter the Special Rapporteur) by Resolution 1993/45 in 1993.⁶² In his 1994 report, the Special Rapporteur kept with the traditional interpretation of the right to FOI, in stating that freedom of information "entails the right to seek information inasmuch as this

⁵⁹ Id. The special role of the media is established in Europe under ECtHR case law, *see infra* this section, pp. 25-26

⁶⁰ Even though the GA was considering the adoption of a Convention on Freedom of Information in successive sessions from the 13th to the 17th, and consequently emphasized the right of FOI in these sessions' resolutions, this did not concern access to government-held information. *See supra* note 41

⁶¹ Until 2006 known as the Human Rights Commission. Even though there are differences between the former Human Rights Commission and the current Human Rights Council, these are not pertinent for the discussion in this thesis, and I will here treat them as the same body, referred to by its current name; the United Nations Human Rights Council.

⁶² Then the UN Commission on Human Rights.

information is generally accessible.”⁶³ The Special Rapporteur began reporting extensively on ATI from 1995 – when he was invited by the UNHRC to “develop further his commentary on the right to seek and receive information”.⁶⁴ ATI has since been a central theme in almost all the Special Rapporteur’s reports to the UNHRC.

The Special Rapporteur’s 1998 report affirmed for the first time the right of access to government information, by stating that “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government”.⁶⁵ The right of ATI was expounded upon in the 2000 report, where a detailed analysis of what the right contains was provided. In that context, the Special Rapporteur urged governments to either adopt or amend existing ATI legislation so to include a set of minimum standards, including *inter alia* that: (1) the public has a right to receive government information, while the government has a duty to publish; (2) the government should actively disseminate on its own initiative information of significant public interest; (3) nondisclosure should only be allowed in instances subscribed by law, exceptions should be narrowly drawn, and refusals should be given in writing and within strict time limits; (4) costs should be kept low to not deter the public from requesting information.⁶⁶ The same report endorsed a set of principles on ATI formulated by civil society organization ARTICLE 19.⁶⁷ It was further emphasized that also private entities performing public functions should be subject to access to information rules in the Special Rapporteur’s 2005 report.⁶⁸

In addition to reporting, the Special Rapporteur also issues a yearly Joint Declaration with the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States

⁶³ UN Doc. E/CN.4/1994/33

⁶⁴ Resolution 1997/27, 11 April 1997, para. 12(d).

⁶⁵ UN Doc. E/CN.4/1998/40 1998.01.28

⁶⁶ UN Doc. E/CN.4/2000/63 2000.01.18

⁶⁷ ARTICLE 19, *The Public’s Right to Know - principles on freedom of information legislation* (1999), <http://www.article19.org/pdfs/standards/righttoknow.pdf> visited 2009.10.03.

⁶⁸ UN Doc. E/CN.4/2005/64 2004.12.17

(OAS) Special Rapporteur on Freedom of Expression. These reports has since the first time the three special mandates came together, in 1999, every year emphasized ATI's importance. The Joint Declaration of 2004 deals extensively with access to government information, and recognizes the same principles as in the Special Rapporteur's 2000 report to the UNHRC.⁶⁹

The UNHRC has welcomed several of the Special Rapporteur's comments on ATI, but until recently it did not make any clear commitments to interpret a right of access to government held information into article 19. This changed in 2005, when the Human Rights Council adopted by consensus a resolution on freedom of opinion and expression. The Resolution deals among other issues with ATI, most importantly in Article 5, which calls upon all states:

*To adopt and implement laws and policies that provide for a general right of public access to information held by public authorities, which may be restricted only in accordance with article 19 of the International Covenant on Civil and Political Rights.*⁷⁰

This is the first official UN Resolution to unambiguously confirm the right to access government information, and a landmark resolution indicating ATI's recognition by the international community. It is also the first UN resolution defining the legitimate restrictions to the right, i.e. as set out in ICCPR article 19(3). The UNHRC also adopted, again unanimously, a resolution with an identical provision during its 12th session in October 2009.⁷¹ China is a current member of the UNHRC, and the fact that the Resolution was adopted unanimously indicates China's approval.

When the recent UNHRC Resolution and the Special Rapporteur's reports are added to the foundation laid by the Human Rights Council, a fairly substantial right of ATI emerges. While the Human Rights Council only acknowledges the right's existence,

⁶⁹ Joint Declaration of 6 December 2004. All Joint Declarations of the three special representatives are available through the OSCE webpage:

<http://www.osce.org/fom/documents.html?lsi=true&limit=10&grp=401>, visited 2009.10.29

⁷⁰ UN Doc. E/CN.4/RES/2005/38

⁷¹ UN Doc. A/HRC/RES/12/16 2009.10.12

the UNHRC provides that the right should include access to government information, and that it can only be restricted in accordance with the provisions of ICCPR article 19. The Special Rapporteur provides further details on the rights specific contents, e.g. that ATI is a human right, which means both that the public has a right to access government information, and that it is not only a citizen's right; that the government has a duty to provide access.⁷²

2.1.2 Regional standards

Organization of American States

The American Convention Human Rights (ACHR), adopted by the Organization of American States (OAS) in 1969 and effective from 1978, provides for basic protection of the of access to information in article 13(1), which is virtually identical to ICCPR article 19(1). The fact that the American Convention follows the wording of the ICCPR has nevertheless not kept the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) from going further than the UN Human Rights Committee in its interpretation of the right to access information.

The best example of this is the landmark case of *Claude Reyes et al v Chile*, arguably the most important ATI case in the world to date. The plaintiffs were three environmental activists who sought information on a forestation project that had attracted controversy because of its possible negative environmental impact. Chilean authorities denied them part of the information without justification, and the case was not admitted by Chilean courts. In its decision, the IACtHR made several important observations. The focus here will be five principles relied upon by the Court, namely (1) the inclusion of a right to government information in the right to “seek, receive and

⁷² See table 1

impart information”, (2) the public interest principle, (3) the need for justification of non-disclosure, (4) universal access (no needs test), and (5) maximum disclosure.⁷³

Most importantly, the Court established first that the right to “seek, receive and impart information” as laid out by article 13 of the ACHR includes a right to access government information, with the same narrow set of legal restrictions as applies to right of access to other information.⁷⁴ It supported this by referring to both international and regional treaties and other documents, and stating that “there is a regional consensus among the [OAS] States ... about the importance of access to public information and the need to protect it.”⁷⁵ International documents referred to include the UDHR, the ICCPR, the UN Convention against Corruption, the Rio Declaration on Environment and Development, and the Aarhus Convention (which is not even binding on a single OAS member country).⁷⁶ On the regional level important documents relied on included apart from the ACHR, “specific resolutions from the OAS General Assembly” explicitly promoting the right to government information, article 4 of the Inter-American Democratic Charter emphasizing the importance of transparency in government activity, and the Nueva León Declaration, where the Heads of State of the Americas undertook to “guarantee the right to information to our citizens”.⁷⁷ In addition, the court found it “particularly relevant that, at the global level, many countries have adopted laws designed to protect and regulate the right to accede to State-held information”.⁷⁸ I interpret this to indicate that the Court saw ATI as a developing *general principle of law*, and as such, developing into a source of international law. It is significant that the Court based its decision to include the right of ATI in article 13 on both international treaty

⁷³ *Claude-Reyes et al. v Chile* (IACtHR 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf visited 2009.03.05.

⁷⁴ *Id.* para. 77

⁷⁵ *Id.* para 78

⁷⁶ *Id.* paras 76 and 81

⁷⁷ *Id.* paras 78-80

⁷⁸ *Id.* para. 82

law, regional treaties (even non-American), and on *general principles of law*, as it is the first international judgment to do this.

Second, the IACtHR made clear that denials must be justified. This implies according to the Court that unless there is a legal basis for a denial, and unless this legal basis is actually provided to the information seeker, a denial is not justified and thus illegal.⁷⁹

Third, Court affirmed as “evident that the information the State failed to provide was of public interest”,⁸⁰ because it pertained to a controversial case with a potential environmental impact, and also because it “concerned verification that a State body ... was acting appropriately and complying with its mandate”.⁸¹ This affirms that when there is a public interest in disclosing certain information, the information should be disclosed. Even though the focus on public interest could have indicated that such public interest is needed for the right of ATI to apply, the *presumption of openness* principle under the next point below negates such a possibility.

Fourth, the court affirmed the *presumption of openness* principle, in “establishing the principle that all information is accessible, subject to a limited system of exceptions”.⁸²

Fifth, it was established that there should be no limits as to who has the right to seek the information, given the public interest in the matter, i.e. also non-citizens and stateless people have the right of access to information.

The court found on the basis of the principles laid out above that Chile had violated the right to access government information, the first and only decision recognizing the right of ATI by an international tribunal so far.

⁷⁹ Id. paras 93-5

⁸⁰ Id. para. 73

⁸¹ Id. para. 73

⁸² Id. para. 92

The Council of Europe

The Council of Europe (CoE) has long been stating that it is a strong proponent for the right to information, but until recently this was done only through the European Convention on Human Right (ECHR) and recommendations from the Council of Ministers.⁸³

ECHR's article 10 provides that the right of freedom of expression "shall include freedom to ... receive and impart information and ideas without interference by public authority and regardless of frontiers." Freedom to 'seek' information is not included, but has later been interpreted into the article by the European Court of Human Rights (ECtHR).⁸⁴ Case law concerning ATI is limited, but in the few cases that have come up the Court's traditional view has been that article 10 does not include a right to access government information. According to the Court in the case of *Leander v Sweden*, "[t]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."⁸⁵ This view has been reiterated in a number of instances.⁸⁶ The Court has, however, in its own words: "recently advanced towards a broader interpretation of the notion of "freedom to receive information"".⁸⁷ This has happened gradually, by first recognizing "that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest",⁸⁸ before including also NGO's as important *watchdogs* for society, and granting them the right to access government information important to the informed

⁸³ Most importantly Recommendation Rec(2002)2 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities, which sets out broad ATI requirements. Available at [http://www.coe.int/T/E/Human_rights/rec\(2002\)2_eng.pdf](http://www.coe.int/T/E/Human_rights/rec(2002)2_eng.pdf), visited 2009.10.28

⁸⁴ Nowak, *CCPR Commentary* (cited in note 41), at 446.

⁸⁵ *Leander v Sweden* (1987) 9 EHRR 433, para. 74.

⁸⁶ See e.g. *Sirbu and other v Moldova* Application nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 (ECtHR 2004)

⁸⁷ *Társaság a Szabadságjogokért v Hungary* Application no. 37374/05, (ECtHR 2009) para. 35.

⁸⁸ *Sîrbu and others v Moldova* Application nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 (ECtHR 2004), para. 17.

public debate.⁸⁹ It is important to note that the ATI rights granted in these cases have two important limitations. First, the right of access only applies to journalists and NGOs (“watchdogs for society”), the public only has a right to *receive*. Second, the right only applies if the information sought is seen to be of general public interest. These restrictions indicate that even though the European Court of Human Rights is getting closer to recognizing a right to access government information under article 10 of the ECHR, they are still a long way from granting the public a general right of ATI.

The traditionally limited protection of ATI under European law changed radically in November 2008, when the CoE’s adopted the Convention on Access to Official Documents (CoE Convention),⁹⁰ to date the international treaty with the most detailed provisions on ATI. The treaty makes in its preamble reference to the UDHR article 19 and ECHR article 10, as well as other documents with FOI provisions, and should therefore be seen as being based mainly on the right of FOI. The Convention is open for accession only to Council of Europe member states in the first round, but any non-CoE member can also accede upon invitation after the Convention’s entrance into force.⁹¹

The treaty provides for a general right to access government information, by providing a “right for everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities”.⁹² Other important provisions include that; (1) all government and other organs performing administrative functions are covered;⁹³ (2) “official documents” include all recorded information,⁹⁴ and

⁸⁹ *Sdruženi Jihočeské Matky v Czech Republic*, Application no. 19101/03 (ECtHR 2006), *Társaság a Szabadságjogokért v Hungary*, Application no. 37374/05 (ECtHR 2009)

⁹⁰ Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737>. Ten ratifications are needed before the convention enters into force. It has as of 2009.10.06 been signed by twelve countries, but so far only been ratified by one of these (Norway). For ratification status, *see*: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG> visited 2008.10.29

⁹¹ CoE Convention arts. 16-17

⁹² *Id.* article 2(1)

⁹³ *Id.* article 1(2a)

⁹⁴ *Id.* article 1(2b)

good record-keeping habits should be ensured;⁹⁵ (3) requesters do not need to show a vested interest;⁹⁶ (4) exceptions must be “set down precisely in law, be necessary in a democratic society and be proportionate to the aim”, and must relate to one of 11 listed aims, including e.g. national security, public safety, and privacy;⁹⁷ (5) all exceptions are subject to a public interest override;⁹⁸ (6) requests shall be dealt with promptly;⁹⁹ (7) only reasonable fees not exceeding the actual cost of retrieving information may be imposed;¹⁰⁰ there should be access to independent review of request denials;¹⁰¹ (8) openness should be actively promoted through *inter alia* educating the public and officials on their rights and duties;¹⁰² and (9) key information should be disclosed on the government’s own initiative.¹⁰³ As we will see, these principles go well beyond minimum standards, and meet with almost all best practice requirements.¹⁰⁴

2.1.3 Access to information and the right to privacy

The right to privacy as set out by article 17 of the ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”. According to the Human Rights Committee GC 16, this includes a right to access information on one’s own person stored by both private and public entities. As expressed in GC 16 paragraph 10:

“[E]very individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If

⁹⁵ Id. article 9(c and d)

⁹⁶ Id. article 4(1)

⁹⁷ Id. article 3(1)

⁹⁸ Id. article 3(2)

⁹⁹ Id. article 5(4)

¹⁰⁰ Id. article 7

¹⁰¹ Id. article 8

¹⁰² Id. article 9(a and b)

¹⁰³ Id. article 10

¹⁰⁴ See Tables 1 and 2 on minimum standards and best practices respectively.

such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination."¹⁰⁵

The Committee has reiterated this right to access personal information also in Concluding Observations on state reports, for instance by appraising Norway's enactment of a law giving citizens the right to access Police Security Services' records on themselves as falling in under article 17.¹⁰⁶

No individual complaints have dealt directly with the issue, but the logic of the GC has been applied by one concurring opinion in the case of *Zheludkova v Ukraine*. The Human Rights Committee found a breach of article 10, relating to inhuman treatment during custody, because an inmate was denied access to his own medical records. One concurring opinion in this case adopted a perhaps more precise view, in drawing on the logic of GC 16, stating that a "person's right to have access to his or her medical records form part of the right of all individuals to have access to personal information concerning them".¹⁰⁷

The ECtHR has found a similar right to access personal information in the ECHR article 8 on "the right to private and family life". For instance in *Gaskin v the United Kingdom* the Court found a violation of article 8 due to a refusal to release government records on Gaskin's years in foster care.¹⁰⁸

From the unambiguous statement in GC 16, and the similar logic adopted by the ECtHR, it seems prudent to include the right to access personal information in the minimum standards.

¹⁰⁵ Human Rights Committee GC 16 (1988) para. 10

¹⁰⁶ UN Doc. CCPR/C/79/Add.112, 1 Nov 1999, para. 8

¹⁰⁷ UN Doc. CCPR/C/76/D/726/1996, 6 Dec 2002, Individual Opinion by Committee Member Ms. Celia Medina.

¹⁰⁸ *Gaskin v the United Kingdom*, Application no. 10454/83 (ECtHR 1989)

2.2 Economic, social and cultural rights

2.2.1 The International Covenant on Economical, Social and Cultural Rights (1966)

An overview

China ratified the ICESCR in 2001, and it is therefore legally binding on the country. No article in the ICESCR mentions the right of access to information explicitly, but the right is far from absent from the Covenant. Adequate and timely information is on the contrary seen as essential in realizing several of the Covenant's rights. Most important of these is perhaps article 12's right to health, defined broadly to encompass all rights with immediate influence over one's health, including but not limited to the interconnected rights to water, food, and a healthy environment.¹⁰⁹ The logic behind including a right of ATI in the right to health is that without access to information on health hazards such as for instance poor water quality, epidemic disease, or contaminated food, one cannot realize one's right to health.¹¹⁰ The importance of this aspect of access to information has been amply demonstrated by recent Chinese experiences, such as the Songhua River chemical spill, SARS, and melamine contaminated milk.

The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) oversees the implementation of the ICESCR through *inter alia* Concluding Observations on state reports and General Comments (GC), and has emphasized the importance of ATI in

¹⁰⁹ See e.g. the Committee on Economic, Social and Cultural Rights GC 14 (2000) UN Doc.

E/C.12/GC/14, especially paras. 3 and 4. The right to a healthy environment, even though not specified as a separate right in the ICESCR, is often treated as a separate right. I here treat it as part of the right to health, as this is the CESCR's traditional approach.

¹¹⁰ See CESCR GC 14 (2000), see also New York Law School Institute for Information Law and Policy, et al., *Access to Health Information Under International Human Rights Law* (2009), <http://www.hifa2015.org/wp-content/uploads/2009/09/access-to-health-information-under-international-human-rights-law-draft-v1-08sep09.pdf>, visited 2009.09.29.

several GCs. Importantly, GC 14 on the right to health (article 12) states that “[t]he right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to ... access to information”, that the right to health includes a “right to seek, receive and impart information”, and that one of the core obligations of state parties is to “provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them”.¹¹¹ GC 15 on the right to water (articles 11 and 12) goes even further in stating that “[i]ndividuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.” Third parties should here be taken to include private entities. In addition, the right of ATI is also mentioned in the GCs on forced evictions under the right to adequate housing (article 11(1));¹¹² intellectual property rights (article 15(1)(c)),¹¹³ the right to work (article 6),¹¹⁴ and the right to social security (article 9).¹¹⁵ The General Comments seen as a whole thus clearly show that adequate access to information is an integral part of the ICESCR.

2.2.2 The Rio Declaration

The Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992,¹¹⁶ provides in its Principle 1 that human beings are “entitled to a healthy and productive life in harmony with nature”. This right to health is linked to ATI in the Declaration’s Principle 10, which provides that:

¹¹¹ CESCR GC 14 (2000) Un Doc E/C.12/GC/14

¹¹² GC 7 (1997) Un Doc E/C.12/GC/7

¹¹³ GC 17 (2005) UN Doc E/C.12/GC/17

¹¹⁴ GC 18 (2005) UN Doc E/C.12/GC/18

¹¹⁵ GC 19 (2008) UN Doc E/C.12/GC/19

¹¹⁶ Available at

<http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163>, visited 2009.11.02

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The Rio Declaration's Principle 10's most important contribution was through laying the foundation for the Aarhus Convention,¹¹⁷ through affirming the public's right to ATI, public participation, and access to justice.

2.2.3 Regional standards

The Council of Europe

The European Court of Human Rights has in several instances found that the right of ATI is included in the right to health. Note that the ECHR does not include a specific right to health, and the Court has based its decision on ECHR article 8 on the right to private and family life (the same basis as used in the right to privacy, see above). In *Guerra and Others v Italy*,¹¹⁸ concerning a community's right to be informed about health hazards from a nearby high-risk chemical plant, the Court reiterated its view in *Leander v Sweden* and found no violation of article 10 on FOI,¹¹⁹ but then moved on to article 8 where it found a violation. The court argued that "[t]he direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that article 8 is applicable"¹²⁰, with the reason that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."¹²¹ This implies that the court

¹¹⁷ See *infra*, notes 123-133 and accompanying text.

¹¹⁸ *Guerra and others v Italy*, Application no. 14967/89 (ECtHR 1998)

¹¹⁹ See *supra*, note 85 and accompanying text.

¹²⁰ *Guerra and others v Italy*, Application no. 14967/89 (ECtHR 1998) Paragraph 57

¹²¹ *Id.* Paragraph 60

interprets a right to health into article 8. The Court also stated that article 8 not only poses negative obligations on the government, it also includes positive obligations to ensure that people's private and family lives are respected – an obligation to *fulfill*: the government, due to its failure to provide adequate information on the risks involved in residing in the proximity of the chemical plant, did not fulfill its obligation to secure the applicants' rights under article 8.¹²²

Both in the cases of *Guerra and Others* and *Gaskin*, the right to information is limited to information that is of vital interest to a person, and does not include a comprehensive right to access information that is of general interest to the public, meaning that the applicant must be a direct stakeholder in a case to have a right to access the relevant information. In other words, a *needs test* is applied.

The United Nations Economic Commission for Europe

In 1998 the United Nations Economic Commission for Europe (UNECE) adopted the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), which entered into force in 2001.¹²³ The Convention had as of October 2009 43 member countries from the whole UNECE region; including China's neighboring countries Kazakhstan, Kyrgyzstan, and Tajikistan.¹²⁴

The Convention, notwithstanding it being limited to issues regarding environmental matters, provides a very strong right of access to information. Important provisions include that: (1) All bodies performing public administrative functions or providing public services are covered;¹²⁵ (2) everybody has right of access, regardless of

¹²² Id.

¹²³ UN Doc. ECE/CEP/43, 25 June 1998. Note that the Convention's implementation guide, even though the convention concerns environmental matters, makes reference to ICCPR article 19. Available at <http://www.unece.org/env/pp/acig.pdf>, visited 2009.10.28.

¹²⁴ For ratification status, see <http://www.unece.org/env/pp/ratification.htm>. Visited 2009.10.29

¹²⁵ Aarhus Convention art. 2(2)

interest,¹²⁶ or whether or not they are citizens;¹²⁷ (3) information should be provided timely, at least within 30 days;¹²⁸ (4) refusals are only allowed in a restricted set of circumstances, and a public interest test shall always be applied to determine if information should be released even if it pertains to one of the exemptions;¹²⁹ (5) refusals shall be in writing, give justification, and provide information on review procedure;¹³⁰ (6) only legally vested fees not exceeding a reasonable amount can be charged;¹³¹ (7) especially important information shall be proactively disseminated;¹³² and (8) refusals are appealable to an independent tribunal.

The Aarhus Convention has a very interesting feature: it combines civil and political rights with economical, social and cultural rights through *granting* the public civil and political rights to *ensure* their economical, social and cultural rights. Access to information, as exemplified by the Aarhus Convention, is therefore a prime example of human rights being “indivisible[,] interdependent and interrelated”.¹³³

¹²⁶ Id. art. 4(1a)

¹²⁷ Id. art. 3(9)

¹²⁸ Id. art. 4(2)

¹²⁹ Id. arts. 4(3) and 4(4)

¹³⁰ Id. art. 4(7)

¹³¹ Id. art. 4(8)

¹³² Id. art. 5

¹³³ The Vienna Declaration and Programme of Action. UN Doc. A/CONF.157/23, 12 July 1993, para. 5.

2.3 Additional requirements

2.3.1 Right to effective remedy

Most of the requirements of the minimum standards are specifically provided in the discussion above. Nevertheless, the minimum standards also include a requirement to provide independent review of nondisclosure decisions, which is only referred to in a few of the instruments discussed in this chapter. The lack of reference to the right of remedy in other ATI standards should not be seen as implying that it does not exist, but rather that it is implicitly included, as the right to remedy is a human right of its own. While an exhaustive discussion of this complex and controversial issue is beyond the scope of this thesis, a short account is warranted.

The right to independent review is based on the right to an effective remedy, set out by e.g. article 8 of the UDHR and article 2(3) of the ICCPR. As expressed in ICCPR article 2(3), state parties to the Covenant undertake:

To ensure that any person whose rights or freedoms as ... recognized [in the Covenant] are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

To ensure that the competent authorities shall enforce such remedies when granted.

In cases of violations there is therefore only right of access to review by a *competent authority*, but this review must be *effective*. According to Nowak's authoritative *CCPR Commentary*, this implies that "decisions made solely by *political* and subordinate administrative *organs* (especially governments) do not constitute an effective remedy within the meaning of para. 3(b); it also follows that States parties are obligated to place priority on judicial remedies."¹³⁴

¹³⁴ Nowak, *CCPR Commentary* (cited in note 41), at 64. (original emphasis)

ICCPR Article 14, on the right to equality before courts and tribunals and to a fair trial provides some further requirements. While the article primarily concerns criminal procedure, it also provides that in determination of a person's "rights and obligations in a *suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (emphasis added). As interpreted in the Human Rights Committee GC 32, *a suit at law* should be taken to encompass certain administrative law cases, involving e.g. "the determination of social security benefits, ... the use of public land or the taking of private property", as well as other instances, which, "however, must be assessed on a case by case basis in the light of the nature of the right in question."¹³⁵ Drawing on Nowak's commentary again, this indicates that "most decisions of administrative authorities, which determine individual rights, need to be subject to full judicial review by and independent and impartial tribunal."¹³⁶

Returning to the issue of ATI, with basis in the discussion above, I claim that a right to remedy by a competent, independent and impartial tribunal is part of the minimum standards of the right of ATI.

2.3.2 United Nations Convention against Corruption (2003)

The United Nations Convention against Corruption (UNCAC) which entered into force in 2005 is currently the non-regional international treaty with the most comprehensive provisions on ATI. China ratified the treaty in 2006, and as of October 2009 there are 141 parties to the convention.

The UNCAC provides that States parties must develop or maintain "integrity, transparency and accountability" in public dealings (article 5), and in public procurement and financial management (article 9). More elaborately, article 10 on public reporting, requires that parties to the convention "shall ... take such measures as

¹³⁵ UN Doc. CCPR/C/GC/32, 23 August 2007

¹³⁶ Nowak, *CCPR Commentary* (cited in note 41), at 318.

may be necessary to enhance transparency in its public administration.” The article goes on to list possible measures, which include among others adoption of disclosure procedures or regulations. The parties to the convention are thereby required to enhance transparency of their public administration, but are given freedom to choose how to do this.

Article 13 on participation of society sets out slightly stronger requirements. It first requires parties to take measures to “promote the active participation of individuals and groups outside the public sector”. The article further requires that this participation should be strengthened by *inter alia* “ensuring that the public has effective access to information” (art 13(b)), and “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption”, which is subject to restrictions that “are provided for by law and are necessary” either “for the respect of the rights or reputation of others”, or “for the protection of national security or *ordre public* or of public health and morals” (art 13(d)). Subparagraph (d) is close to a verbatim copy of ICCPR article 19 paras. 2 and 3. The “Interpretative Notes”, an authoritative interpretation of the *travaux préparatoires* to the Convention, explains that the intention behind including subparagraph (d) is only to “stress those obligations which State Parties have already undertaken ... and should not *in any way* be taken as *modifying their obligations*.”¹³⁷ Subparagraph (d) creates therefore no new obligations on the parties to the convention, but the clear reference to ICCPR article 19 underlines the interrelatedness of the right of ATI, anti-corruption work, and freedom of expression and information. Additionally, even though subparagraph (b) provides that effective ATI should be ensured, it does not define what is meant by ATI, and what specifically is required by state parties consequently remains elusive. The United Nations has also produced a “legislative guide”, with the purpose of explaining the exact obligations the

¹³⁷ UN doc. A/58/422/Add.1, para. 17 (emphasis added).

treaty creates for state parties, but also this guide fails to provide a definition of what is meant by the ATI provisions.¹³⁸

The Convention does not yet have a formal review mechanism, but a “Pilot Review Program” has been initiated. This procedure is a voluntary test program to evaluate options for review mechanisms. So far four reports are available, three of these commend existence or criticize lack of ATI legislation.¹³⁹ The vagueness of the Convention’s ATI provisions means that interpretation will be left largely up to the review mechanism, and it is therefore a positive sign that the pilot reviews have emphasized ATI legislation.

Even with the uncertainty of what exactly is meant by the UNCAC’s ATI provisions, it is still the international (not counting regional) treaty with the strongest requirements on access to government information, especially so if considering only treaties ratified by China. For this reason and the fact that the Convention makes direct reference to access to information, its importance for the right of ATI’s protection under international law should not be underestimated, even if the Convention provides little in help in setting out minimum standards.

2.3.3 The World Trade Organization

The WTO sets out some basic requirements on transparency in its regulations, but this transparency is to a large degree *regulatory transparency* as opposed to general *government transparency*. The requirements are not based on human rights, but rather on the assumption that free flow of information is a requirement for free trade. The common requirements for all members are laid out in GATT 1994 Article X (unchanged

¹³⁸ Division for Treaty Affairs United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/06-53440_Ebook.pdf, visited 2009.10.15.

¹³⁹ Pilot Review Reports available from United Nations website <http://www.unodc.org/unodc/en/treaties/CAC/pilot-review.html> visited 2009.10.15

since GATT 1947) on “Publication and Administration of Trade Regulations”.¹⁴⁰ The article provides only for a basic obligation to disseminate *trade related* “laws, regulations, judicial decisions and administrative rulings of general application”.¹⁴¹

The requirements on transparency for different WTO member countries are not uniform, and the most extensive ATI requirements for China can be found in its accession protocol. These include *inter alia* a requirement similar to GATT X’s, to publish all “laws, regulations or other measures ... pertaining to or affecting trade in goods, services, TRIPS [Trade-related Intellectual Property Issues] or the control of foreign exchange...”¹⁴² Additionally, an “enquiry point” is required, “where, upon request of any individual, enterprise or WTO Member all information relating to the measures required to be published ... may be obtained”.¹⁴³ Such enquiry points are not required by GATT 1994, and even if it can sometimes be required in SPSs or TBTs,¹⁴⁴ the scope is then more limited. Most significant is the wording “all information relating to...” which should be interpreted as not only the measures, but also background information regarding how and why they came into being, should be made public upon request by any *individual, enterprise or WTO Member*. This requirement goes a long way in binding China to a commitment to ensure the right to access trade related government information not only for Chinese citizens, but also foreign citizens, enterprises, and governments. Note, however, that China’s accession protocol is only binding on China, and the WTO rules’ only contribution to minimum standards is therefore GATT X’s requirement to proactively disclose laws and regulations.

¹⁴⁰ GATT 1994 art. X

¹⁴¹ GATT 1994 art. X(1). Some further requirements on transparency are found in certain Sanitary and Phytosanitary Measures Agreements (SPS) Technical Barriers to Trade Agreements (TBT), both relating to safety.

¹⁴² WTO WT/L/432 Protocol on the Accession of the People’s Republic of China (2001), para I.2(C)(2)

¹⁴³ Id. para I.2(C)(3)

¹⁴⁴ See *supra* note 141

2.4 Minimum standards

Table 1 below shows the minimum standards provided for in the different instruments discussed in this chapter. All requirements have basis both in international and regional sources. Requirements only stipulated by regional standards are not considered as minimum requirements. The two requirements with weakest basis (timely disclosure and low cost) are included because of their universal recognition in national legislation (no legislation I am aware of runs counter to these principles). Based on these criteria, international minimum standards consist of the following:¹⁴⁵

1. Access to information is a human right.
2. Disclosure legislation should be based on the presumption of openness, i.e. all information should be accessible unless it pertains to a legitimate exception.
3. As it is a human right, there should be no citizenship restriction.
4. ATI should not be limited to people with a vested interest in a matter, i.e. there should be no *needs test*.
5. Government organs should be required to proactively disclose key information on matters such as the organ's structure, contact information, etc. This should include also information of vital public interest related to people's right to health (defined broadly).
6. Exceptions must be listed in law, serve this listed purpose, and be necessary to attain the purpose.
7. Information should be disclosed timely
8. Costs should be kept so low as not to prevent information requests.
9. There should be a right to effective remedy provided by access to a competent, independent and impartial tribunal.
10. ATI includes a right to access personal information.

¹⁴⁵ Only a summary list of the requirements is given here, as a more thorough explanation will be provided under section 2.3.

Table 1: Minimum Standards

		ATI under the ICCPR					ATI under the ICESCR				
		Human Rights Committee	UNHRC Resolution	Special Rapporteur	ACHR	ECHR	CoE Convention	CESCR	Rio Declaration	ECHR	Aarhus Conv.
Human right of ATI		(√)	√	√	√	(√)	√	(√)	√	√	√
Presumption of Openness			(√)	√	√		√			(√)	√
No citizenship restriction		(√)	(√)	√	√	(√)	√	(√)	√	√	√
No needs test			(√)	√	√		√				√
Proactive disclosure of key information				√	√	√	√	√	√	√	√
exceptions	Listed in law	(√)	√	√	√	(√)	√	(√)		√	√
	Serve listed purpose	(√)	√	√	√	(√)	√	(√)		√	√
	Necessary	(√)	√	√	√	(√)	√	(√)		√	√
Timely disclosure				√	√		√			(√)	√
low cost				√	√		√				√
Right to remedy		√	√		√	(√)	√		√	(√)	√
Access to personal information		√			√	√	√			√	

√ = required; (√) = partially or implicitly required; [blank] = not required

Source: own compilation.

3 Best practice

3.1 Foundation

International law does, as the previous section shows, not provide very detailed standards on access to information. This section will therefore formulate a more comprehensive framework for comparison – best practice standards. These standards are based on the minimum requirements, but incorporate elements also from evolving national practice.

Most of the major studies of comparative ATI and international ATI standards are done by civil society organizations, significantly ARTICLE 19, Privacy International, and the Open Society Institute and its Justice Initiative.¹⁴⁶ And while it is important to keep in mind that these are activist organizations lobbying for broader ATI rights, they have provided some of the most thorough analyses of where ATI stands as an internationally protected right and of what should be considered best practices. The abovementioned organizations have all contributed with major studies on ATI that have been important in the development of international best practice principles.

ARTICLE 19 has produced a vast amount of comparative studies, policy recommendations, and reviews of ATI legislation.¹⁴⁷ Most important is a document entitled “The Public’s Right to Know – Principles on Freedom of Information Legislation” (the FOI Principles), which “are based on international and regional law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts) and the general principles of law recognized by the community of nations.” They were endorsed by the UN Special Rapporteur on freedom of opinion and expression’s report to the UN Commission on Human Rights in 2000,¹⁴⁸ and have also – along with the Johannesburg Principles on National Security, Freedom

¹⁴⁶ While many other organizations could have been included, these have been chosen for their important academic contributions.

¹⁴⁷ Available through ARTICLE 19’s website: www.article19.org

¹⁴⁸ ARTICLE 19, *Principles on FOI legislation* (cited in note 67).

of Expression and Access to Information, on which they are based – been endorsed and utilized by a wide range of civil society organizations, intergovernmental organizations, and national courts,¹⁴⁹ and should therefore be said to constitute some of the most authoritative international principles on ATI. ARTICLE 19 has also concretized the FOI Principles into a Model Freedom of Information Law, which has also been utilized in the formulation of the standards.¹⁵⁰

Privacy International’s most important contribution to the development of a set of international standards is a comparative study conducted over many years, encompassing all countries with enacted ATI legislation in the world.¹⁵¹ This large scale study helps both in recognizing general principles adopted by a large number of countries, as well as in identifying best practices.

The Open Society Justice Initiative has contributed with a comparative study of ATI in 14 countries, including both countries with and without ATI laws.¹⁵² Both legal principles and practical implementation was assessed, and on this background ten basic principles on the “the Right to Know” were formulated. The study was commended by the UN Special Rapporteur on Freedom of Opinion and Expression in his 2005 report to the UNHRC.¹⁵³

3.2 Evolving standards

Based on these civil society contributions and the minimum requirements, this section formulates a set of international best practice principles. Some of these practices are

¹⁴⁹ ARTICLE 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1995), <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>, visited 2009.10.03., Coliver, et al. (eds), *Secrecy and Liberty* (cited in note 29); Mendel, *The Johannesburg Principles Overview* (cited in note 19).

¹⁵⁰ ARTICLE 19, *Model Freedom of Information Law* (2001), <http://www.article19.org/pdfs/standards/modelfoilaw.pdf>, visited 2009.09.23.

¹⁵¹ Banisar, *Freedom of Information* (cited in note 5).

¹⁵² Open Society Justice Initiative, *Transparency & Silence* (cited in note 5).

¹⁵³ UN Document E/CN.4/2005/64 2004.12.17

fairly common and appear in most countries' legislation, while others are found in only a handful of laws.

Principle 1: Maximum disclosure

Disclosure legislation should explicitly state that disclosure should be the norm and nondisclosure the exception. This means that all information held by public bodies should be subject to disclosure, only restricted by a limited set of exceptions.

The maximum disclosure principle further implies that all governmental bodies and other bodies that provide public services are subject to disclosure legislation. This includes also private entities performing public functions.¹⁵⁴ Private public service providers are included because of the now common practice of contracting out many core services to private entities.¹⁵⁵ As Calland allegorically notes: “[l]ike archaeologists who finally locate the buried tomb of Egyptian King Rameses II but, when they pry open the door, find that the riches within have been long since looted, advocates for government transparency will now find that much public information has been spirited away into the hands of the private sector.”¹⁵⁶

Finally, maximum disclosure also means that all information is covered. Most countries' legislation only covers recorded information, but as this might provide an incentive to not keep records, best practice is to give access to all information, and importantly also to require that all information is available. This last point is included

¹⁵⁴ Exactly what term to use has been widely discussed internationally. I here use ‘public functions’ synonymous with ‘public services’, the two most commonly adopted. See e.g. background material, drafting of CoE Convention on Access to Official Documents [http://www.coe.int/t/e/human_rights/cddh/3._committees/05.%20access%20to%20official%20information%20\(dh-s-ac\)/03.%20Working%20documents/](http://www.coe.int/t/e/human_rights/cddh/3._committees/05.%20access%20to%20official%20information%20(dh-s-ac)/03.%20Working%20documents/), visited 2009.10.08

¹⁵⁵ See generally Richard Calland, *Prizing Open the Profit-Making World*, in Ann Florini (ed), *The right to know: transparency for an open world* (Columbia University Press, 2007); Alasdair Roberts, *Less Government, More Secrecy*, 60 *Public Administration Review* 308, (2000); Alasdair Roberts, *Structural Pluralism and the Right to Information*, 51 *University of Toronto Law Journal* 243, (2001); Roberts, *Blacked Out* (cited in note 5).

¹⁵⁶ Calland, *Prizing Open the Profit-Making World* (cited in note 155) at 215.

because bad record keeping habits and deliberate destruction of records is a considerable problem internationally, and severely hinders effective realization of ATI rights.¹⁵⁷ In assessing the severity of bad record keeping and its impact on ATI, Roberts found that “[a] decent system of record keeping and a reasonably professional civil service are likely to be two prerequisites for an effective disclosure law.”¹⁵⁸

Principle 2: Universal right of access

Access to information should not be limited by citizenship or by special interest. Anyone within a country’s territory should be able to request information, both to protect the rights of foreigners and stateless people, and to ensure that requests are not refused because of lack of means to prove citizenship, as has reportedly been the case in India.¹⁵⁹

Requirements to show a vested interest in a case can severely limit the right to ATI, and it goes directly against the basic presumption that government-held information is a public good. Such requirements are commonly referred to as a “needs test”.

Additionally, ATI should also be ensured for people who do not speak the language or who cannot read or write, and for disabled people, through facilitating request procedures.

Principle 3: Obligation to proactively disclose

Information that is of significant public interest should be disseminated on the government’s own initiative. Best practice is here to both include a “catch-all” obligation to publish all information that is of special public interest, and to provide a positive list of certain key categories of information that must be disseminated. A minimum requirement is to publish; (1) key structural information about the body in

¹⁵⁷ Roberts, *Blacked Out* (cited in note 5), at 111 ff.

¹⁵⁸ *Id.*, at 112-113.

¹⁵⁹ Banisar, *Freedom of Information* (cited in note 5), at 22.

question, such as contact and operational information, how to request information, how to participate in decision-making, etc; (2) laws, regulations, and policies affecting the public, as well as background material for these; and (3) information about the major types of information held.

Principle 4: Limited scope of exceptions

Legitimate exceptions should be well defined, and only encompass issues such as national security, public safety, efficiency of government decision making, ongoing criminal investigations, privacy, and commercial confidentiality.

State secrecy laws are often a problem, with overly wide or unclear definitions of what is to be confidential, and harsh penalties for leaking of confidential information.¹⁶⁰ ATI laws should therefore explicitly provide that the ATI law takes precedence over other laws dealing with ATI issues. Protection of state secrets laws should also be formulated so as to not restrict legitimate access to information.¹⁶¹

Principle 5: Legitimate refusals

This principle has two components. First, all refusals must be in writing. This is perhaps obvious, but important nonetheless. Studies have shown that even in countries with disclosure legislation, a large majority of refusals are mute and only five percent are given in writing.¹⁶²

Second, refusals must go through a three part test. First, it must be affirmed that the refusal is based on a legitimate aim as listed in law (principle 3), second, disclosing the information must be likely to cause *substantial harm*, and finally, a public interest test

¹⁶⁰ See e.g. Banisar, *Right to Information, State Secrets and Protection of Sources* (cited in note 5); Roberts, *Blacked Out* (cited in note 5).

¹⁶¹ For a full set of best practices and policy recommendations for protection of state secrets legislation see Banisar, *Right to Information, State Secrets and Protection of Sources* (cited in note 5).

¹⁶² Open Society Justice Initiative, *Transparency & Silence* (cited in note 5), at 13.

must be applied to ensure that the substantial harm likely to be caused is greater than the public interest in disclosure.

Overly restrictive secrecy legislation is one of the reasons behind the importance of the substantial harm and public interest tests. It should be obvious that exceptions do not apply if no substantial harm is likely to come out of disclosure, but still general practice is to not disclose rather than risk being prosecuted for leaking state secrets or the like. Best practice would therefore be to also include sanctions for officials who deliberately conceal information that should be disclosed. Sanctions should normally be placed on the government body in charge, but individuals should be held liable in extreme cases, such as deliberate destruction of records.

The public interest override is based on the logic that nondisclosure for the sake of e.g. “public safety” should be measured against the effects of disclosure. If disclosure provides more benefits to the public interest than harm to public safety, the information should be disclosed even if it passes both the legitimate aim and substantial harm tests.

If parts of requested information pertain to a legitimate exception, then partial access should be granted.

Principle 6: Timely release of information

Maximum time limits should be imposed on the government in handling requests for information. These are generally set out to be 30 days, with a possible extension of another 30 days if the request is particularly expansive.

Principle 7: Minimal costs

The cost of requesting information should be kept at a minimum to not prevent people from requesting information because of economical reasons.¹⁶³ This means that maximum fees imposed should not exceed the actual cost of retrieving the requested

¹⁶³ Increased fees levied on ATI requests in Ireland resulted in a 50 percent overall decrease, 82 percent decrease of requests from journalists from 2002 to 2003. See Roberts, *Blacked Out* (cited in note 5), at 86.

information, and that the fees should be transparent, i.e. regulated by law. Best practice also includes fee waivers for economically disadvantaged people.

Principle 8: Independent oversight

Implementation of the disclosure law should be ensured through an oversight body that has responsibility for monitoring overall implementation. The body should have full investigative authority, and should publicize its findings regularly, as well as in yearly reports. It should also have the authority to sanction government organs who fail to comply.

The oversight body should be independent, e.g. in the form of an Information Commissioner, Ombudsman, National Human Rights Institution, or the like. Safeguards against interference with its independence should be ensured by the way appointments to the body are made, and through stable sources of funding.

A good practice is to let this body handle first instance external appeals, but a viable alternative is to let the courts handle also first instance appeals.

Principle 9: Active promotion of open government

Secrecy, rather than openness, is the norm in most governments around the world. Reversing this trend requires taking active measures to create an open government. In addition there are also problems related to the public's lack of knowledge of their legal rights. Active measures needed to create an open society include educating both public officials and the general public about different ATI subjects, such as; rights and duties, procedural issues, records management, etc. Government officials should also have a duty to actively assist requesters.

Public bodies should be required to ensure easy access to information, and to keep an easy to understand system of access. It should also be clearly established who has the responsibility to provide information, ideally by having specifically designated

individuals within each public body. To ensure that these requirements are followed, external supervision by an independent body should also be ensured (see Principle 8).

Adequate human and economical resources are vital for implementation of disclosure legislation, as the costs of administering an open government system are significant. In the US, the relevant costs for 2003 were \$323 million, or about \$100 per request, which is actually a lot less per request than in comparable countries.¹⁶⁴ It has also been pointed out that some aspects of ATI systems might be even more resource demanding in developing countries, as it is costly also to build adequate infrastructure, information systems and records management systems required for satisfactory implementation.

Balancing sanctions for disclosure of confidential information and for deliberate refusal to comply with the ATI law can also help undermine the culture of secrecy and thereby facilitate ATI implementation. Criminal liability for disclosure of state secrets should therefore only apply to officials and other people with a specific responsibility to maintain confidentiality, and only apply if the disclosure is intentional or gross negligence is showed.

Principle 10: Right to effective remedy

All requesters who get their requests denied should have the right to appeal the decision, ideally both to an internal and external review body. The internal review should be conducted by a higher level authority, while the external review should be conducted by an independent tribunal, such as a court, an independent information commissioner or ombudsman. The external review body should have full review authority, and power to order disclosure. It should also have authority to review both the legality and necessity of the nondisclosure (based on the three-part test set, see Principle 5). The tribunal's decision should be appealable – both for the requester and the public body – to a higher level tribunal, which should always be a court of law.

¹⁶⁴ Id., at 114.

Both internal and external review should be free of charge, or at least not so costly as to prevent actual access to justice.

4 Summary

The minimum standards and best practice provided in this chapter are summarized in table 2 on the following page. Also some of the more advanced standards are included to indicate what standards the different principles are based on. The table is, when referenced to the different principles set out above, fairly self explanatory, and only a few clarifications will be provided here. First, it should be noted that the principles of table 1 above (minimum standards) and table 2 below do not entirely correspond to each other. This is due to the best practice principles being more numerous, and also having a slightly different formulation than the minimum standards. Second, all minimum standards are naturally also best practice requirements. The requirement for legitimate refusals, for instance, is expanded to also include a public interest test. Third, the table shows that a majority of best practice principles are founded not only on evolving national practice, but are also found in international regional standards. Fourth, the best practices on the first page of table 2, in addition to the last principle regarding right to remedy (*review*), should be seen as “fundamental principles” and the second page as “implementational principles”. This does not necessarily signify that some principles are more important than others. Fifth and last, most minimum standards are fundamental principles.

Table 2: Best practice

Best Practices		Minimum Standards	ARTICLE 19 Principles	OSJI Principles	Special Rapporteur	Aarhus Convention	CoE Convention	ACHR
Maximum disclosure	Explicit right of ATI	√	√	√	√	√	√	√
	Presumption of Openness	√	√	√	√	√	√	√
	All gov. bodies		√	√	√	√	√	
	Public service providers		√	(√)	√	√	(√)	
	All information	√	√	√	√	√	√	√
	Obligation to record		√			(√)	√	
Universal access	No citizenship restriction	√	√	√	√	√	√	√
	No "needs test"	√	√	√	√	√	√	√
Proactive disclosure	Structural and operational info	√	√	√	√	√	√	
	Decisions and policies		√		√	√		
	Vital public interest info	(√)	(√)		√	√	√	
Limited exceptions	Narrow definitions	√	√	√	√	√	√	√
	ATI law takes precedence		√		√	(√)	√	√
Legitimate refusals	Written refusals		√	√	√	√	√	
	Legitimate aim	√	√	√	√	√	√	√
	Substantial harm	√	√	√	√	√	(√)	
	Public interest	(√)	√	√		√	√	√

(CONT.) Best Practices		Minimum Standards	ARTICLE 19 Principles	OSJI Principles	Special Rapporteur	Aarhus Convention	CoE Convention	ACHR
Timely disclosure	Timely release	√	√	√	√	√	√	√
	Specified time limit		√			√		√
Minimal costs	Minimal	√	√	(√)	√	√	√	
	Max. actual cost of retrieval	√	√	√		√	√	
Oversight	Specified body		√	√			(√)	
	Independent		√	√			(√)	
	Investigative authority		√					
	Authority to sanction							
Active promotion	Education of the public		√		√	√	√	
	Education of officials		√				√	
	Obligation to assist requesters		√	√		√	√	
	Adequate resources		(√)					
	Balanced sanctions		√					
Review	Internal		√				√	
	independent external review	√	√	√	√	√	√	√

√ = required; (√) = partially or implicitly required; [blank] = not required

Source: own compilation

Chapter 3 Drafting and Opening-Up

1 Conceptualization

Most countries enacted disclosure legislation after pressure from an informed middle class acting together with the media and civil society who sought to realize their democratic or human rights.¹⁶⁵ The struggle in these countries was chiefly between the people's want for transparency, and the government's want for secrecy.¹⁶⁶ In China the process was largely government driven; it was the government itself who chose to become more open. Furthermore, it has been demonstrated that a majority of countries either comply with – or at least make extensive reference to – international standards on access to information legislation.¹⁶⁷ This and the following chapter will show that while China found inspiration in these standards in its beginning stages of drafting ATI legislation, the discrepancy between international standards and the final OGI Regulations is substantial. This raises two sets of questions; first, why did the Chinese government willingly open up when most governments are fighting to remain as closed as possible? Or more to the point; why were the OGI Regulations seen as necessary? And second, why did the OGI Regulations turn out as they did? Why the discrepancy between the Chinese Regulations and international standards? This chapter will answer these sets of questions through examining a third question; namely *how the Regulations came to be*. This will be done in three steps; I first look at the reform towards openness' historical development, i.e. the political backdrop (section 3.2); second, I examine other legislation affecting the OGI Regulations, i.e. the legal backdrop (section 3.3); before lastly studying the OGI Regulations' concrete legislative history (section 3.4).

¹⁶⁵ See generally Florini (ed), *The Right to Know* (cited in note 5); Roberts, *Blacked Out* (cited in note 5).

¹⁶⁶ See generally Florini (ed), *The Right to Know* (cited in note 5); Mendel, *Freedom of Information* (cited in note 5); Roberts, *Blacked Out* (cited in note 5).

¹⁶⁷ Banisar, *Freedom of Information* (cited in note 5); Mendel, *Freedom of Information* (cited in note 5).

2 Crossing the river by feeling the stones

The reform process that eventually led to the enactment of the OGI Regulations has simplistically been called a top-down approach,¹⁶⁸ while in reality the development was somewhat more complicated and deviates from a traditional top-down approach in at least two (related) ways: First, grassroots initiatives for increased village openness was a very important factor in why the reform came about. Second, the OGI reform can be seen as a special form of *point to surface* (由点到面) reform,¹⁶⁹ with some elements of what has been called “rightful resistance”,¹⁷⁰ together resulting in the reform process to a certain extent being out of the Center’s direct control. These points are elaborated upon in the following two sections.

2.1 Grassroots initiatives – a bottom-up beginning to a top-down reform?

Reform towards a more open government was started out by grassroots initiatives promoting “Open Village Affairs (村务公开)” in the countryside, before the central government eventually enacted national legislation to promote nationwide village openness.¹⁷¹ Influenced by this reform, the concept of “Open Government Affairs” (政务公开) came about, and soon drafting of national OGI legislation had begun. But before passing the national legislation, several province and city level governments carried out *local experimentation* by enacting lower level OGI regulations, and first after several years of experimentation, along with continuous central drafting, came the

¹⁶⁸ Jamie Horsley, *China Adopts First Nationwide Open Government Information Regulations* (Yale Law School China Law Center, 2007).

¹⁶⁹ Sebastian Heilmann, *From Local Experiments to National Policy: the origins of China's distinctive policy process*, 59 *The China Journal* 1, (2008). See also *infra* note 174 and accompanying text.

¹⁷⁰ See Kevin J. O'Brien & Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge University Press 2006).

¹⁷¹ For a more thorough discussion on Open Village Affairs, see Zhou Hanhua (ed), *Open Government Affairs* (cited in note 4). Note that the Open Village Affairs system deals only with openness in the dealings of Village Committees which are the lowest level of administration, but not the lowest level of government, as the Village Committees are part of the system of village autonomy.

final promulgation of the nationwide regulations.¹⁷² In the words of Professor Zhou Hanhua, a leading authority on OGI and central drafter of the OGI Regulations, the grassroots initiated Open Village Affairs “kicked off the move toward greater openness throughout the country”.¹⁷³

Policy experimentation where local level legislation is enacted in test locations (or “experimental points (试点)”), is not unique for the OGI reform. On the contrary, the *point to surface* approach was used by the CCP already before the foundation of the PRC, and has in the last 30 years been used in a range of areas, from rural de-collectivization to opening up to foreign investment. Sebastian Heilmann holds that:

*Although these methodologies were the product of the distinctive historical context of revolutionary struggle, at the beginning of the economic reforms in the 1980s they came to be seen as the “concretization” of the CCP’s best traditions of “seeking truth from facts”. ... This is why the terminology of experimentation and the slogan “crossing the river by groping the stones” were taken from their revolutionary contexts and made to serve the purpose of reforming the Chinese economy.*¹⁷⁴

In its most common variety, point-to-surface reform consists of three basic stages; in stage one, the government conceives a reform plan and decides to use the point-to-surface technique; in stage two, test locations are found and policy experimentation is carried out; and finally, in stage three, the central government evaluates experiments and makes policy decisions. Depending on the experiments’ success along with other considerations, the reform is either scrapped, carried out on a national basis, or goes through another round of experimentation. This variety of point to surface reform is initiated and directed by the central government and should therefore be seen as a top-down process. But in some cases, such as rural de-collectivization, village autonomy, and the related Open Village Affairs, grassroots activism played a crucial role, showing

¹⁷² Zhou Hanhua, *Open Government in China* (cited in note 4).

¹⁷³ Id. at 93.

¹⁷⁴ Heilmann, *59 The China Journal* (cited in note 169) at 12. Another related term for this kind of policy experimentation is “first local then central (先地方后中央)”.

the “dialectic that is inherent in the point-to-surface technique: it can be a bottom-up or a top-down affair, depending on the overall political and ideological constellation.”¹⁷⁵

The grassroots initiatives for government openness are closely linked to rural de-collectivization and village autonomy, as Open Village Affairs is part of the system of village autonomy, with increased self governance, popular elections of village leaders, etc.¹⁷⁶ The move toward greater village transparency thus started out at more or less the same time as the de-collectivization and village autonomy reform of the early 1980s.¹⁷⁷ Based only on the 1982 Constitution’s vague provision on village autonomy and *democratic supervision*,¹⁷⁸ a few villages around the country made rules requiring publication of certain information. These villages were few, each locality had different openness requirements, procedural requirements were largely absent, and the system had minimal legal basis.¹⁷⁹ The 1987 Organic Law of the Village Committees (for Trial Implementation) required for the first time all Village Committees to publicize a certain – albeit narrow – range of information related to public expenditure.¹⁸⁰

The Notice on Universalizing the System of Open Village Affairs and Democratic Administration in Rural Areas, issued jointly by the CCP Central Committee and the

¹⁷⁵ Id. at 13. for more on the synergies arising in this kind of reform, see *infra* this chapter, section 3.2.2. For more on grassroots activism, see O'Brien & Li, *Rightful Resistance* (cited in note 170).

¹⁷⁶ Jamie Horsley, *Toward a More Open China?*, in Ann Florini (ed), *The right to know : transparency for an open world* (Columbia University Press, 2007).

¹⁷⁷ Zhou Hanhua, *Open Government in China* (cited in note 4) at 93. For more on grassroots activism and democracy in general, see e.g. Richard Levy, *Village Elections, Transparency, and Anticorruption: Henan and Guangdong Provinces*, in Elizabeth J. Perry & Merle Goldman (eds), *Grassroots political reform in contemporary China* (Harvard University Press, 2007); O'Brien & Li, *Rightful Resistance* (cited in note 170).

¹⁷⁸ 1982 Const. arts 27, 41 and 111. For more on *democratic supervision* as basis for the right of ATI, see *infra* pp. 64 ff.

¹⁷⁹ Zhou Hanhua (ed), *Open Government Affairs* (cited in note 4), at 86-87.

¹⁸⁰ 《中华人民共和国村委会组织法(试行)》. *Esp.* Article 17. Available <http://www.lawinfochina.com/law/display.asp?db=1&id=287>, visited 2009.10.28. The Law was amended in 1998 and has since been in full effect. See note 183.

State Council General Affairs Office, helped standardize openness in village affairs.¹⁸¹ The Notice states that Open Village Affairs will help bring about a number of positive effects, including: “developing grass-root democracy, ... ensuring villagers’ democratic rights, ... constructing a clean and honest government, strengthening party members’ and the masses’ supervision over cadres, ... [and making] village cadres act according to law”. To achieve this, “all key matters of public concern, and all major issues in villages, should be made public”, while the “emphasis should be on financial matters”. Some specific areas are pointed out as important, such as land requisition and village revenues and expenditures. The main way of disclosure is provided by requiring all villages to set up a public bulletin board that should be updated at least every three months. According to government statistics, 90 percent of all villages had such a bulletin board by 2003.¹⁸²

The final push for universalizing Open Village Affairs came with the 1998 amendment of the Organic Law of the Village Committees,¹⁸³ when openness requirements were significantly expanded. Article 22 of this law demands financial matters publicized within six months, and provides a list of matters to be made public, including the near catch-all provision “matters that involve the interests of the villagers and that all the villagers are concerned about”. However, local officials have wide discretion in determining what to disclose, since no clear definition of what is meant by this provision is provided.

By the late 1990s, inspired by the Open Village Affairs experiences, the concept of government openness was gaining ground across all levels of government. This was

¹⁸¹Zhongbanfa (1998) no. 9 《关于在农村普遍实行村务公开和民主管理制度的通知》 中办发[1998]9号 available at <http://cpc.people.com.cn/GB/64162/71380/71382/71383/4844863.html>, visited 31 May 2009. The following excerpts are my own translations.

¹⁸² Progress in China's Human Rights Cause in 2003, Government Whitepaper available at http://www.chinadaily.com.cn/english/doc/2004-03/30/content_319211.htm visited 31 May 2009

¹⁸³ 《中华人民共和国村民委员会组织法》 (1998), available in Chinese with unofficial English translation at <http://www.lawinfochina.com/law/display.asp?db=1&id=988>, visited 2009.10.28. The Law replaced the Organic Law of the Village Committees (for trial implementation), see note 180.

shown to the full by Jiang Zemin's introduction of the term "Open Government Affairs" in his report to the 15th National People's Congress in 1997.¹⁸⁴

In summary, the grassroots initiated Open Village Affairs, even though only requiring increased openness in the dealings of Village Committees, was the first initiative signaling a move towards a more open government. Calling the OGI reform a top-down process would thus at least be an oversimplification.

2.2 Synergetic reform

The second reason why top-down is an inaccurate word for describing the OGI reform is the synergies that arise in this kind of *point-to-surface* reform. The following is meant as an exploration of this complex process, and is in no way meant to be exhaustive, but rather a prod at something in need of further deliberation.

The starting point will be Heilmann's notion that *point-to-surface* reforms are not always top-down, they can also be bottom-up.¹⁸⁵ Heilmann does not, however, go deeper into these bottom-up reforms, and fails therefore to explain their importance. His *point-to-surface* model will for this reason be somewhat expanded here, following the argument that in some reform areas the role of grassroots and local activism, in cooperation with *individual entrepreneurs* (e.g. scholars) play a crucial role.¹⁸⁶

In making this point, I also rely on M.S. Tanner, who argues that lawmaking in China is no longer a unified, top down process, but should rather be seen as a "multi-stage, multi-arena" process.¹⁸⁷ This argument is based on the assertion that lawmaking goes through five stages: agenda-setting; inter-agency review; leadership decision-

¹⁸⁴ Jiang Zemin, *Speech to the 15th NPC: Holding High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement for the Cause of Building Socialism with Chinese Characteristics to the 21st Century* (1997), at section IV, <http://xibu.tjfsu.edu.cn/elearning/lk/15en.htm>, visited 2009.06.01.

¹⁸⁵ Heilmann, *59 The China Journal* (cited in note 169) at 13.

¹⁸⁶ Zhou Hanhua, *Open Government in China* (cited in note 4); Murray Scot Tanner, *How a Bill Becomes a Law in China: stages and processes in lawmaking*, 141 *The China Quarterly* 39, (1995)., see also Zou Keyuan, *China's Legal Reform : towards the rule of law*, at 87-105 (Martinus Nijhoff Publishers 2006).

¹⁸⁷ Tanner, *141 The China Quarterly* (cited in note 186) at 39.

making; NPC review; and explications,¹⁸⁸ where “[n]o particular pattern (such as elite factionalism, bureaucratic bargaining or freewheeling entrepreneurship) seems to predominate throughout the process”.¹⁸⁹ A key point Tanner makes is that the number of actors with a say in recent policy- and lawmaking is expanding, where new actors include among others intellectuals, think-tanks, and foreign advisers, and that “[a]t many moments in the lawmaking process the key ideas and the loudest voices in the system do not always come from within the bureaucracy, no matter how powerful it is.”¹⁹⁰

Like Heilmann, Tanner does not focus much on grassroots activism. Nevertheless, he does hint at the fruitful synergy that can arise from local government cooperation with what he calls “legislative entrepreneurs”, “whose chief characteristics” he says, “are persistence and obsessive devotion to their pet problems or policy proposals”.¹⁹¹ Much can be accomplished by these entrepreneurs, especially if they are trusted policy advisors, since “[t]op leaders appear to depend heavily upon their key advisers ... to generate and screen policy options for them, and to feed them other policy-relevant information such as feasibility studies, [and] results from local “testpoint” policy experiments”.¹⁹² In some cases, Tanner argues, this can go so far that leaders in reality do not understand the policy options presented to them, and that the legislative proposals thus are “slipped in” by the legislative entrepreneurs.¹⁹³

¹⁸⁸ The lawmaking stages are apart from the “NPC review stage” – which for State Council regulations are exchanged for another round of inter-agency review – the same for both NPC laws and administrative regulations. Tanner’s model therefore works well also for explaining the process of making State Council regulations. Note that the process is not always linear and that some stages might be done several times. For example, after a round of inter-agency review, a draft might go back to drafting and local experimentation, which belongs to the agenda-setting stage.

¹⁸⁹ Tanner, *141 The China Quarterly* (cited in note 186) at 40.

¹⁹⁰ *Id.* at 43.

¹⁹¹ *Id.* at 44

¹⁹² *Id.* at 48

¹⁹³ *Id.*

O'Brien and Lee also indirectly strengthens the theory with their research on what they call "rightful resistance", i.e. resistance that "entails the innovative use of laws, policies, and other officially promoted values ... [I]t is a kind of partially sanctioned protest that uses influential allies and recognized principles to apply pressure on those in power who have failed to live up to a professed ideal or who have not implemented some beneficial measure."¹⁹⁴ This kind of activism is in addition more often local than national, mostly non-violent, and the "rightful resisters" stay mostly within the boundaries of the law, to have a more legitimate claim, and thus a better chance of getting the policy change they want.¹⁹⁵ In the case of Open Village Affairs, for example, the villagers were relying on vague stipulations in the Constitution on village autonomy and the right to supervise.¹⁹⁶ What the "rightful resistance" theory effectively does, is providing the grassroots activism part that was missing in Heilmann and Tanner's theories.

When including an increased focus on grassroots initiatives, a *point-to-surface* reform would roughly go like this: the central government first gets a reform idea, this idea can come from either grassroots initiatives, as in the case of rural de-collectivization, or from scholars or think-tanks inspired by foreign legislation or policy, as in the case of the proposed Administrative Procedure Law (APL),¹⁹⁷ or from a combination of the two, as I argue was the case with the OGI reform.¹⁹⁸ Research and deliberation is then initiated at the central level by government sponsored research

¹⁹⁴ O'Brien & Li, *Rightful Resistance* (cited in note 170), at 2-3.

¹⁹⁵ *Id.* at 4

¹⁹⁶ Zhou Hanhua, *Open Government in China* (cited in note 4) at 93.

¹⁹⁷ By the Administrative Procedure Law (APL) I mean the proposed but not yet adopted law which in Chinese is called 行政程序法. The Administrative Litigation Law (ALL, 行政诉讼法) has sometimes been inaccurately translated as "the Administrative Procedure Law". I use the designations of APL for 行政程序法 and ALL for 行政诉讼法.

¹⁹⁸ See *infra* Chapter 3. Ideas can of course also come from different sources, most importantly from within the bureaucracy (Tanner, *141 The China Quarterly* (cited in note 186) table at 62-63. These sources are superfluous to making my argument and are therefore not discussed.

groups, and to a lesser extent semi-independent initiatives from scholars.¹⁹⁹ During this research and deliberation part of the drafting, which mostly occurs at the ‘agenda-setting’ and ‘inter-agency review’ stages of Tanner’s five lawmaking stages (see above), local officials and scholars start working together in making what is sometimes more progressive local legislation than the central government originally had in mind. Scholars do this because they tend to be somewhat more progressive than the central government, and want to influence the direction and degree of reform.²⁰⁰ Local officials, on their part, have incentives to be ‘test laboratories’, to try out progressive legislation, because success will make them look good, while failure is most likely to not generate any negative consequences.²⁰¹ At this point, the central government – even if having approved a project’s initiation – has only limited control over the direction and degree of reform. When then projects can be ‘slipped in’ by trusted policy advisors, it seems clear that the central government’s control, even over centrally backed reform, is not absolute.

Conversely, such a coalition between scholars and local officials might also prove to be *too* progressive. Part of the reason why the draft APL still remains to be enacted might be explained by the fact that scholars and local officials try to influence the central government to enact legislation that is progressive beyond its level of acceptance. The government might then choose to not enact any law at all, or stall the process indefinitely.²⁰² The APL seems to be a good example of this, while part of the OGI Regulations’ success could be attributed to its central advocates’ ability to adapt to the political climate. In any case, these two ‘pressure groups’ – scholars and local officials – seem to be extremely important in the drive for reform. Whether or not national legislation is enacted is most definitely dependent on the success of local

¹⁹⁹ Id.

²⁰⁰ Id. See also case study Hunan Administrative Procedure Provisions below.

²⁰¹ Heilmann, 59 *The China Journal* (cited in note 169). at 27.

²⁰² Academic A, interview, 2009.06.29

experimentation, and it might even hinge on the position or trustworthiness of central drafters and advocates in the eyes of the central government leaders.²⁰³

The passing of the Hunan Province Administrative Procedure Provisions (the Provisions) in April 2008, the only of its kind in the country, exemplifies the synergies nicely (even though, as we will see below, not as well as the OGI Regulations). A set of vital conditions made the Provisions come about, but most important among them was perhaps the fact that the three architects behind the regulations were not only in the right positions to make the reform happen, they were also old friends and classmates, and formed a “progressive network” of sorts.²⁰⁴ The three were current Vice-President of the Supreme People’s Court (former President of Hunan Province Higher People’s Court); the Governor of Hunan Province; and a National School of Administration professor, one of the most prominent figures in the drafting of the national APL. These three managed – with the help of local officials and other scholars – to push the Provisions through without official endorsement from the central leadership (i.e. only with its tacit approval).²⁰⁵

Two conclusions can be drawn from the example above. First, progressive forces within China can, if they hold high positions, wield considerable power, and can provide a significant push for reform. If “progressive networks” form, this is naturally even more the case. Second, as the future of the national APL remains uncertain even with the wide calls for support, it seems that advocates for reform have been pushing for too progressive legislation, or alternatively that the political climate in China is not ready yet.²⁰⁶ In the OGI field, very similar synergy effects played an important part in the drafting process, as is shown in section 3.4

²⁰³ Tanner, *141 The China Quarterly* (cited in note 186). As Tanner points out, this is also the case in other jurisdictions.

²⁰⁴ Legal Daily Online (法制网), 2009.04.27, *A record of the coming into being of the first provincial level “Administrative Procedure Provisions”*, at http://www.legaldaily.com.cn/bm/2008-04/27/content_840574.htm, visited 2009.07.15.

²⁰⁵ Ibid. Also Academic A, interview, 2009.06.29

²⁰⁶ Further discussion of the APL *see* pp. 72 ff.

3 Central legislation on openness and secrecy – democracy vs. efficiency

3.1 Introduction

At the same time as village affairs began opening up, the people were given what has been interpreted as an increased right to know in the 1982 Constitution,²⁰⁷ and national legislation slowly began including some aspects of transparency,²⁰⁸ thereby increasing peoples' information rights. But also enacted in the same period were the Protection of State Secrets Law (SSL),²⁰⁹ the Archives Law and other legislation that poses severe restrictions on the people's access to information. This conflicting approach of opening up some areas while constricting others has been followed for the last 30 years, mirroring the central government's contradictory goals of maintaining social stability and legitimacy by means of transparency, while at the same time wanting to preserve its power. The result has been that even though the people's right to know has been recognized, true realization of this right remained blocked until the OGI Regulations took effect. To comprehend the mechanisms at work better, the relevant legal framework and must also be understood.

Prior to the enactment of the OGI Regulations, there was already a vast regulatory system governing many aspects of government openness and secrecy. This system included everything from constitutional and administrative law, through commercial law, to local regulations governing minuscule issues. The amount of laws and regulations is so large that only a small part can be dealt with here, but adequate elucidation will hopefully be achieved through analyzing the most central legislation. The discourse concerns mostly constitutional and administrative law, which is what will be the focus of this section.

²⁰⁷ See *infra* section 3.1.1

²⁰⁸ See *infra* section 3.1.2

²⁰⁹ 《中华人民共和国保守国家秘密法》, available at http://www.gov.cn/banshi/2005-08/21/content_25096.htm, visited 2009.04.22.

Increased understanding of the political-legal landscape the OGI Regulations sprang out of hopefully provides clarification not only of what legislation governs ATI issues and how the OGI Regulations came about, but perhaps also more generally about how reform is driven in China.

3.2 The Constitution

As a general principle, all rights must be provided by the Constitution.²¹⁰ As the right to know (知情权)²¹¹ is not referred to directly in the Constitution, this section will attempt to find its constitutional basis. The justiciability of the Chinese Constitution is a controversial topic that will not be treated at length here. It is sufficient to say that the Chinese Constitution's importance lies more in its status as the supreme authority of law than as a foundation for legal action.²¹² As "most citizens are far more likely to encounter the state in the routine matters that are the stuff of administrative law rather than in the rarified sphere of constitutional law",²¹³ questions of judicialization and justiciability of information rights will be dealt with in the section on administrative law, while the constitutional basis for "the right to know" (知情权) and the OGI system will be discussed here.

There is no direct mention of a right to know or other information rights in the Constitution, and it has been an issue of some controversy whether or not such rights truly exists at all.²¹⁴ In examining this question, and in determining what the best

²¹⁰ Chen Jianfu, *Chinese Law : context and transformation*, at 130 (Martinus Nijhoff Publ. 2008).

²¹¹ As indicated in Chapter 1, I will in discussing the constitutional right of ATI use the term 'the right to know' (知情权), as this is the term used in the Chinese discourse.

²¹² Chen Jianfu, *Chinese Law* (cited in note 210), at 77 ff.

²¹³ Tom Ginsburg & Albert H. Y. Chen (eds), *Administrative Law and Governance in Asia - comparative perspectives*, at 1 (Routledge 2009).

²¹⁴ Huang Delin & Tang Chengmin, *Citizens' "Right to Know" and its Realization* [公民的“知情权”及其实现], 5 *Legal Forum* [法学评论] 33, (2001); Li Xianggang, *China's Constitution Should Clearly Stipulate the Right to Know* [我国宪法应明确规定知情权], 2 *Seek Truth From Facts* [实事求是] 76, (2006); Zhang Jiansheng, *The Right to Know and its Legal Protection - the Case of "Open Government*

constitutional basis for the right to know would be, Professor Zhou Hanhua concluded that the course taken in most other countries (and in international human rights law) – i.e. basing information rights on the right to freedom of expression – is not the way to go in China:

*[E]ven though article 35 of the Constitution stipulates citizens' right to freedom of expression and of the press, there is still no Press Law or Publication Law, and there is still no authoritative interpretation of article 35, thus, we believe that the Open Government Information system and the right to freedom of expression should not be connected. ... [T]his could be seen as a special characteristic of the Chinese Open Information system.*²¹⁵

Professor Zhou's conclusion, however, is not that there is no constitutional basis for the right of ATI. His argument, which now seems to be the mainstream position, is that the right to know is protected through articles 2, 27 and 41.²¹⁶ Even though I do not entirely agree with Professor Zhou in saying that the right to know should not be connected to freedom of expression, I will follow his reasoning in discussing the constitutional basis for the right to know, as it is the most common line of argumentation in China today.

Article 2 of the 1982 Constitution determines that "all power in the People's Republic of China belongs to the people", and that "the people exercise state power [through] the National People's Congress and the local people's congresses". It is possible to interpret this as meaning that the people have effectively transferred their power to the people's congresses, but this interpretation is not the norm, which is unsurprising when one includes articles 27 and 41 in one's reading. Rather, the people have only temporarily transferred their power, and retain the authority to take it back.

Information Regulations" [知情权及其保障 -- 以《政府信息公开条例》为例], 4 *China Legal Science* [中国法学] 145, (2008); Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13).

²¹⁵ Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13).

²¹⁶ Id. See also Huang Delin & Tang Chengmin, 5 *Legal Forum* (cited in note 214); Li Xianggang, 2 *Seek Truth From Facts* (cited in note 214); Zhang Jiansheng, 4 *China Legal Science* (cited in note 214); Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13).

Article 27 concerns “the principle of simple and efficient administration”, a principle which requires that “[a]ll state organs and functionaries must rely on the support of the people, keep in close touch with them, heed their opinions and suggestions, accept their supervision and work hard to serve them.” The final part of the argument for an implied right to know is article 41, which grants citizens the “right to criticize and make suggestions to any state organ or functionary”. Article 27 and 41 together make up the system of “people’s democratic supervision”, which was important for the advances in Open Village Affairs, and provide for a fairly well protected right to know – as citizens are given a right not only to ‘criticize and make suggestions’, but also to ‘supervise’, which is critical for effective ATI rights. As Huang and Tang point out; “[if] citizens are ignorant then they’re unable to criticize and make suggestions state organs and state officials.”²¹⁷ Note that this argument can also be taken as a freedom of expression argument; as it is virtually identical to the argument for including a right of ATI in the human right of FOI – i.e. access to relevant information is necessary to be able to form an informed opinion which in turn is essential to freedom of expression.²¹⁸ The reason for Chinese academics choosing to argue the right to know based on *democratic supervision* instead of freedom of expression therefore seems to be more the politically sensitive nature of freedom of expression than the lack of a legal basis. I would in fact argue that an argument for the right to know based on a combination of the right to democratic supervision and freedom of expression would be stronger than an argument based on only one of the two.

The right to know, as all constitutional rights, have, as Chen Jianfu has pointed out, an additional weakness brought about by the focus is more on the *efficiency* of the government than on the *rights* of the people, as exemplified by the fact that a core part of the implied right to know is article 27 on “simple and efficient administration”. This

²¹⁷ Huang Delin & Tang Chengmin, 5 *Legal Forum* (cited in note 214) at 34-35.

²¹⁸ See *supra*, Section 2.2

is very much in keeping with the ideals at the time when the 1982 Constitution came about:

*For Deng Xiaoping the major problems inherent in the Party and state leadership and the cadre (bureaucratic) system were bureaucratisation, over-concentration of power, patriarchal methods, life tenure in leading posts, and privileges of various kinds. Thus his major concern was the efficiency of government and not government accountability, at least not towards the governed.*²¹⁹

This efficiency concern might provide some of the explanation for why constitutional rights are less than adequately protected in China.²²⁰

When discussing constitutional rights in China, it is also important to note the limitations these rights have. Especially important is the Constitution's article 51, which requires *inter alia* that exercise of basic rights "may not infringe upon the interests of the state". Article 51 implies thereby that no rights are absolute, and that the state retains the authority to decide which limitations should be imposed.²²¹

3.3 Administrative law

3.3.1 Reform – from power control to balancing powers

As exemplified by Deng Xiaoping's statement above, the focus of the constitutional provisions on the right to know is on government efficiency. But even so, the people's individual and collective right to know was still strengthened by the Constitution's provision, a strengthening that has deepened over time, influenced also by the

²¹⁹ Chen Jianfu, *Chinese Law* (cited in note 210), at 215.

²²⁰ For more on the discussion of constitutional rights' status, see e.g. Id., at 134-146; Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? constitutional development and civil litigation in China*, 7 *International Journal of Constitutional Law* 215, (2009); Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 9 *China Brief* 4, (2009).

²²¹ Chen Jianfu, *Chinese Law* (cited in note 210), at 134. This is also related to the (socialist) notion of the reciprocity of rights and obligations, i.e. that there are no rights without corresponding duties and vice versa. See Otto Malmgren, *Article 37 - an exploration into the right to liberty of person under the Chinese constitution* (awaiting publication) On file with author (2009).

administrative law discourse.²²² Deng Xiaoping's view of administrative law was traditional, and his school of thought has later been labeled the "theory of administration (管理论)", or the "theory of securing power". It basically advocates the view that administrative law's main function is to determine the structure, powers and working principles of the government administration, in order to make it as stable and efficient as possible. Administrative law is thus in essence only a means of public management.²²³

Starting in the early 1990s, several additional theories emerged, most important of which are the "theory of power control (控权论)" and the "theory of balance (平衡论)". The 'theory of power control' advocates a view clearly influenced by Western scholars such as H.W.R Wade, where the function of administrative law is to control government power through checks and balances, with a clear procedural focus. The 'theory of balance', finally, rejects both the 'theory of power control' and the 'theory of administration'. The former is rejected for its lack of realism, essentially on the basis that it is too idealistic and does not take the realities of China's socioeconomic situation into consideration, i.e. it sacrifices too much efficiency for the sake of democracy. The latter is rejected because of its arcaneness, due in part to its failure to address the conflict between democracy and efficiency. In other words, the 'theory of balance' *balances* the two other theories as it argues that the 'theory of administration' focuses too much on efficiency and too little on democracy, while just the opposite is the case with the 'theory of power control'.²²⁴

The 'theory of balance', by far the most influential of the three models, was developed by Luo Haocai, a prominent figure in both academic and political circles, and current Vice-President of the Chinese People's Political Consultative Conference. The

²²² See generally Chen Jianfu, *Chinese Law* (cited in note 210), at 214-223. See also Lin Feng, *Administrative Law - procedures and remedies in China* (Sweet & Maxwell 1996).

²²³ Chen Jianfu, *Chinese Law* (cited in note 210).

²²⁴ Id. See also Lin Feng, *Administrative Law* (cited in note 222), at 8-9; Luo Haocai, *A Theory of Balance of Contemporary Administrative Law* [现代行政法的平衡理论] (Peking University Press 1997).

success of the theory is clearly manifested both in academia, by its prevalence in the discourse on the subject; and legislation and government policies, as shown by the gradualist rhetoric used by the government and the enactment of laws in keeping with this philosophy.

The discourse is significant because it shaped the political-legal landscape the OGI Regulations sprang out of. Had the ‘theory of administration’ maintained its position as the prevailing theory, then the OGI Regulations would perhaps never have been enacted, while the Regulations might on the other hand have been more progressive had the ‘theory of power control’ won through. The fact that the ‘theory of balance’ was the most successful is thus significant in that it shaped the OGI Regulations in many ways, as it shaped so many other laws and regulations, to fit into this system of balancing democracy and efficiency. This balancing, as we will see in Chapter 4, is clearly visible in the OGI Regulations.

The discourse is also interesting from a comparative perspective, as the focus on balance clearly deviates from the Western focus on forcing the “government and its employees ... to do, as it were, what they are supposed to do in the way they are supposed to do it.”²²⁵ Comparing European and North American definitions of administrative law to Chinese definition exemplifies this difference nicely. The English legal scholar H.W.R. Wade focuses on administrative law’s importance in controlling the government, by defining administrative law as “the law relating to the control of governmental power”.²²⁶ Wade was naturally an important source of inspiration for the ‘theory of power control’ in China. While other authorities generally have a somewhat broader definition, they all recognize the centrality of administrative law as a means of controlling the executive, and focus on procedure as the core of administrative law.²²⁷ The leading American scholar Schartz, for example, defines administrative law as “that

²²⁵ H. B. Jacobini, *An Introduction to Comparative Administrative Law*, at 1 (Oceana 1991).

²²⁶ H.W.R. Wade, cited in *Id.*, at 3.

²²⁷ See *e.g.* *Id.* at 3-4, and Jiang Ming'an (ed), *Administrative Law and Administrative Litigation Law* [行政法与行政诉讼法] (Peking University Press 2007).

branch of the law that controls the administrative operations of government. It sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action.”²²⁸

Chinese definitions of administrative law has been less focused on procedure and limiting administrative power than Western definitions, but following the power-balance shift between proponents of the ‘power control theory’ and the ‘theory of balance’, definitions have also started focusing more on procedure and on limiting governmental power abuse. The definition from the first Chinese textbook on administrative law published in 1983 focused in keeping with the theory of power control on administrative law as being “the collective term for all laws and regulations [governing] administrative management”.²²⁹ The next textbook on administrative law, edited by the father of the ‘theory of balance’ Luo Haocai, came out in 1989, and shifted the focus away from managing the administration. Luo’s definition focused instead on administrative law being that part of the law which “regulates administrative relations”, i.e. the relations between the government and the governed.²³⁰ Jiang Ming’an, the editor one of the most authoritative textbooks on administrative law today, goes one step further in his definition, in saying that: “So called administrative law, is the standardized system of laws that regulates all administrative relations, [and] standardizes and controls administrative powers.”²³¹ This plain example shows the apparent development towards a greater focus on controlling government power, a step-by-step advancement that again shows the influence of the ‘theory of balance’.

²²⁸ Schwartz as cited by Jacobini, *Comparative Administrative Law* (cited in note 225), at 3.

²²⁹ Wang Mincan & Zhang Shangshuo, *An Outline of Administrative Law [行政法概要]* (Law Press China 1983). Cited in Jiang Ming’an (ed), *Administrative Law* (cited in note 227), at 15.

²³⁰ Luo Haocai, *Administrative Law [行政法学]* (Law Press China 1989). Cited in Jiang Ming’an (ed), *Administrative Law* (cited in note 227), at 15.

²³¹ Jiang Ming’an (ed), *Administrative Law* (cited in note 227), at 18.

3.3.2 Administrative procedure

That the ‘balanced’ reform model became government policy had significant ramifications for the development of administrative procedure, where the approach made sure reform was made in the familiarly unhurried and gradual fashion.

In Europe and North America, procedural justice has been given great importance, and has been called the “core of democracy”, the “essence of justice”, and the “difference between rule by law and rule by whim”.²³² Standardization of administrative procedure was also an important step towards an open government. In fact, many ATI acts in the West can be said to be special law – *lex specialis* – under Administrative Procedure Acts (APA), as they to a great extent deal with procedural issues.

The United States’ APA is the classical example. It was adopted in 1946, due in large part to what has been termed the bureaucratization of society, i.e. that the executive branch of government was growing, and needed to be controlled through new measures. The APA set out basic ATI provisions, but these were restricted to information about cases where the requester had a vested interest. The Freedom of Information Act (FOIA) was later adopted among other reasons to expand this right of access to include all government held information.²³³

Even though this *lex specialis* argument has been hinted at by administrative legal scholars in China as well,²³⁴ the fact is that China lacks comprehensive administrative procedure legislation. Currently there is only a small number of separate administrative laws and regulations with procedural provisions, but these only encompass certain narrow issues, such as administration of licensing or of penalties, in addition to the areas of administrative litigation and reconsideration (for the two latter, see next section).

The drafting process of a comprehensive Administrative Procedure Law (APL) has been ongoing for a decade, but it is still highly uncertain when, if ever, the law will be

²³² Chen Jianfu, *Chinese Law* (cited in note 210). at 226, citing various sources.

²³³ Roberts, *Blacked Out* (cited in note 5).

²³⁴ Jiang Ming'an (ed), *Administrative Law* (cited in note 227). at 369

enacted. Certain factors seem indeed to point in the direction of abandoning the effort to enact an APL, and instead choose a piecemeal approach.²³⁵ Even so, not everybody has given up hope on the APL, because even though the law is neither included in this year's legislative agenda, nor in the current five-year legislative plan, it's still possible to insert the APL into the agenda and enact it. As one scholar close to the drafting process put it: "China has an official goal of constructing a country with 'socialist rule of law' by 2010, but what kind of rule of law would that be without comprehensive administrative procedure legislation?"²³⁶ A recent survey of which administrative laws legal experts thought were "in most urgent need of enactment", mirrored this view. The APL came out as the most called for law, with 88% of the asked experts considering it necessary.²³⁷ On the other hand, it has also been pointed out that "the passage of an APL within the next decade would still be much earlier in the developmental arc than in other East Asian development states such as Japan, Taiwan and Korea, all of which only passed such laws in the 1990s",²³⁸ indicating that one should be patient and not expect wonders from a legal system as young as the Chinese.

3.3.3 Supervision, reconsideration and litigation

Administrative reconsideration²³⁹ and litigation are perhaps the areas with the clearest procedural provisions, stemming from the Administrative Reconsideration Law

²³⁵ Indicators for this include adoption of a number of largely procedural laws on separate issues, e.g. the Administrative Licensing Law and the Administrative Penalties Law. *See generally* Chen Jianfu, *Chinese Law* (cited in note 210).

²³⁶ Academic A, interview, 2009.06.29

²³⁷ Mo Yuchuan & Zhao Yan, *Legal Daily*, 2008.05.07, *Authoritative administrative law research organization launches special study: which laws does our country need to amend or enact in the next five years* [权威行政法研究机构开展专题调查: 未来五年我国亟需修改制定哪些行政法律], at http://www.legaldaily.com.cn/bm/2008-05/07/content_846314.htm, visited 2009.10.16.

²³⁸ Randall Peerenboom, *More Law, Less Courts: legalized governance, judicialization, and dejudicialization in China*, in Tom Ginsburg & Albert H. Y. Chen (eds), *Administrative Law and Governance in Asia - Comparative Perspectives* at 177 (Routledge, 2009).

²³⁹ Internal review system for handling first instance complaints against administrative decisions.

(ARL)²⁴⁰ and the Administrative Litigation Law (ALL)²⁴¹ respectively, which together make up the complete system of and procedures for legal remedy in administrative cases.²⁴² As such they are not only important as examples of procedural administrative law, they also make up the two different forms of remedy (internal and external) in OGI cases. The implications for the OGI Regulations can thus not be overstated.

The scope of administrative reconsideration and litigation is limited in two ways. First, administrative reconsideration and litigation are normally limited to review *concrete* administrative actions (具体行政行为),²⁴³ while review of *abstract* actions (抽象行政行为) is subject only to limited administrative and legislative supervision.²⁴⁴ Many other jurisdictions differentiate similarly between specific and abstract administrative actions, albeit with different implications. In the United States, for example, both what is referred to as adjudicative and rulemaking actions are reviewable by the judiciary. Most other legal systems have judicial review systems with similar review authorities.²⁴⁵ The term *concrete act* should, however, be interpreted somewhat more broadly than the US' *adjudicative act*, as it contains some acts that would be deemed rulemaking in other jurisdictions. A key importance lies in that if a general rule

²⁴⁰ 《中华人民共和国行政复议法》(1999), Chinese and unofficial English translation at <http://www.lawinfochina.com/law/display.asp?db=1&id=5279>, visited 2009.10.02

²⁴¹ 《中华人民共和国行政诉讼法》(1990), Chinese and unofficial English translation at <http://www.lawinfochina.com/law/display.asp?db=1&id=1204>, visited 2009.10.02

²⁴² See generally Chen Jianfu, *Chinese Law* (cited in note 210), at 236-260; Lin Feng, *Administrative Law* (cited in note 222).

²⁴³ Administrative reconsideration can however review certain special abstract acts, and can in cases where concrete acts are reviewed also review the legality of low lever provisions (规定). See generally Jiang Ming'an (ed), *Administrative Law* (cited in note 227), at 404-446.

²⁴⁴ Chen Jianfu, *Chinese Law* (cited in note 210), at 223-225; Jiang Ming'an (ed), *Administrative Law* (cited in note 227). The applicability of legal remedy only to concrete acts is highly contentious, as it leaves all abstract acts out of the courts' reach. Some scholars have argued that the distinction should be abolished (see Chen Jianfu, *Chinese Law* (cited in note 210). text to footnote 104, at 223-224). For more on supervision, see *infra* pp. 76-7

²⁴⁵ E.g. all European legal systems have some form of judicial review of rulemaking administrative actions. See Ren éSeerden & Frits Stroink, *Administrative Law of the European Union, its Member States and the United States : a comparative analyses* (Intersentia 2002).

is directed at a specific person or group of people, i.e. “whether it was possible to add up and ascertain the number affected by the act at the time of performance”, it is still a concrete act.²⁴⁶ As a general rule, however, it suffices to say that a concrete act roughly corresponds to an adjudicating act, while an abstract act roughly corresponds to a rulemaking act.²⁴⁷

Second, the ALL only gives courts authority to consider the *legality* of an administrative action, the *appropriateness* (merit) of the action is not to be taken into account, while it is to be considered in cases of administrative reconsideration.²⁴⁸ Most countries give broader authorities to the courts, either through review also of appropriateness of actions, or through applying legal principles such as the legislative goal or the “spirit of the law”, which in practice leads to similar results.²⁴⁹

The rather narrow scope of judicial review seems to be partly due to the belief in a step-by-step approach, as showed by the drafters of the ALL in their considerations:

*The stipulation in the [ALL] that ‘common people can sue officials’ is an issue that is conceptually rather new. It is a question for which there is no custom and to which we have not adapted, and yet it is an enduring issue. Therefore, the scope for acceptance of cases should not yet be set too widely but shall be expanded step by step”*²⁵⁰

The gradual widening of the scope is especially visible in what kind of cases the courts accept. The ALL only provides for judicial review of cases concerning personal rights (人身权) and property rights, while opening for other laws to provide for judicial review in cases of other rights infringements (article 12). This has led to a gradual expansion of the scope of acceptable cases, as a growing number of laws stipulate that

²⁴⁶ Jiang Ming'an (ed), *Administrative Law* (cited in note 227), at 201.

²⁴⁷ For a general comparison with several countries, see Id. at 196-204. See also Chen Jianfu, *Chinese Law* (cited in note 210); Lin Feng, *Administrative Law* (cited in note 222).

²⁴⁸ ALL article 5, ARL article 2.

²⁴⁹ Jiang Ming'an (ed), *Administrative Law* (cited in note 227), at 469.

²⁵⁰ Wang Hanbin “Explanation of the (Draft) Administrative Litigation Law of the PRC”, delivered at the 2nd Session of the Seventh NPC on March 28, 1989, cited in Chen Jianfu, *Chinese Law* (cited in note 210), at 248.

infringement of certain other types of rights, such as some civil and political rights, can also serve as basis for litigation.²⁵¹ The OGI Regulations is one such example.

There is no general requirement to first apply for administrative reconsideration before initiating administrative litigation in the ARL or ALL,²⁵² and administrative reconsideration decisions are, except for a few special instances,²⁵³ appealable to the court.²⁵⁴ The burden of proof is generally placed on the responding government agency, i.e. it has to produce the material the decision was based on, and applicants are given access to this information except if it pertains to state secrets, commercial confidentiality or personal privacy.²⁵⁵

People's courts are theoretically independent in their adjudication. That is, according to the Constitution's article 136: "The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals." How independent the courts are in reality is nonetheless a hotly debated issue.²⁵⁶ This is not the place for a thorough discussion of this complex issue, but it is still possible without going into detail, to point to three problematic aspects of current judicial independence in China;

²⁵¹ See SPC judicial interpretation of the ALL: Supreme People's Court, Interpretation on Several Issues Concerning Execution of the Administrative Litigation Law (Fashi [2000] no. 8), 《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)》. See generally Jiang Ming'an (ed), *Administrative Law* (cited in note 227), at 471 ff.

²⁵² ALL article 37. Except if relevant laws require it, such as in cases involving issues concerning certain natural resources where the law requires that redress is sought first through administrative reconsideration (ARL article 30(1)). Other examples include the provisions of the Tax Administration Law article 88(1), National Security Law article 31, Trademark Law articles 32 and 43, and Patent Law articles 41 and 46(1).

²⁵³ ARL article 30(2)

²⁵⁴ ARL article 5, ALL article 37

²⁵⁵ ARL article 23 and 24, ALL articles 30 and 32.

²⁵⁶ See generally Jonas Grimheden, *Themis vs. Xiezhì: assessing judicial independence in the People's Republic of China under international human rights law* (2004) (PhD Lund University); Benjamin L. Liebman, *China's Courts: restricted reform*, 191 *The China Quarterly* 620, (2007); Ma Huaide & Deng Yi, *Judicial Independence and Constitutional Amendments* [司法独立与宪法修改], 12 *Legal Science* [法学] 29, (2003); Randall Peerenboom, *China's Long March toward Rule of Law*, at 280-330 (Cambridge University Press 2002); Randall Peerenboom, *China Modernizes : threat to the West or model for the rest?* (Oxford University Press 2007).

namely undue interference by the CCP, people's congresses, and local governments, all three mainly through interference in individual cases (*individual case supervision* 个案监督). The combination of these three sources of undue influence severely obstructs the courts in their work, as showed e.g. by a 2001 survey on administrative law, which found that 88 percent of the surveyed judges cited lack of judicial independence as an obstacle to effective implementation of the ALL.²⁵⁷ It has also been suggested that undue influence is more likely to happen in administrative cases, as the likelihood of these being politically sensitive, or of the CCP, the local government or people's congresses having a stake in some other way, is larger in administrative cases than in criminal or civil cases.²⁵⁸

As already indicated, also abstract acts are reviewable, albeit only in form of administrative supervision – i.e. no judicial proceedings and limited sanctioning powers – by specially designated supervisory organs, in accordance with the “Administrative Supervision Law” (ASL), as well as through the *letters and visits* (信访) system.²⁵⁹ The supervisory system set out by the ASL includes most importantly general supervision of observance of laws and regulations, which is initiated either on the supervisory organ's own initiative, or on the basis of individual complaints on government misconduct through the *whistleblower system* (举报制度). The supervisory organs lack independence as they are placed within the government hierarchy (under the Ministry of Supervision), and they have limited investigative and sanctioning authorities. Because

²⁵⁷ Peerenboom, *China's Long March* (cited in note 256), at 307., citing Fang Ning et al. (2001) *A Call for Rationality: a Survey of the Status of Implementation of China's Administrative Litigation Law* (理想的呼唤：中国行政诉讼法实施现状调查报告). Dongwu Faxue Chubanshe.

²⁵⁸ See generally Liebman, 191 *The China Quarterly* (cited in note 256); Peerenboom, *China's Long March* (cited in note 256); Shen Kui, *Commentary on "China's Courts: Restricted Reform"* 191 *The China Quarterly* 639, (2007).

²⁵⁹ The complete system of administrative supervision is very complex, and involves in addition to the administrative supervision agencies importantly also legislative supervision, the letters and petitions (信访) system, the CCP non-judicial disciplinary system (双规), the national audit system, and judicial supervision. A complete account of these is outside the scope of this thesis. See generally Chen Jianfu, *Chinese Law* (cited in note 210), at 242-246; Peerenboom, *More Law, Less Courts* (cited in note 238) at 181.

of these reasons, the supervision system has been characterized as “more a disciplinary enforcement organization than a supervisory system. Its fatal flaw is its lack of any meaningful independence and power of decision-making. As such, it is perhaps not even a tiger without teeth; it is a paper tiger.”²⁶⁰

3.3.4 State secrets

In and of itself, the protection of state secrets is an internationally recognized exemption from disclosure, but only as long as the standards for protection of secrets are well defined and narrow. China’s 1998 Protection of State Secrets Law (SSL),²⁶¹ enacted in 1988 and effective from 1989, has recently been on the receiving end of hard criticism for not meeting these requirements. According to the recent criticism, the Chinese law is too vague, the definitions of state secrets too broad, and the punishments for leaking secrets too hard.²⁶² In his expert draft OGI Regulation, Professor Zhou Hanhua characterized the current system for protection of state secrets as having “vague standards of classification; lenient procedures; too broad scope; [and] too long time limits”.²⁶³ That being said, the law has by some scholars gotten a somewhat more positive review and was said to have “clarified and narrowed the range of secrecy in government”.²⁶⁴ A statement, however, which most likely implies that having legislation governing state secrets – even if it is far from perfect – is better than not having any at all.

²⁶⁰ Chen Jianfu, *Chinese Law* (cited in note 210), at 246.

²⁶¹ 《中华人民共和国保守国家秘密法》(1988)

²⁶² See e.g. Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 86-90. Horsley, *China Adopts First Nationwide Open Government Information Regulations; Human Rights in China* (HRIC), *State secrets: China's legal labyrinth* (HRIC 2007). HRIC has done an excellent job in compiling laws, regulations and other relevant documents and translating them into English, translations I rely upon in the following quotes from state secrets legislation; See also Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 86-90; Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13), at 112 ff.

²⁶³ Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13), at 112.

²⁶⁴ Tanner, *141 The China Quarterly* (cited in note 186) at 50.

The SSL defines state secrets broadly as “matters involving state security and national interests”.²⁶⁵ This is specified somewhat by providing six broad categories, including the three internationally recognized categories of (1) national security and defense; (2) diplomatic affairs; and (3) investigation of criminal offences. The other categories are secrets concerning (4) major policy decisions on state affairs; (5) national economic and social development; and (6) science and technology. In addition there’s a catch-all seventh category of “other matters that are classified as state secrets by state secret departments”.²⁶⁶

Somewhat more detailed provisions on what is to be considered secrets are given by lower level regulations. In environmental protection work, for instance, information that would, if disclosed “affect social stability” or “have an unfavorable influence on our country’s foreign affairs work” should be classified.²⁶⁷ It would be possible to argue that reviling information about any environmental pollution disasters could both affect social stability and create an unfavorable impression of China, as seems to have been the case in the cover-up of the Songhua River chemical spill in 2005.²⁶⁸

The broad categorization of state secrets is accompanied by strict penalties for disclosure,²⁶⁹ and the obligation to protect state secrets (which implies criminal liability for disclosure) is extended to *all* citizens.²⁷⁰ People are criminally responsible for disclosing state secrets intentionally or through negligence if the circumstances are

²⁶⁵ SSL Article 2

²⁶⁶ SSL Article 8

²⁶⁷ Regulation on the Specific Scope of State Secrets in Environmental Protection Work, article 2.2.2. For an extensive list of examples, see e.g. Human Rights in China (HRIC), *State Secrets* (cited in note 262), at 168-185.

²⁶⁸ Id.; Xinhua Online, 2005.11.13, *6 missing, 70 wounded in chemical plant blasts*, at http://news.xinhuanet.com/english/2005-11/13/content_3775869.htm, visited 2009.11.02; BBC News Online, 2005.11.24, *Chinese papers condemn Harbin 'lies'*, at <http://news.bbc.co.uk/2/hi/asia-pacific/4465712.stm>, visited 2009.11.02; Xinhua Online, 2005.11.24, *Toxic water from polluted water reaches Harbin*, at http://news.xinhuanet.com/english/2005-11/23/content_3828666.htm, visited 2009.11.02.

²⁶⁹ SSL Articles 31, 32, and Criminal Law Articles 111, 282 and 398.

²⁷⁰ SSL Article 3, Criminal Law 398

serious, or if it is done “for foreign organizations”,²⁷¹ and can in serious cases get up to 7 years imprisonment.²⁷² If the divulgence of secrets is part of espionage against the country, the maximum punishment is death.²⁷³

In addition, there is also a retroactive classification of state secrets if detrimental consequences occur, which leads to a retroactive liability for disclosure of secrets, even if they were not classified at the time of disclosure. The basis for this is the Measures for Implementing the Law on the Protection of State Secrets.²⁷⁴ Its article 4 provides that “if any matter, once disclosed, could result in any of the following, it should be considered to fall within the scope of state secrets and their security classifications”:

- (1) *Endangering the ability of the state to consolidate and defend its power.*
- (2) *Affecting national unity, ethnic unity or social stability.*
- (3) *Harming the political or economic interests of the state in its dealings with foreign countries.*
- (4) *Affecting the security of state leaders or top foreign officials.*
- (5) *Hindering important security or defense work of the state.*
- (6) *Causing a decrease in the feasibility, or a loss of effectiveness to, the measures used to safeguard state secrets.*
- (7) *Weakening the economic or technological strength of the nation.*
- (8) *Causing state organs to lose the ability to exercise their authority according to law.*

While these categories are largely within internationally recognized limits, the retroactive classification of secrets is highly problematic: Firstly, it leads to an even broader definition of state secrets where almost anything can be classified as secret

²⁷¹ SSL Article 31 paragraph 1 and Article 32.

²⁷² Criminal Law Articles 282 and 398. *See also* SPC Interpretation of Certain Issues Regarding the Specific Application of the Law When Trying Cases of Stealing, Gathering, Procuring or Illegally Providing State Secrets or Intelligence Outside of the Country (fashi [2001] no 4) 《最高人民法院关于审理为境外窃取、刺探、收买、非法提供国家秘密、情报案件具体应用法律若干问题的解释》(法释[2001]4号)).

²⁷³ Criminal Law Articles 111 and 113.

²⁷⁴ 《中华人民共和国保守国家秘密法实施办法》 Issued in 1990 by the National Administration for the Protection of State Secrets

because it *might lead to harm*.²⁷⁵ Secondly, there is an *ex post facto* problem. As illustrated by a number of cases, it is unclear where the line is drawn as to negligence and intentionality in disclosing retroactively classified information. Must a person be aware that the information he is handling could cause one of the above mentioned consequences to be criminally liable, or is it enough that the consequences occurred? The answer should be that there has to at least be negligence, and that this negligence must be proved by the prosecution, but case law seems to indicate that the answer is more muddled. Zhang Shanguang, for example, was charged with leaking *intelligence* (情报) when he told a Hong Kong reporter about a protest and kidnapping case in Xupu County in Hunan Province, because the information had not yet been officially released by public security officials, even though it was common knowledge among locals of the area.²⁷⁶ In another case Zheng Enchong was sentenced to three years in prison for “illegally providing state secrets outside of the country” after sending two documents to an American human rights organization, documents that had been circulated in China and were not classified as secret.²⁷⁷

In addition to serving as the legal basis in individual cases, overly broad definitions of state secrets should also be seen as one important reason behind the culture of secrecy that has led to cover-ups of scandals that have directly affected the health of millions of people. Examples include the initial cover-up of SARS, the Songhua River chemical spill, and the HIV/AIDS epidemic among Henan blood sellers.

Compared to international practice, the Chinese legislation on state secrets has overly wide definitions and harsh punishments, and is therefore far from adhering to international standards.²⁷⁸

²⁷⁵ This is further exacerbated by the fact that *intelligence* (情报) and *state secrets* often are used interchangeably in criminal trials, further blurring the distinction between state secrets and other information.

²⁷⁶ Human Rights in China (HRIC), *State Secrets* (cited in note 262), at 12.

²⁷⁷ *Id.* at 28

²⁷⁸ Compare with table 2 and pp. 45-46.

Still, incremental change might be underway, as the SSL is in the process of being amended for the first time.²⁷⁹ This amendment presents an opportunity to create better defined categories of secrets, to abolish the retroactive classification and limit criminal liability to people with an explicit responsibility for handling confidential information. But, both Chinese and foreign media and observers have noted that the proposed amendments will provide only very few changes, and that the main focus seems directed at strengthening the work on protecting state secrets, not narrowing the definitions.²⁸⁰

²⁷⁹ Draft available from NPC's webpage: http://www.npc.gov.cn/npc/xinwen/lfgz/2009-06/27/content_1508588.htm. Visited 2009.10.29

²⁸⁰ Human Rights in China (HRIC), *State Secrets* (cited in note 262). Southern Weekend, 2009.07.16, *Behind the scenes of the amending: the fight between secrecy and openness* [修法内幕: 保密和公开的角力- “越开放, 越要保密”], p 10; Caijing Magazine, 2009.06.15, *Draft amendment to Protection of State Secrets Law up for deliberation in the Legislature* [保密法修改将提交立法机关审议], at <http://www.caijing.com.cn/2009-06-15/110184794.html>, visited 2009.08.11; Southern Weekend, 2009.07.16, *Neibu secrets* [内部秘密], p 10; Southern Weekend, 2009.07.16, *Secrets protection tempest* [保密风暴], pp 9-10; Jerome Alan Cohen & Jeremy Daum, South China Morning Post, 2009.08.06, *State of Secrecy*, p 2. Caijing Magazine, 2009.04.14, *"State Secrets Law" amendment aiming at strengthening protection of secrets attracts controversy* [《保密法》修订旨在强化保密引争议], at <http://www.caijing.com.cn/templates/inc/webcontent.jsp?id=110143290&time=2009-04-14&cl=100&page=all>, visited 2009.10.10.

4 Drafting the OGI Regulations

4.1 Introduction

Against this political/legal backdrop was it the OGI Regulations started taking shape. It is important to keep this backdrop in mind, as it defined the limits of reform in two ways: On the one hand, disclosure legislation could not directly contradict existing legislation, such as the SSL or ALL, and on the other, drafters and other advocates had to make sure their rhetoric stayed consistent with what was politically acceptable. The drafters managed this job fairly well, but the drafting process was not without relapses, and the final adoption of the OGI Regulation should be seen not only as a product of the drafters' prudence, but also of their good fortune, as several factors came together in making the final adoption possible. These factors, as I will show, include but are not limited to; good experiences from grassroots openness reform, individual entrepreneurship, a favorable political climate, and a series of exposed cover-ups leading to a public call for openness.

The drafting went through three main phases: (1) the CASS research group expert draft; (2) local regulatory experimentation; and (3) finalization. Each of these will be expounded upon in the following.

4.2 Central initiation – the expert draft

Promotion of general governmental openness started gaining momentum when the concept of Open Government Affairs was introduced in the mid 1990s, as can be observed in official speeches.²⁸¹ However, the real beginning of the OGI reform came at the beginning of 2000, when CASS set up the “Information Society and Open Government Information System Research Group”, headed by Professor Zhou Hanhua.

The idea for setting up the group was conceived in 1997, during a drafting session for an amendment to the State Secrets Law. During the drafting session a main issue

²⁸¹ See esp. Jiang Zemin, *Speech to the 15th NPC* (cited in note 184).

was how to deal with excessive classification of information. This problem meant the organs in charge of secrets protection did not have the resources to properly manage all the classified material. It was therefore perceived that properly defining the limits of state secrets would help solve this problem, but to be able to do this a counterpart that governed all information except state secrets was needed. Therefore then, the CASS group was established; to assess the possibility for adopting disclosure legislation so that state secrets could be properly protected.²⁸²

Back then government transparency was a very novel issue, and the research group had to invent the whole discipline, including the terminology and its definitions. The term “Open Government Information”, for example, was created by the CASS research group. At first, because of the sensitive nature of government transparency, the group used the term “opening up utilization and management of information resources in government resources” (政府资源的信息资源开发利用与管理). Only later did they see it safe to use OGI.²⁸³

The group’s perhaps most important contribution was the “OGI Regulations Expert Opinion Draft” (the Expert Opinion Draft),²⁸⁴ which was central to the OGI reform in at least two ways; first, it concretized the vague transparency aspirations of the Open Village Affairs and Open Government Affairs systems into a tangible legal framework. This included defining all the core OGI terms and concepts, such as what was to be considered *information*, what government organs should be covered, and so on. Many of these concepts were direct translations from foreign laws, which Prof. Zhou had found during his comparative research on ATI legislation around the world.²⁸⁵ Second, through providing this legal framework, and spreading the idea of enacting OGI

²⁸² Academic C, interview, 2009.10.20

²⁸³ Zhou Hanhua, *The Whole Story Behind the "Open Government Information Regulations"* [《政府信息公开条例》出台始末], 7 *E-Government* [电子政务] 15, (2008).

²⁸⁴ Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13).

²⁸⁵ *See Id. See also* Zhou Hanhua (ed), *Foreign OGI Systems* (cited in note 14).

legislation through media and academic publishing, the group gained far-reaching influence, thereby attracting the interest of the leadership.²⁸⁶

4.2.1 Key provisions

The Expert Opinion Draft was fairly consistent with recognized international standards, while at the same time taking some special circumstances of the Chinese political/legal system into consideration. Internationally recognized principles included *inter alia*: (1) the public has a legal “right to know”;²⁸⁷ (2) everybody can access information, or as expressed in the Draft: “Natural persons, legal persons and other organizations have the right to acquire government information, except where these Regulations or other laws have other clear limitations”.²⁸⁸ In the explanation to this article, Zhou Hanhua says that an important feature of this article is that it gives *all* people a right to access government information, not excluding foreigners and not requiring requesters having any vested interest (no “needs test”);²⁸⁹ (3) the presumption of openness, i.e. that disclosure is the principle, while non-disclosure the exception;²⁹⁰ (4) only government sanctioned fees amounting to no more than the expenses of providing requested information is to be put on requesters;²⁹¹ (5) acquired information can be used freely without any limitations;²⁹² (6) right to legal remedy;²⁹³ (7) disclosure of information should not infringe on others rights or interests;²⁹⁴ (8) non-disclosure is only allowed in a defined set of circumstances, and justification must be provided;²⁹⁵ (9)

²⁸⁶ Academic C, interview, 2009.10.20

²⁸⁷ Expert Opinion Draft art. 1

²⁸⁸ Id. article 2(1)

²⁸⁹ Academic B, interview, 2009.06.08; Academic C, interview, 2009.10.20; Zhou Hanhua, *The Whole Story Behind the OGI Regulations* (cited in note 283) 48-50.

²⁹⁰ Expert Opinion Draft art. 2(2)

²⁹¹ Id. arts. 4 and 18

²⁹² Id. art. 5

²⁹³ Id. art. 6

²⁹⁴ Id. art. 3

²⁹⁵ Id. art. 19

the “public interest test” shall be applied even if information pertains to a legal exception, i.e. if the public interest in disclosure is larger than in non-disclosure, information shall be disclosed;²⁹⁶ and (9) information must be disclosed in a timely fashion.²⁹⁷

Furthermore, the draft provided that the government should proactively disclose a predefined set of information on e.g. governmental organs’ set-up, contact information, the basis of administrative decisions, and procedural rules,²⁹⁸ while all other information can be acquired upon request.²⁹⁹ The government at the relevant levels should have an “information officer” to be in charge of the OGI work at that level of government,³⁰⁰ who should also be responsible for compiling an annual report on OGI work.³⁰¹

All the provisions listed so far could have been adopted in China without major structural changes. However, the draft also provided for an alternative dispute settlement mechanism: an information commission made up out of the information officers at the relevant level of government, and an “expert committee” which should make up not less than one third of the commission. Those who felt their rights had been infringed upon could thus choose to either apply for administrative reconsideration, or to ask the information commission to handle the claim. The information commission would have full investigative authority, but could only come with suggestions to the government. If an applicant disagreed with the commission’s decision, he could then apply for administrative reconsideration or go directly to administrative litigation. Administrative reconsideration decisions would also be appealable to the court.³⁰² The information commission, even though it would lack independence, was an attempt at adhering as much as possible to international standards, while at the same time adapting

²⁹⁶ Id. art. 20

²⁹⁷ Id. arts. 9 and 13-16

²⁹⁸ Id. art. 8

²⁹⁹ Id. art. 9

³⁰⁰ Id. art. 25

³⁰¹ Id. art. 26

³⁰² Id. arts. 27-35; Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13), at 159-179.

to the Chinese situation. It is, however, not included in the final version of the OGI Regulations.

Compared to the standards set out in the previous chapter, the Expert Opinion Draft complies fundamentally with all minimum standards, and comes up short only of a few best practice requirements. Independent oversight and appeal to an independent body, for example, is lacking even with the institutional innovations the draft introduced. The main problem thus, seems to not be the drafters' willingness to comply with international standards, but rather the restrictions inherent in the current government and legal system. One example of this is the Legislation Law's requirement that change in the basic government structure must be made through NPC legislation.³⁰³ The OGI Regulations therefore did not have authority to create an independent information commission; such a commission would need to be set down in national law.

4.2.2 Gaining momentum

The focus on OGI that was created in part by the Expert Opinion Draft, prompted NPC deputies to file proposals to commence official drafting of an OGI law in three consecutive NPC sessions from 2001-2003, which lead to the inclusion of an OGI law in the 10th NPC's five-year legislative agenda.³⁰⁴

Why was then State Council regulation chosen over an OGI Law enacted by the NPC? A law would clearly have more authority, as it is one step higher in the legal hierarchy. Conflicts with the State Secrets Law could then also be more easily resolved, as it wouldn't be necessary to completely subordinate an OGI Law to the SSL. In addition, national law would also have higher authority to create rights and obligations. In explaining why the expert drafting group chose State Council regulation, Professor Zhou Hanhua admits that a law would have higher authority, but says that a regulation was chosen because it could be enacted more speedily, which would mean that a

³⁰³ Legislation Law of the People's Republic of China, 中华人民共和国立法法(2000) art. 8(2)

³⁰⁴ Horsley, *Toward a More Open China* (cited in note 4) at 77-78.

national OGI system could be set up sooner than would be the case if NPC law was chosen. He also points out that “based on our country's more than 20 years of legislative experience with similar systems to the OGI system, first practice, then legislation, first establish administrative or local regulations, before changing these into laws, is not only beneficial to perfect and mature the contents of the law, it is also beneficial to accumulation of experience and final implementation.”³⁰⁵

The CASS group got strong support from the Leading Group on National Informatization (国家信息化领导小组), an organ set up in 2001 and headed by former Premier Zhu Rongji.³⁰⁶ The Leading Group promulgated the “Guiding Opinions for the Construction of E-Government”, which was jointly issued by the General Office of the CCP Central Committee and the General Office of the State Council in 2002.³⁰⁷ These *Guiding Opinions* required among other things that governments at all levels should speed up research on and enactment of informatization legislation, including Open Government Information laws and regulations,³⁰⁸ a requirement that was included after suggestion from the CASS research group.³⁰⁹

The OGI Regulations Expert Opinion Draft was submitted to the State Council for consideration in June 2002, which signaled the commencement of the official drafting of the OGI Regulations. The Draft then went through internal deliberation, before a new drafting group was set up, this time within the State Council, under the Informatization Office. At the same time, progress was made at the local level, where local governments

³⁰⁵ Zhou Hanhua (ed), *Expert Opinion Draft* (cited in note 13), at 69.

³⁰⁶ Deputy directors included then Vice-President Hu Jintao, then Vice-Premier Wu Bangguo, former Vice-Premier Li Lanqing, and former head of the CCP Central Propaganda Department Ding Guan'gen.

³⁰⁷ CCP Central Committee General Office & State Council General Office, *Guiding Opinions for the Construction of E-Government* (Zhongbanfa [2002] no. 17), 《国家信息化领导小组关于我国电子政务建设指导意见 (中办发[2002]17号)》.

³⁰⁸ Id. At section 2(8).

³⁰⁹ Academic C, interview, 2009.10.20

were listening to the call from the central government to enact OGI legislation, thereby marking the beginning of the *point to surface* stage of the OGI reform.³¹⁰

4.3 Local experimentation

4.3.1 Guangzhou

First out to enact local OGI legislation was Guangzhou City, with the Guangzhou Municipal Provisions on Open Government Information (hereinafter Guangzhou Provisions), promulgated in October 2002, in effect from 1 January 2003.³¹¹ While certainly being inspired by the CASS research on OGI, the drafters of the Guangzhou Provisions hold that the Provisions were an original invention of their own based mainly on local experiences with Open Village Affairs, as well as drawing on international practice.³¹² However, the Guangzhou Provisions' enactment would not have been possible without the official call for local OGI legislation, a call that as mentioned came after suggestion from the CASS research group.

Even though the Guangzhou Provisions were not directly based on the CASS group's Expert Opinion Draft, it still seems that some cooperation occurred, as there were several nationwide conferences on OGI where representatives of both the CASS research group and the Guangzhou drafters both attended.³¹³ It has also been pointed out that even though there are important differences between the Expert Opinion OGI Regulation and the Guangzhou Provisions, there are also important similarities that

³¹⁰ For *point to surface* reform, see *supra* notes 169-204 and accompanying text.

³¹¹ Guangdong Municipal Provisions on Open Government Information, (广州市政府信息公开规定). Unofficial English translation available at <http://www.freedominfo.org/documents/provisions.pdf> translation courtesy of Jamie P. Horsley, China Law Center, Yale Law School. I will in the following rely mostly on this translation, with a few exceptions where I find the translation to be inaccurate.

³¹² Horsley, *Toward a More Open China* (cited in note 4) at 70.

³¹³ Such as an administrative law conference in the summer of 2002 where a draft of the Guangzhou Provisions were circulated (see *Id.* at 70), and an OGI Conference arranged by the CASS research group in Changsha in 2001.

support the argument that some collaboration took place.³¹⁴ For instance, all the internationally recognized principles from the Expert Opinion Draft were included in the Guangzhou Provisions, except for principles (4) and (8) relating respectively to free use of acquired information and the *public interest test*.

The Guangzhou Provisions also included the two-tiered access approach with proactive disclosure and disclosure upon request. However, the amount of information required to be proactively disclosed was significantly increased to a nonexhaustive list of 13 items. All items from Professor Zhou's group were included, as was information regarding matters related to among other things the economic development plan,³¹⁵ "major decisions on matters affecting the overall situation"³¹⁶, major emergency situations,³¹⁷ and the financial budget.³¹⁸

Other major differences include the Guangzhou Provisions' clear stipulations on legal liability, which provides that government officials who either disclose information they should not disclose, or fail to disclose information they should disclose, are liable for their actions, criminally liable if their actions constitute a crime.³¹⁹ Similar provisions were adopted by most local level OGI legislation. What this essentially means is that an official risks being held criminally liable under provisions in the Criminal Law on disclosure of state secrets for disclosing too much, while the worst case scenario if the official withholds too much information is a reprimand from his superiors. This runs contrary to international best practice, which requires balancing of sanctioning so as to not thwart the presumption of openness.

³¹⁴ Id.

³¹⁵ Guangzhou Provisions art. 9(a)

³¹⁶ Id. art. 9(b)

³¹⁷ Id. art. 9(f)

³¹⁸ Id. art. 9(h)

³¹⁹ Id. arts. 30-32.

4.3.2 Shanghai

The first province-level legislation came in 2004 when Shanghai enacted the Shanghai Municipality Open Government Information Provisions (hereinafter the Shanghai Provisions).³²⁰

The Shanghai Provisions follow the same basic set-up as the Guangzhou Provisions, with some important differences. Innovations included three important features to help better implementation, namely (1) the OGI Guide, a tool with the dual function of helping the public better understand and use their new information rights, and of assisting officials in their OGI work;³²¹ (2) the Government Information Catalogue, a register of all disclosed information;³²² and (3) the Annual Report, which should include statistics on both information disclosed proactively and upon request, as well as an evaluation of the OGI system.³²³ In practice the reports have included detailed statistics on information requests, such as justification for rejected requests, i.e. which of the categories of exemptions the requested information belonged to.

The government organs in charge of organizing the efforts to promote Open Government Information were also more advanced than in Guangzhou, and were vested with more political power.³²⁴ The organizational structure provided in the Shanghai Provisions article 4, sets out that the most central organ in charge of OGI work is the Municipal Informatization Committee, but in addition to this, the Shanghai government also established a “Citizens’ Economy and Informatization Leading Group”, which had a supervisory function. This Leading Group was headed by Mayor Han Zheng, clearly emphasizing the importance placed on the OGI work.³²⁵ To further underline the

³²⁰ 上海市政府信息公开规定(2004), unofficial English translation: Yale China Law Center, *Shanghai Municipal Provisions on Open Government Information* 23 Government Information Quarterly 36.

³²¹ Shanghai Provisions art. 22(1)

³²² Id. art 22(2)

³²³ Id. art 30

³²⁴ Horsley, *Toward a More Open China* (cited in note 4).

³²⁵ Cheng Jie, Legal Daily, 2008.5.11, *What Can We Expect From the Implementation of the Open Government Information Regulations? - Report on Survey of the Implementation of Local Regulations* ”

Provisions' significance, the "Transparent Government Program" was also launched on the same day as the Shanghai Provisions.³²⁶ The significant importance placed on implementing the Shanghai Provisions as compared to the Guangzhou Provisions and other local legislation gave clear results both in the number of requests for information, and in the number of applications for administrative reconsideration and litigation.³²⁷

As compared to international standards, the Shanghai Provisions took a step forward when it comes to implementation mechanisms. However, not all parts of the Shanghai Provisions can be said to have done the same, as much of the rights-oriented language of the Expert Opinion Draft and Guangzhou Provisions has been replaced by rounder formulations. There is for instance no direct reference to the right to know, and only "citizens, legal persons and other organizations" have the right to request information, meaning that unlike in the Expert Opinion Draft and the Guangzhou Provisions, foreigners have no right to access information. Additionally, the definition of "government information" is narrowed to only include information "related to economic and social management and public services".³²⁸ Exactly what kind of information this excludes is hard to say, but it does restrict the presumption of openness and gives the government an additional justification for denying requests.

Before the OGI Regulations' final promulgation, there were over 30 lower level OGI provisions.

4.4 Final stage – amendments and promulgation

The next step in the OGI reform was to re-draft the whole OGI Regulation. As the Regulations had entered the official drafting stage, the drafting was presided over by the State Council Informatization Office. The head drafter was therefore a government

[政府信息公开条例实施,我们可以期待什么? - 地方政府信息公开规定实施情况调研报告], at http://www.legaldaily.com.cn/bm/content/2008-05/11/content_848680.htm, visited 2008.07.09.

³²⁶ Id.

³²⁷ Horsley, *Shanghai OGI* (cited in note 16), at 74-75, 81.

³²⁸ Shanghai Provisions art. 2

official, but expert opinions were still heavily influencing the drafting. Zhou Hanhua continued as an advisor, while some new experts, including importantly Professor Mo Yuchuan of Renmin University, were also taken in. Other members of the drafting committee included professors from China University of Political Science and Law, Peking University, and Tsinghua University.

After toning down some of the more controversial provisions, a new draft was submitted for a second round of inter-agency review. But the draft was still received as too radical; almost all opinions asked for significantly more flexibility, such as less rigid time limits for disclosure, broader exceptions, removal of the right to seek redress, etc. The drafters saw this as a complete hollowing out of the Regulations, and as a result the draft was shelved, and didn't resurface for two years.³²⁹ A contributory reason for the shelving of the OGI Regulation was the Informatization Office's lack of authority, as they did not have the necessary influence to overrule powerful ministries and commissions.³³⁰ It has been pointed out that the status of the organ in charge of drafting regulations within the State Council power hierarchy is central to regulations' chance of enactment, and one can only speculate what would have happened had the drafting been presided over by a more powerful governmental organ.³³¹

After a two year period of standstill, the CCP Central Commission for Discipline Inspection got involved. As the Draft Regulations were stranded inside the State Council with no sign of movement, the Disciplinary Commission picked it up and – with the backing of the Premier and President – forced it to the next level.³³² Intuitively it might seem strange that a Party organ provided crucial support for disclosure

³²⁹ Academic A, interview, 2009.06.29 and Academic A, interview, 2009.06.29

³³⁰ Academic A, interview, 2009.10.26; Academic B, interview, 2009.06.08

³³¹ Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China - institutions, processes and democratic prospects*, at 120-132 (Clarendon Press 1999).

³³² Academic A, interview, 2009.06.29; Academic C, interview, 2009.10.20 Beijing Morning Post, 2007.4.25, *Expert deciphers the Open Government Information Regulations: The Central Disciplinary Commission pushed vigorously for enactment* [专家解读政府信息公开条例: 中纪委大力推动出台], at http://www.china.com.cn/law/txt/2007-04/25/content_8167009_2.htm, visited 2009.9.18.

legislation, and to a certain extent it is; the CCP is not renowned for its transparency. But at the same time it is not completely unnatural, as the Disciplinary Commission is in charge of anti-corruption work, and was also the party organ in charge of overseeing Open Village Affairs.³³³ Besides, the OGI Regulations govern only government information and would not directly affect Party organs.

Under the patronage of the Central Disciplinary Commission and the Premier, the drafting moved to be presided over by the State Council Legal Affairs Office, an organ with much greater resources and authority than the Informatization Office. With these powerful supporters the OGI Regulations had the backing needed for the final push for enactment. While the Regulations were not changed much in this last phase of drafting, some important amendments were nevertheless made. The presumption of openness principle, for instance, which had been part of all previous drafts, was taken out at this point.³³⁴ After a final submission to different governmental organs soliciting opinions and another round of minor tweaks, the draft OGI Regulations were *passed in principle* (原则通过) by the State Council 17 January 2007, before final promulgation by the State Council Standing Committee on 5 April 2007, with entrance into force set to 1 May 2008.

³³³ Academic C, interview, 2009.10.20

³³⁴ Academic A, interview, 2009.06.29; Academic A, interview, 2009.10.26

5 Summary

Through tracking the OGI reform's development from its beginning with Open Village Affairs, this chapter has shown that the OGI Regulations were an example of a grassroots initiated *point to surface* reform. That is, it was not a pure top-down process with the central government directing every move, but neither was it an a bottom-up process where popular demand pushes reform through. The OGI Reform was a mix of both approaches; it originates from the bottom-up reform of Open Village Affairs, but the Open Village Affairs was but one out of several sources of inspiration. Other sources included the need for better management of state secrets, exposed cover-ups showing the negative side of excessive secrecy, and inspiration found in foreign countries' experiences with access to information legislation.

When comparing the Expert Opinion Draft, the Guangzhou Provisions, and the Shanghai Provisions to the final OGI Regulations, it is obvious that there is a gradually stronger resemblance, with the Shanghai Provisions being the most similar to the OGI Regulations. This maturation shows the value of local regulative experimentation in testing out regulations to expose weaknesses. The maturation did not, however, only mean a gradually stronger protection of the public's right to access government information. One clear example concerns the presumption of openness. The Expert Opinion Draft provided unambiguously that disclosure should be the principle and nondisclosure the exception. The Guangzhou Provisions had the same clear stipulation, while in Shanghai the principle was expressed only indirectly, through requiring that "[a]ll government information ... should be made public or provided upon request, unless subject to one of the exemptions from making public in accordance with the law".³³⁵ Drafts of national Regulations included the presumption of openness almost up until the final draft, but the principle was excluded from the OGI Regulations in the end,

³³⁵ Shanghai Provisions art. 2.

due mainly to fear of the principle imposing a too heavy burden on the government.³³⁶ Other examples include the elimination of a direct mention of the right to know, and the introduction of a *needs test*.

³³⁶ Academic A, interview, 2009.06.29

Chapter 4 **The Open Government Information Regulations**

1 Introduction

After a drafting period of seven years and an implementation period of a little more than one year, the OGI Regulations finally came into effect on 1 May 2008. The previous chapter showed the development from initiation of drafting to promulgation. This chapter analyzes the Regulations, and compares them to international standards and practices. The analysis done in this chapter will then, along with findings of previous chapters, be compiled in a chart to provide an easy to understand overall comparison between the OGI Regulations, the CASS research group's Expert Opinion Draft, the Shanghai and Guangzhou OGI Provisions, and international minimum standards and best practices.³³⁷

2 Important features

The Open Government Information Regulations consist of 38 articles spread over five chapters; General Principles, Scope of Disclosure, Methods of and Procedures for Disclosure, Supervision and Safeguards, and Supplementary Regulations. The following analysis will, however, deviate somewhat from this structure and will, to facilitate comparison with international standards, instead be structured after the best practice principles set out in chapter 2.

Except for the OGI Regulations themselves, several other relevant documents and statements will be used to analyze the OGI system. These include most importantly; the "Notice of the General Office of the State Council on Preparing Well for Implementing

³³⁷ See Table 3

the Regulations of the People's Republic of China on Open Government Information” (the State Council Notice),³³⁸ the “Opinions of the General Office of the State Council on Various Issues of Implementing the Open Government Information Regulations of the People’s Republic of China” (the State Council Opinions),³³⁹ the “Explanatory Booklet on the Regulations of the PRC on Open Government Information” (the Explanatory Booklet),³⁴⁰ and the “Booklet on the Regulations of the PRC on Open Government Information” (the OGI Regulations Booklet).³⁴¹

2.1 Principles 1-3: Maximum disclosure, universal access and proactive disclosure

2.1.1 Legislative purpose

Right to know?

The legislative purpose, as expressed in Article 1, is to “ensure that citizens, legal persons and other organizations obtain government information in accordance with the law, enhance transparency of the work of government, promote administration in accordance with the law, and bring into full play the role of government information in serving the people’s production and livelihood and their economic and social activities...”. Only including “citizens, legal persons and other organizations” is inconsistent with both international minimum standards best practice, as it implies that foreigners and stateless people have no legal capacity to request government

³³⁸ Guobanfa (2007) No. 54 《国务院办公厅关于做好施行《中华人民共和国政府信息公开条例》准备工作的通知》(国办发[2007]54号), both Chinese and unofficial English translation available from Yale China Law Center <http://www.law.yale.edu/intellecualife/openinformation.htm>, visited 2009.10.13

³³⁹ Guobanfa (2008) No. 36 《国务院办公厅关于施行中华人民共和国政府信息公开条例若干问题的意见》(国办发[2008]36号)

³⁴⁰ Law Press China - Laws and Regulations Center (ed), *Explanatory Booklet on the Regulations of the PRC on Open Government Information* (《中华人民共和国政府信息公开条例注释本》) (Law Press China 2008). Examined and approved by the NPC Legislative Affairs Committee and State Council Legislative Affairs Office

³⁴¹ Cao Kangtai & Zhang Qiong (eds), *Booklet* (cited in note 4). Edited by the Director and Vice Director of the State Council Legislative Affairs Office.

information. Even though many countries have similar provisions, a majority now allow anybody to request information.³⁴²

As opposed to the Expert Opinion Draft and the Guangzhou Provisions, but similar to the Shanghai Provisions – the legislative goal includes no direct mention of protection of rights. International standards require a more rights-based approach where the legislative purpose should be to provide a *right* to access government information.³⁴³

Professor Zhou Hanhua emphasized the need for a clearly stipulated right as follows:

*If open information merely is a way of handling work [not a clearly stipulated right], it implies that government information can be disclosed, and it can also not be disclosed. The arbitrariness is rather high, and there is a lack of safeguards and restrictions. Treating open information as a right not only conforms with most counties and regions' practice, it also makes the whole [OGI] system more operable.*³⁴⁴

Even though no direct mention of a right to access government information or a right to know is included, the right has been given a lot of attention and has often been cited by officials as a key reason for enactment. On a press conference introducing the new Regulations, Deputy Director Zhang Qiong of the State Council Legislative Affairs Office stated that “[t]he regulations, which guarantee people's right to know, will facilitate the masses to supervise government departments in correctly exercising their power ... and prevent abuses of power”.³⁴⁵ Also the CCP has officially recognized the people's right to know, e.g. in “Opinions on Further Reforming the Government Administration System”, passed by the second plenary session of the 17th CCP Central

³⁴² Banisar, *Freedom of Information* (cited in note 5), at 22.

³⁴³ ARTICLE 19, *Model Freedom of Information Law* (cited in note 150), art. 2.

³⁴⁴ Zhou Hanhua, *Fundamental Considerations in Drafting the "Open Government Information Regulations" (expert opinion draft)* [起草《政府信息公开条例》(专家建议稿)的基本考虑], 6 *Chinese Journal of Law* [法学研究] 57, 98 (2002).

³⁴⁵ A complete transcript of the press conference is provided in Cao Kangtai & Zhang Qiong (eds), *Booklet* (cited in note 4). The right to know is affirmed on pp. 12 and 17. Also the Explanatory Booklet mentions the right to know as a reason for enacting the OGI Regulations, Law Press China - Laws and Regulations Center (ed), *Explanatory Booklet* (cited in note 340), at 2. See also Zhao Huaxin, *China Daily*, 2007.04.25, *Statute to make government open, clean*, at http://www.chinadaily.com.cn/cndy/2007-04/25/content_858970.htm, visited 2009.09.25.,

Committee on 27 February 2008, demanding that all levels over government: “improve the open government affairs system, release information timely, and increase government transparency, to conscientiously safeguard the people’s right to know”.³⁴⁶

From the above discussion it seems clear that the reason for not including an explicit right to know in the Regulations was not lack of recognition of its importance. While one reason behind not including the right to know might lie in wanting to take a step-by-step approach, another important reason is the status of State Council regulations. The Constitution does not establish an explicit right to know,³⁴⁷ and while this does not necessarily mean the right cannot be created by national law (the Legislation Law is silent on the matter) there are to my knowledge no examples of State Council regulations establishing new citizen’s rights, and scholars seem to be of the general opinion that new rights must be established by national law.³⁴⁸ The likelihood for the inclusion of an explicit right of ATI should consequently be higher if the NPC decides to “upgrade” the OGI Regulations to an OGI Law.³⁴⁹

Government information

The definition of “government information” given in Article 2 is “information made or obtained by administrative agencies in the course of exercising their responsibilities and recorded and stored in a given form”. This is a point where the OGI Regulations are more progressive than the Shanghai Provisions which only gave access to government information “related to economic and social management and public services”.³⁵⁰ The wording seems however to indicate that only organs strictly within the

³⁴⁶ CCP Central Committee, Opinions on Further Reforming the Government Administration System (Zhongfa (2008) No. 5), 《中共中央、国务院印发《关于深化行政管理体制改革的意见》的通知（中发[2008]5号）》.

³⁴⁷ Even though it might be implied in some of its provisions. See previous chapter, section on the Constitution.

³⁴⁸ Academic A, interview, 2009.10.26

³⁴⁹ For why regulations were chosen over law, *see supra* pp. 86-87.

³⁵⁰ Shanghai Provisions art. 2

governmental structure are covered by the Regulations, but article 36 expands this to also include “organizations that are authorized by laws or regulations to exercise the functions of managing public affairs”. Article 37 provides even more importantly that “disclosing information that is obtained in the course of providing public services by public service enterprises and institutions (公共企事业单位) that are closely related to the people’s interests such as education, medical care, family planning, water supply, electricity supply, gas supply, heating, environmental protection and public transportation shall be done with reference to these Regulations.” In explaining what “with reference to...” should be taken to mean, the Explanatory Booklet says: “public service enterprises and institutions have the right to be run independently, and cannot possibly be completely subject to [the Regulations], they can only [disclose information] with reference to [the Regulations].”³⁵¹ This is, however, still rather vague, and a clearer interpretation is needed. It is also somewhat unclear if the entities in article 37 also include private public service enterprises. The Explanatory Booklet only makes clear that “all these entities are *normally* state owned or dependent on public funding”,³⁵² which most likely should be taken to mean that private entities are excluded, while *public private partnerships* (PPPs) are included. Neither the State Council Notice nor Opinions provide further clarification.

In any case, the bodies subject to the OGI Regulations are in keeping with minimum standards and normal international practice, where the most common approach is to include either only governmental organs or to also include certain state owned enterprises and publicly financed entities.³⁵³ The OGI Regulations take one step further by including a positive, nonexhaustive list of covered public service providers. Best practice, however, requires inclusion also of all *private* public service providers. The logic behind this is that the basic features of public services do not change if they are outsourced to private companies and that disclosure obligations consequently also

³⁵¹ Law Press China - Laws and Regulations Center (ed), *Explanatory Booklet* (cited in note 340), at 32.

³⁵² *Id.* at 32 (emphasis added)

³⁵³ Banisar, *Freedom of Information* (cited in note 5), at 20.

should remain the same.³⁵⁴ For China to meet best practices the current exclusion of private entities in the interpretation of “public service enterprises and institution” should therefore be abandoned in favor of an interpretation including also private entities. This could, for example, be done with the forthcoming Supreme People’s Court interpretation.³⁵⁵

Another point where the OGI Regulations fail to meet best practices is its lack of a clear obligation to record all information. Bad record keeping is one of the major obstacles for effective implementation of disclosure laws around the world,³⁵⁶ and has also been recognized as one of the biggest challenges in implementing the OGI system in China.³⁵⁷ Best practice requires therefore that the law stipulates that government agencies and other covered bodies have an obligation to record all information.

2.1.2 Active dissemination

China follows international standards by providing disclosure in two ways; on the governments own initiative and upon request. All information that is important for a broad range of people should generally be published actively by the government, while all other information is available upon request.

In the OGI Regulations the range of information actively disseminated by the government is comparatively broad. Minimum standards requires publishing all laws, regulations and rule-making decisions, as well as basic information on the government

³⁵⁴ See generally Roberts, *60 Public Administration Review* (cited in note 155); Roberts, *51 University of Toronto Law Journal* (cited in note 155).

³⁵⁵ The judicial interpretation currently open for public comments does not include private entities. See Draft Judicial Interpretations article 18, available from the Supreme Court’s website: <http://www.chinacourt.org/wsdc/index.php?id=379436>. Visited 2009.11.13 See also Ye Doudou, *Caijing Magazine*, 2009.03.10, *Judicial interpretation on Open Information will probably be issued within the year* [信息公开司法解释有望年内出台], at <http://www.caijing.com.cn/2009-03-10/110116434.html>, visited 2009.10.17.

³⁵⁶ Roberts, *Blacked Out* (cited in note 5), at 112 ff.

³⁵⁷ Zhou Hanhua, *The Whole Story Behind the OGI Regulations* (cited in note 283) 17. See also Zhou Hanhua, *Open Government in China* (cited in note 4).

structure. The international trend in more recent laws is towards including more categories of information to be actively published.³⁵⁸ This comes seemingly out of the recognition that if more information is published, then the burden in dealing with requests is reduced. The European Commission, for example, has recognized the benefits of active dissemination, and has recommended that the European Regulations on Public Access to Documents should be amended to include more categories of information to be published actively. It is held that this will both benefit the public directly by making more information available, and reduce the EU's burden of handling requests. More information available means both that more requests can be handled simply by referring to already available information, and that the number of requests is likely to be reduced.³⁵⁹

The OGI Regulations follow the recent international trend, but goes further than most countries in including a list of 27 categories of information to be actively disclosed by different levels of government.³⁶⁰ Article 9 provides four very broad categories to be disseminated by all levels of government; information regarding “citizens’, legal persons and other organizations’ vital interests”; information that “needs to be extensively known or participated in by the general public”; information on the “structure, function, and procedures of administrative agencies”; and “other information that should be actively disclosed according to law”.

Articles 10 through 12 contain detailed provisions for what information should be stressed by different levels of government. Article 10 pertains to information that should be disseminated actively by governments at county level and above, including information on: (1) administrative regulations, rules, and regulatory documents; (2) development plans; (3) development statistics; (4) budget and budget outcome; (5)

³⁵⁸ Banisar, *Freedom of Information* (cited in note 5).

³⁵⁹ Commission of the European Communities, *Public Access to Documents Held by Institutions of the European Community - a review* (2007), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0185:FIN:EN:PDF>.

³⁶⁰ OGI Regulations arts 9-12

administrative fees; (6) government procurement; (7) administrative licensing; (8) major construction projects; (9) poverty assistance, education, medical care, social security and job creation; (10) public emergencies; and (11) environmental protection, public health, safe production, food and drugs, and product quality. Article 11 relates to governments at the level of “cities divided into districts and the county level”, and provide that these should focus on disseminating information concerning: (1) major matters in urban and rural construction and management; (2) construction of social and public interest institutions; (3) land requisition and appropriation, household demolition and resettlement; and (4) donations for emergency and disaster relief, special care for servicemen and their families, and poverty alleviation. Article 12 concerns township and town level governments, which should focus on information in the following categories: (1) implementation of state rural work policies; (2) financial revenue and expenditure; (3) land use plans; (4) land requisition and appropriation, and household demolition and resettlement; (5) credits, debts, fund raising and labour levies; (6) donations for emergency and disaster relief, special care for servicemen and their families, and poverty alleviation; (7) collectively owned enterprises; and (8) implementation of the family planning policy.

The list of items to be actively disclosed takes up close to 1/4 of the whole OGI Regulations, and is likely the most extensive of any ATI law anywhere in the world. This proactive approach was probably taken to force the central and local governments into complying, as it is easier to supervise the implementation of active dissemination than the more passive system of information requests. Providing specific categories of information to be disseminated also limits the different governmental organs’ discretion, and provides useful guidelines for officials with little prior experience in information disclosure. Overall, it seems a logical approach in such a vast country where the central government has limited control over local implementation, and where officials’ knowledge of the logic of transparency is unevenly distributed.

2.1.3 Access by request

Article 13

In addition to government information disclosed by administrative agencies on their own initiative provided for in Articles 9, 10, 11 and 12, citizens, legal persons or other organizations may, based on the special needs of such matters as their own production, livelihood and scientific research, also file requests departments of the State Council, local people's governments at all levels and departments under local people's governments at the county level and above to obtain relevant government information.

Even though article 13 provides a truly major change from not having a right to request information at all, the qualification required poses a threat to the use of this right. The necessity of having special needs to have a right to access was reiterated and strengthened in the State Council Opinions: “An administrative organ may decline to provide a requester government information that is not related to special needs in respect of matters such as the requester’s own production, livelihood and scientific research”.³⁶¹

One of the basic principles of international minimum standards, and certainly of best practice, is the idea that information should be available to all regardless of their reasons for wanting the information. Only a few countries follow China in deviating from this principle.³⁶² The reasoning, at least in a majority of countries, behind having disclosure legislation is that information does not belong to the government, but to the people; it is a public good that the government is merely in charge of administering. The Chinese constitutional provisions stating that “all power belongs to the people” and the system of *democratic supervision* seem to indicate that this is theoretically also the case in China (as does the motto “serve the people”). Requiring that people have *special needs* for to grant access to information directly counteracts this principle, and is

³⁶¹ Guobanfa (2008) 36, paragraph 14

³⁶² Banisar, *Freedom of Information* (cited in note 5). Banisar here examines the laws of nearly 70 countries, and find that nearly all countries who previously had such restrictions (including Greece and Panama) now have abandoned them. In Italy, one of the few countries still requiring a legal interest, the requirement to show a legal interest has recently been relaxed to allow for public interest requests.

especially impeding for public interest requests. The detrimental effect of this type of *needs test* has also been recognized by Chinese scholars, and the qualification stipulated in Article 13, especially as interpreted in the State Council Opinions, has been harshly criticized. As briskly expressed by one scholar:

*“Not a single country or region in the world with open government information applies restrictions to information requesters’ qualifications and reasons. In particular, if one should apply restrictions then open government laws would not be the slightest bit different from traditional administrative procedure laws, and the significance of adopting OGI legislation would perish, because ... the reason for open government laws’ emergence was precisely to get rid of this restriction. ... It is regrettable that after the OGI Regulations went into effect, relevant [governmental] departments added in their authoritative interpretations a requirement for requesters to have a vested interest in the requested government information. This is a distortion of the Regulations, and it is in conflict with higher level legislation.”*³⁶³

The gravity of this needs test is, however, highly dependent on how the Regulations are enforced in practice. Article 20, paragraph 2, which sets out what information requests must contain, does not require any explanation for why the information is sought. When requesting access to personal information, on the other hand, stricter conditions apply (Article 25). An initial probe has also showed that no special interest is required in most cases. It seems clear, therefore, that the needs test imposed by article 13 is not an ordinary needs test requiring that one *must* show vested interest, it appears that the test is more an added insurance, i.e. an added exception to ease the initial burden on government organs – that one “could see as an implementation strategy, some would say a stopgap”³⁶⁴ – which was included because “when implementing this completely new system, we shouldn’t plunge into opening up too wide at once, otherwise we will more than likely be looking at something that might

³⁶³ Lü Yanbin, *New Developments of Administrative Litigation* (行政诉讼的新发展) at 183-185 (China Social Sciences Press 2008), cited in Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 15, 35.

³⁶⁴ Mo Yuchuan & Lin Hongchao (eds), *Implementation Guide* (cited in note 13), at 238.

look very good, but which in reality wouldn't be achievable.”³⁶⁵ Nevertheless, the requirement to show an interest does pose limitations on the right of ATI. This has been showed for instance in the case of *Yuan Yulai v Anhui Province Government*.³⁶⁶ The plaintiff was a lawyer requesting information about an ongoing administrative reconsideration case involving two of his clients were involved. The court ruled in favor of the defendant, arguing that Mr. Yuan did not meet the requirements of article 13.

2.2 Principles 4 and 5: Limited and legitimate exceptions

A well functioning and predictable ATI system is dependent on having well defined exceptions, and a strict system to ensure that only legitimate exceptions are used as basis for refusing information requests. The OGI Regulations provide exceptions in two ways: First, Article 8 stipulates that disclosed information “may not endanger state security, public security, economic security and social stability”. Second, Article 14(4) sets out more specific requirements:

Administrative agencies may not disclose government information that involves state secrets, commercial secrets or individual privacy. However, government information involving commercial secrets or individual privacy may be disclosed by administrative agencies with the consent of the rightholder(s) or if administrative agencies believe that non-disclosure might give rise to a major impact on the public interest.

The stipulations regarding privacy and commercial secrets comply with international minimum standards, and are reasonably consistent with best practices, especially due to the public interest test posed. The test could optimally have been formulated slightly differently, i.e. require disclosure if the benefits to public interest is greater than the harm to the rightholder(s).

The exception for state secrets is more problematic, as this is a very broad term with unclear boundaries. As noted in the previous chapter, the SSL sets down so broad

³⁶⁵ Jiang Bixin & Li Guangyu, *Open Government Information Litigation* (cited in note 13) at 17.

³⁶⁶ 袁裕来与安徽省政府(合行初字第12号) Judgment of 2008.10.14.

definitions of state secrets that most things can be classified as such. There have for this reason been constant calls for amendment of the SSL, especially after the OGI Regulations' entrance into force, and it seems there is broad agreement, at least in scholarly circles, that change is needed. Focusing on the specific issues in need of improvement, Li Guangyu put it this way:

*[The SSL] has in the 20 years since its enactment served an important function, but it is in need of amendment. ... For example, strictly defining secrets' scope, standardizing classification procedures, clarifying classification responsibilities, preventing random classification, solving the problems of wrong and excessive classification, and of state secrets not being timely declassified, etc, will all have a very positive effect on open government information.*³⁶⁷

The additional requirement to not disclose information that may endanger state security, public security, economic security and social stability is also contentious. The two former categories are consistent with minimum standards best practices, while the two latter are not. Both *economic security* and *social stability* are vague terms that have not been clarified elsewhere. International minimum standards require that exceptions meet three requirements: they must be provided by law, pertain to either the purpose of respecting the rights of others, or the protection of public order, health or morals, as well as be necessary to attain this purpose. That the purpose must be provided by law means that it should be a well defined, narrow exception, which economic security and social stability unquestionably are not.

This test roughly corresponds to the first of the three tests required to comply with best practice. The two remaining parts of the three-part test are the *substantial harms test* and the *public interest test*. The former is not mentioned directly, but there is an indirect mention of its reverse formulation in Article 8: “disclosed information *may not endanger...*”. There is significant difference between saying that something must be likely to cause substantial harm for nondisclosure to be acceptable (as in best practice), and saying that disclosure is unlawful if it might cause harm. A variation of the latter

³⁶⁷ Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 87.

test is as mentioned applied on privacy and commercial confidentiality matters, but is not applicable on information related to state secrets.

The problems with broad definitions of exemptions are magnified by article 14(2), which effectively subordinates the OGI Regulations to all other laws and national regulations by providing that:

Prior to disclosing government information, administrative agencies should examine the government information to be disclosed in accordance with the provisions of the Law of the People's Republic of China on Protecting State Secrets and other laws, regulations and relevant state provisions.

Best practice here clearly stipulates that disclosure laws should take precedence, and in addition that other laws which limit disclosure should be amended or interpreted in compliance with ATI principles. The ongoing amendment of the SSL could provide an opportunity to align the SSL with the ATI principles, but initial reports indicate that the focus of the amendment is on strengthening classification procedures rather than ATI principles.³⁶⁸ As the OGI Regulations are administrative regulations, i.e. one level lower than national laws in the legal hierarchy, there is little to add about the OGI Regulations' subordination to the SSL and other laws. In relation to other "regulations and relevant state provisions", however, the OGI Regulations could theoretically well have precedence. As noted in the previous chapter, there is a chance for the OGI Regulations being upgraded to national law enacted by the NPC sometime in the future. Until then it seems there is little to do about ATI not taking precedence.³⁶⁹

Regarding criminal responsibility, the SSL and Criminal Code stipulate criminal liability for leaking state secrets for all citizens.³⁷⁰ The OGI Regulations reiterate this in article 35 which provide that if administrative agency violates the Regulations in any way, it shall be ordered to comply by the supervision agency at the same level of

³⁶⁸ See *supra* p. 81

³⁶⁹ Zhou Hanhua, *Fundamental considerations of drafting the "Open Government Information Regulations" (expert opinion draft)*. See also previous chapter, section on Expert Opinion Draft.

³⁷⁰ SSL Articles 31 and 32, Criminal Law Articles 111, 282 and 398. See also previous chapter, section on state secrets.

government or administrative agency at the next higher level. In serious cases individuals in charge are held liable, and are, depending on the gravity of the violation, subject administrative or criminal sanctions. Except for all citizens being criminally liable for disclosing state secrets, this is very much in harmony with international best practices.

The OGI Regulations provide a list of instances which constitute violations of the Regulations which includes: (1) failure to fulfill OGI obligations; (2) failure to timely update disclosed information, the OGI guide, and the OGI catalogue; (3) collecting fees in violation of provisions; (4) receiving payment for information through other organizations or individuals; (5) disclosing information that should not be disclosed; and (6) other actions that violate the OGI Regulations. The list focuses more on failure to provide information and exploitation of the system for personal gain, than on sanctioning disclosure of confidential information. International best practice underscores this as an important point, because fear of criminal liability for disclosure of secrets always will be a bigger fear than administrative sanctions for withholding information that should be disclosed. It should be noted, however, that failure to disclose information which should be disclosed does not constitute a crime, and therefore this imbalance in favor of nondisclosure is likely to persist. Neither is there any stipulation directly forbidding deliberate destruction of records, although it in all likelihood is considered part of the catch-all sixth category.

2.3 Principles 6 and 7: Time limits and costs

Information to be disclosed on the governments own initiative must according to article 18 be published within 20 days of the information's creation. Requests should as far as possible be answered on the spot, and normally within 15 business days. A maximum extension of 15 more business days is possible, after approval from "the person in charge of the office for OGI work", but notification of the extension must be sent the requester (article 24).

Fees for requesting information should not be higher than the actual cost in “searching, photocopying, postage and the like” (article 27), these fees can be reduced or exempted if the requester has “true economic difficulties” (article 28). Detailed provisions are set out by two largely overlapping documents, which provide *inter alia* that exact fees shall be stipulated by local governments at the provincial level, details on fee exemptions, and procedural details on fee collection.³⁷¹

All provisions on both fees and time limits are entirely consistent with best practices. Responding to requests on time and not deterring requesters by high fees are core requirements for a functioning ATI system, and their inclusion in the Chinese OGI system is thus very positive for the realization of the right of ATI.

2.4 Principles 8 and 9: Implementation and oversight

The OGI Regulations designate the General Office of the State Council as the “national department in charge of OGI work” (article 3), while local governments at county level and above are required to designate an office of their choosing to be responsible for OGI work (an OGI office), that should be responsible for all general OGI work of the relevant government organ. (article 4). The OGI Offices are also, together with supervision agencies under the Ministry of Supervision, in charge of supervising and inspecting implementation (article 30). OGI Offices are in charge of “promoting, guiding, coordinating, and supervising the OGI work within its administrative area”, while supervision agencies are in charge of inspecting administrative organs and public officials in their enforcement of laws and regulations, as well as sanctioning breaches.

³⁷¹ “Notice of the Ministry of Finance and the National Development and Reform Commission on Fees Collected for Providing Open Government Information and Other Relevant Issues” (Caizong (2008) No. 44) 2008.06.11 and “Notice of the National Development and Reform Commission and the Ministry of Finance on the Standards for Fees Collected by Administrative Organs for Providing Open Government Information upon Request and Other Relevant Issues” Fagaijiage (2008) No. 1828, 2008.07.16

The OGI offices are in other words in charge of the general implementation supervision, while the supervision agencies oversee the OGI offices' work.³⁷²

Detailed responsibilities for both the OGI offices and supervision agencies are to a large extent set down in province level or lower local regulations which means there are large variations from locality to locality.³⁷³ Some important mechanisms are however set down in the OGI Regulations, most of which are to be undertaken by the OGI offices, under the leadership of the State Council General Office. In addition to the general responsibility to carry out OGI work in their administrative area, including maintaining and updating disclosed government information, all OGI offices are to organize the compilation of an OGI guide, an OGI catalogue and annual reports.

The OGI guide and catalogue is set up mainly to educate the public about their right to access information. The guide's main function is to tell people how to access information and what categories of information is available (upon request), while the OGI catalogue is set up to tell the public what information is already available, through providing an index of available information with titles, summary of contents, and date of creation.³⁷⁴

The annual report, a concept introduced first by the Expert Opinion Draft, and first implemented in the Shanghai OGI Provisions, is the only tool for assessment and evaluation that is open to the public's scrutiny. The reports are to be published by 31 March each year, and should include statistics on information disclosures by request, request denials, and on the government's own initiative; on fees collected; and on administrative reconsiderations and litigations, as well as information on the main problems in OGI work and what is being done to resolve these (articles 30-31). What is not required to be included in the reports is a break-down of the statistics on refusals

³⁷² Law Press China - Laws and Regulations Center (ed), *Explanatory Booklet* (cited in note 340), at 26-27.

³⁷³ See generally Mo Yuchuan & Lin Hongchao (eds), *Implementation Guide* (cited in note 13).: Mo Yuchuan & Lin Hongchao, *6 Legal Science* (cited in note 13).

³⁷⁴ OGI Regulations Article 19. See also Cao Kangtai & Zhang Qiong (eds), *Booklet* (cited in note 4).

and partial disclosures, which was required in the Shanghai Provisions. To be able to properly assess the government's OGI work and whether or not they are doing their jobs and administering according to the law, it is important to be able to have access to statistics on their reasons for refusing requests. As many provinces include the breakdowns without being required to, it would most likely be a highly feasible requirement that would be a greatly contribution to implementation assessments.

Establishing a body within all government organs responsible for OGI work, as this facilitates ATI in numerous ways. In addition to the functions mentioned above, the OGI offices also help ATI by acting as a "window to the outside", in giving people a place to go with all OGI concerns, instead of having to figure out exactly what department or office is in charge of the information they are seeking.³⁷⁵ The OGI office therefore conforms to a very large degree with best practice Principle 9 on active promotion of ATI.

As to Principle 8 on independent supervision, the OGI system does not fare so well. The General Office of the State Council is entrusted with overall supervision, while the day to day supervision is handled by the supervision agencies at the relevant level of government and the government agency at one higher level. These two are together responsible for ensuring that administrative agencies follow the OGI regulations, and ordering correction of behavior or imposing sanctions if violations occur (articles 34 and 35). In addition they should, together with the OGI office at the relevant level, handle individual complaints under the whistleblower system on general failures to fulfill OGI obligations (article 33).

It is positive that the responsibility to supervise has been properly designated to specific organs. Supervision agencies are even supposed to have a minimum of independence according to the Administrative Supervision Law article 3, which states that supervision agencies "shall be subject to no interference from any administrative departments, social organizations or individuals." But this independence is more in

³⁷⁵ Id., at 37.

name that in fact, as the agencies are placed within the government hierarchy. There is thus, except for the public's limited supervision and the supervisory role vested in the people's congresses, no form of general external supervision.

Internal supervision has its limitations, and best practice therefore requires an external oversight body in the form of e.g. an information commissioner or ombudsman. The likelihood of such a body – which should be independent from all three branches of government (and the CCP) – coming into existence in the near future is very low. Ongoing research projects are nevertheless trying to map out possible solutions for where in the government hierarchy a National Human Rights Institution (NHRI) could be placed, and if agreement could be reached on this issue, it is very well possible that the same institution could be trusted with an oversight function of also the OGI system.³⁷⁶ There are, however, no indications as to this happening any time soon.

Until such time, the best oversight body is probably the General Office of the State Council. It is a good choice for a number of reasons, but especially because the Office is already in charge of general oversight over all the State Councils ministries, commissions, offices and other bodies. This position means the Office has experience in supervision, it has authority, and as such – even though it is far from independent – it might just be the closest thing to an independent body within the Chinese government today, as it is set up “over” the State Council (though under the Premier), and is not part of any group of organs (such as ministries, commissions, etc.).

2.5 Principle 10: Right to effective remedy

The right to remedy is provided by article 33, which stipulates in paragraph 2 that citizens, legal persons and other organizations can, if they believe their lawful rights and interests have been infringed upon by a *specific* administrative act, apply for administrative reconsideration or file an administrative lawsuit. Note that the right to

³⁷⁶ See e.g. the joint research project between China University of Political Science and Law and the Raul Wallenberg Institute of Human Rights and Humanitarian Law: <http://www.nhri-ifo.cn/>.

legal remedy includes not only request denials, but violations of all lawful rights and interest, which is in many countries part of general administrative procedure law. The reason why this is included in the OGI Regulations is most likely primarily that the scope of administrative cases accepted by the courts is, as discussed in the previous chapter, gradually expanding. The provision was therefore most likely included to ensure that courts would not turn down cases because of lack of jurisdiction. It has nevertheless been pointed out that some administrative agencies and local courts are not willing to accept administrative reconsideration and litigation cases because of the OGI Regulations being administrative regulations and not national law.³⁷⁷ Even though this has been convincingly argued to be a misinterpretation of the law,³⁷⁸ it shows that it was wise to include the general right to remedy, as the situation probably would have been worse without it.

The most important and most common reason for seeking legal remedy is nevertheless request denials. As these are clearly concrete administrative acts, remedy can be sought both through administrative reconsideration and administrative litigation, in accordance with the provisions of the ARL and ALL.³⁷⁹

As already discussed in the previous chapter, courts are in administrative cases limited to review only the *legality of specific* administrative acts. The appropriateness (merits) and abstract acts are outside of the scope of courts' jurisdiction. *Abstract* acts, i.e. rulemaking acts, are only subject to supervision by supervisory agencies, government at one higher level, and the relevant level people's congress. And while, as mentioned above, a whistleblower system (举报制度) has been established within the supervisory organ, this includes no formal judicial procedures, and will therefore not be considered here.

A Shanghai case from 2007 exemplifies the difficulties encountered because of the concrete/abstract distinction. The case concerned a certain Mr. Huang, whose school

³⁷⁷ See Li Guangyu, *Open Government Information Litigation* (cited in note 13).

³⁷⁸ *Id.*

³⁷⁹ For a general discussion of the ARL and the ALL, *see supra* pp. 72 ff.

had publicized false information concerning amongst other things tuition fees and what degrees the school was authorized to teach. As schools in general must get approval for both these matters from the local Bureau of Education, Mr. Huang saw it fit to request the real information from them. The Bureau of Education, however, only gave Mr. Huang a written reply telling him to get the information through the school. Mr. Huang then sued the Bureau of Education for not adhering to the Shanghai Municipal OGI Provisions. But also the court turned Mr. Huang down, saying that the written reply from the Bureau of Education did not give rights or obligations to Mr. Huang, and thus could not be considered a concrete act. This is according to vice-president of the SPC administrative law court Li Guangyu, who has also been trusted with the task of drafting the judicial interpretation of the OGI Regulations, a misconception, as concrete acts should be interpreted so broadly as to also include this kind of cases.³⁸⁰

Both minimum standards and best practices require that at least second instance appeals are heard by an independent tribunal with full right to review all relevant information, and with the authority to order disclosure. Problems with judicial independence in China are discussed superficially in the previous chapter.³⁸¹ As for what authorities the courts have, the ALL sets out that the burden of proof lays mainly with the administrative organ (article 32).³⁸² The government organ must thus provide the background information for their decision, which in OGI cases means the requested information, and the legal foundation for the refusal. In most ALL cases the plaintiff has full access to the background information (article 30), and all evidence must also be open and recognized by the court for it to serve as evidence.³⁸³ This is naturally not the case in OGI litigations, as the dispute is about whether or not the plaintiff should get

³⁸⁰ Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 5-6.

³⁸¹ See *supra* section on administrative reconsideration and litigation.

³⁸² Exceptions do exist, such as in cases involving non-action, e.g. if an administrative organ does not reply to information requests, the plaintiff must provide evidence of the initial request.

³⁸³ Supreme People's Court, Provisions on Several Issues Concerning Strictly Executing the Open Trials System (Fafa [1999] no. 3), 《最高人民法院关于严格执行公开审判制度的若干规定 (法发[1999]3号)》. Article 5.

access to the information. Consequently, if the requested information involves state secrets, personal privacy or commercial confidentiality, the court should review the confidential information in secret (in camera review).³⁸⁴ The court also has the right to order the government organ to produce certain types of information, either on its own initiative, or after application by the plaintiff.³⁸⁵ However, the court can also accept proof of the requested information being classified and not require the government organ to produce it, and normal practice seems to be to trust secrecy classification.³⁸⁶ This is similar to practice in many other countries,³⁸⁷ and should also be seen as adhering to best practice. Also when it comes to the last best practice requirement, that the tribunal must have authority to order disclosure, does the Chinese system meet best practices, as the courts have a clear authority to order performance.³⁸⁸

The assessment of the courts authority above is admittedly superficial, mainly due to it being based only on the law and not on practice. It is widely recognized that Chinese courts have limited power in administrative trials.³⁸⁹ Thus, what the assessment really says is that the problem does not lay so much in the law as in the judiciary's general lack of authority, which in turn is due largely to its lack of judicial independence.³⁹⁰

³⁸⁴ Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 59-64.

³⁸⁵ Supreme People's Court, Provisions on Several Issues Concerning Evidence in Administrative Litigation (Fashi [2002] no. 21), 《最高人民法院关于行政诉讼证据若干问题的规定(法释[2002]21号)》, arts. 22 and 23

³⁸⁶ Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 59-66. *See also* Draft Judicial Interpretation (cited in note 355)

³⁸⁷ Li Guangyu, *Open Government Information Litigation* (cited in note 13)

³⁸⁸ ALL article 54(3) and ALL Judicial Interpretation article 60(2). *See generally* Jiang Ming'an (ed), *Administrative Law* (cited in note 227), at 583-609. Li Guangyu, *Open Government Information Litigation* (cited in note 13), at 177-188.

³⁸⁹ *See generally* Li Guangyu, *Open Government Information Litigation* (cited in note 13); Liebman, *191 The China Quarterly* (cited in note 256); Peerenboom, *China's Long March* (cited in note 256); Peerenboom, *More Law, Less Courts* (cited in note 238).

³⁹⁰ For a short discussion on judicial independence in China, *See supra* pp. 75-76

3 Summary

Table 3 compares best practice and minimum standards to the OGI Regulations, the Shanghai and Guangzhou Provisions, and the Expert Opinion Draft. In hard numbers, as shown in Table 3, the OGI Regulations comply fully or in part with 10 out of the 16 minimum requirements and 22 out of the 32 best practices. If only full compliance is taken into account, the corresponding numbers are 6 out of 14 and 15 out of 32, or just under half. Note that some of the partial adherences are very limited – such as e.g. the partial fulfillment of the requirement on independent external review. Also noteworthy is the OGI Regulations’ failure to comply with a majority of fundamental requirements. Most important of the deficiencies are the lack of an explicit right of ATI and a clear presumption of openness, and that a *needs test* and citizenship requirements are imposed on information requesters. On the other hand, the OGI Regulations have more detailed provisions than the minimum requirements in some respects, especially when it comes to implementational requirements, and even go exceeds best practice when it comes to proactive disclosure provisions.

Table 3 also shows the gradual trend of moving away from compliance with international standards, where the Expert Opinion Draft adhered fully to 25 out of the 32 best practices, the Guangzhou provisions to 22, the Shanghai Provisions to 18, and the OGI Regulations to 15. A similar trend is visible for the minimum standards; the Expert Opinion Draft and the Guangzhou Provisions adhered to all but one requirement (independent review), the Shanghai Provisions failed to comply with four requirements, while the OGI Regulations fail to follow eight of the minimum requirements.

Table 3: Chinese practice and international standards

	Best Practice	Minimum Standards	OGI Regulations	Shanghai Provisions	Guangzhou Provisions	Expert Opinion Draft
Maximum disclosure	Explicit right of ATI	√		√	√	√
	Presumption of Openness	√		(√)	√	√
	All gov. bodies		√	(√)	√	√
	Public service providers		(√)			
	All information	√	√	(√)	√	√
	Obligation to record		(√)	(√)		
Universal access	No citizenship restriction	√		√	√	√
	No "needs test"	√		√	√	√
Proactive disclosure	Structure etc	√	√	√	√	√
	Decisions and policies		√	√	√	√
	Vital public interest info	(√)	√	√	√	√
Limited exceptions	Narrow definitions	√	(√)	√	√	√
	ATI law takes precedence					
Legitimate refusals	Written refusals		√	√	√	√
	Legitimate aim	√	(√)	√	√	√
	Substantial harm	√		√	√	√
	Public interest	(√)	(√)		√	√
Timely disclosure	Timely release	√	√	√	√	√
	Specified time limit		√	√	√	√
Minimal costs	minimal	√	√	√	√	√
	Max. actual cost	√	√	√	√	√
Oversight	Specified body		√	√	√	√
	Independent					(√)
	Investigative authority		(√)	(√)	(√)	√
	Authority to sanction		√	(√)	(√)	√
Active promotion	Education of the public		√	√	√	√
	Education of officials					√
	Obligation to assist		√	√	√	√
	Adequate resources					
	Balanced sanctions					
Review	Internal		√	√	√	√
	External (independent)	√	(√)	(√)	(√)	(√)

√ = required; (√) = partially required; [blank] = not required.

Source: own compilation

Chapter 5 Concluding remarks

The Open Government Information reform – not bottom-up, not top-down, but a mixture of both – brought increased openness to the People’s Republic of China. The first signs of government openness were initiated by grassroots activism in the early 1980s, which then attracted the central government and academia’s attention. Scholars backed by the government started drafting national legislation, but not only to protect people’s rights, also to ensure the safekeeping of state secrets. A draft was produced, but before enactment, local experimentation was carried out. Guangzhou was the first, Shanghai the “best”. Drafting of national Regulations continued, and after a push from the Central Disciplinary Commission and with the central leadership’s endorsement, the OGI Regulations were enacted. It was far from a straight line, and it took some good 25 years from the first steps toward openness until enactment. But the special kind of reform the OGI Regulations exemplify, what I choose to call *grassroots initiated point-to-surface* reform, represents in this authors eyes a good example of the “multi-stage, multi-arena”³⁹¹ lawmaking of modern China, where central actors are not limited to government and party officials, but include also the people at large, scholars, and other “legislative entrepreneurs”. The role of international law and human rights – as was shown by international standards’ influence especially on early drafts of the OGI Regulations – should neither be neglected, even if this influence waned as the legislative process progressed.

Before the Open Government Information Regulations went into effect, Chinese citizens had under national legislation practically no right to access any government-held information. Now, the right is granted to everybody, almost without exception, and the government is required to proactively disclose a wide range of information. The change is remarkable, especially considering that many of the old democracies of Europe and other places only recently enacted corresponding laws.

³⁹¹ Tanner, *141 The China Quarterly* (cited in note 186) at 39.

This thesis has compared the OGI Regulations to international standards and best practices, in order to map out where the right of ATI stands in China today; what real protections does the right have, and what limitations are still left to be overcome. As there is little previous research on international minimum requirements, the thesis started out by examining international law, both hard and soft sources, to provide a comparative framework consisting of minimum standards and best practice. The minimum standards proved elusive, but were still possible to identify by examining various legal instruments and their interpretation in soft law.³⁹² Previous research on best practices is more substantial, so these were easier to distinguish.³⁹³

There are different ways to assess the OGI Regulations. Prof. Shen Kui proposed one especially notable approach: a three part test for reform assessment; the ideal-based test, the goal-based test, and the process-based test.³⁹⁴ The ideal-based test compares Chinese practice to international ideals, e.g. human rights. This thesis' comparison with minimum standards and best practices could both fit into this test. Here China comes up short, but shows promising signs. The OGI Regulations' shortcomings includes most importantly the lack of an explicit right to access information, no presumption of openness, the requirement to show a vested interest to be eligible for requesting information, as well as the limitations placed on the right to legal remedy due to lack of judicial independence. The discrepancy is even more pronounced compared to best practices. Nevertheless, the overall picture as shown in table 3 portrays a more optimistic reality. In a nutshell, even though failing to meet some of the core requirements, the OGI Regulations comply with approximately half of both minimum standards and best practices, two thirds if partial compliance is counted. In doing so, the Regulations are more detailed than the minimum standards, especially regarding requirements on proactive disclosure and on implementation mechanisms. Overall, even in an ideal-based test, the OGI Regulations does not come out all that bad.

³⁹² See table 1

³⁹³ See table 2

³⁹⁴ Shen Kui, *191 The China Quarterly* (cited in note 258).

Prof. Shen Kui's second test, the goal-based test, compares practice to official policy goals or objectives. How the OGI reform performs in this test is highly dependent on what targets one chooses to compare. Goals set out in the 1980s have long since been surpassed. If, on the other hand, one compares the reality of the OGI system today to more recent policy statements, the reform has only been reasonably successful. As official policy documents set out protecting the right to know as an important policy goal, and the OGI Regulations only provide partial protection, there is still a way to go before the policy goals are reached. However, policy goals are formulated on a long term basis, and the novelty of the OGI system means it is still too early to make any final judgments in this regard.

It is when one assesses the OGI reform with the methodology of Shen Kui's third test, the process-based test, which evaluates legal reform "against the background of the long and difficult process of political reform",³⁹⁵ that the true value of the OGI Regulations appears. The difficulty of OGI reform, and the low point it started out from, is clearly shown in Chapter 3. When taking the political and legal backdrop out of which the OGI Regulations came into account, the Regulations are an impressive achievement indeed. Putting all of Shen Kui's tests together, it becomes apparent that the OGI reform should be deemed at least a reasonable success. The reform succeeded, seemingly against all odds, to bring considerably more transparency into the Chinese government, and provides for – even if not explicitly – a right of ATI that can be used as the basis for suing the government in a court of law.

This thesis also shows that where there is discrepancy between international minimum standards and the OGI Regulations, it is mostly because of the Chinese government's deliberate choice to open up gradually rather than too much too fast. Even though China's legal reform might be of the most dynamic in the world, the government's focus on social stability is still prominent. Examples include the exclusions of the right to know and the presumption of openness in the final

³⁹⁵ Id. at 642.

Regulations. This should not only be seen as negative. On the contrary, both Chinese and international experience shows that gradual strengthening of disclosure laws might be a better approach in the long run, as it helps prevent the legislation becoming wet paper. Initial probes indicate that the OGI Regulations as they are today already provide ample challenge for the government, and it seems reasonable to believe that stronger provisions could lead to even more serious problems with implementation. However, systemic problems such as the judiciary's lack of independence, and the lack of an external oversight body, pose significant limitations on the Regulations' effectiveness. These problems belong to a different category cannot be as easily solved. An additional impediment is the Protection of State Secrets Law. Finding the right balance between protecting state secrets and protecting people's right of ATI is a key challenge for the future.

Implementation of the Open Government Information Regulations is a second challenge. This thesis' theoretical focus has not permitted in-depth research on implementation, and this is consequently a main point in need of further research. Does the government comply with the Regulations' requirement to only refuse requests pertaining to one of the listed exceptions? How big an obstacle is the need's test posed by article 13? Is it used, perhaps, only in instances where the government does not wish to disclose information that is not part of the legitimate exceptions? How does implementation in the richer eastern provinces compare to the less resourceful west? Do the OGI Regulations have an effect on freedom of expression? Or on press freedom? These and other issues still remain largely unanswered, and more research on the growing field of OGI is sorely needed.

In conclusion, this thesis has showed that the Chinese government has, as a direct consequence of the OGI Regulations being adopted, become considerably more open. Even though China is still lagging behind large parts of the world because of the OGI Regulations' failure to comply with important international standards, the public can still increasingly demand to know what the government is doing, which inevitably leads

to increased government accountability. I therefore believe that the OGI Regulations really do signify a transformation of the Chinese government from a government by domination to a government that is increasingly *for* the people. The Open Government Information Regulations therefore not only help the public in realizing their rights, they also help the government in delivering on their promise to “serve the people”.

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