

Towards a More Open China

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I. Executive Summary

The People's Republic of China has joined the international movement toward greater government transparency, including making government records and decision-making more accessible to its citizens.² While China is very much aware of and indeed has drawn lessons from this international trend, the primary force nudging China to adopt a more open form of governance is domestic dynamics.

Transparency in China is in a transitional phase. Like many countries, China has a long tradition of government secrecy. The incremental progress toward greater information openness in China over the past 25 years was not triggered by a particular national crisis or scandal, as happened in some other countries like the United States and Eastern Europe, although most changes in China during the late 1970s and early 1980s might well be attributed to a desire to prevent any repeat of the decade of lawlessness and destruction called the Great Proletarian Cultural Revolution of 1966-76. Instead, the transition toward greater transparency appears to have grown out of the confluence of an "open village affairs" movement that arose in the early 1980s, natural pressures for greater information from rapid economic development, momentum from the information technology revolution and the demands of foreign trade and investment as reflected in China's 2001 commitments to the World Trade Organization.

China is planning for but does not yet have an information access law. General goals of greater governmental openness have been enunciated in national policy over more than a decade, but have been carried out in a piecemeal fashion throughout the country. However, concepts such as the government's obligation to disclose information and the people's "right to know" are beginning to be translated into legal rights and obligations in experimental local legislation that should help institutionalize what the Chinese refer to as "open government information."

This paper will discuss the development of open government information in China, as well as the prospects for China's further opening.

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² See, e.g., Thomas S. Blanton, "The Right to Know is Gaining Around the World," *International Herald Tribune*, October 11, 2003, and "The World's Right to Know," *Foreign Policy* (July-August 2002) at 50; and Ann Florini, "The End of Secrecy," *Foreign Policy* (Summer 1998) at 50.

II. Introduction to the Chinese Context

China hosts the world's largest population, with approximately 1.3 billion people living in an area slightly smaller than the United States. The People's Republic of China was founded on October 1, 1949, as a "dictatorship of the people" led by the Communist Party of China (the Party), which retains a monopoly on political power today.

Following disastrous Party programs of collectivization and communization, and a chaotic decade of "Cultural Revolution" that left China's economy and society in shambles, China adopted the "open-door" policy in 1978 to increase foreign trade and selectively welcome foreign investment in the formerly closed country. Since that time, market reforms have gradually replaced central planning, reducing the number and economic contribution of state-owned enterprises, increasingly supporting private enterprise and lifting price controls on all but a handful of commodities. Today, some 60% of industrial output is produced by non-state enterprises, under what is termed a "socialist market economy." In 2002, the Party set a goal of turning China into a middle-income country with a "well off" population by 2020. Economic development remains the Party's top priority.

These reforms, which have made China one of the fastest growing economies in the world, with a 9.1% rate of economic growth in 2003, have been accompanied by enormous social change. The "iron rice bowl" of guaranteed employment and related social benefits for urban residents has been replaced with a market economy in which they must find or make their own jobs. Farmers are increasingly leaving the land to seek opportunities in the cities. Personal freedoms have expanded with the widespread loosening of social controls. Change has been supported by establishment of a rather sophisticated body of law adapted in many cases from successful models of other countries, although enforcement of these new laws remains problematic. Concepts of private property rights have gradually taken hold and were recognized in an amendment to China's Constitution in March 2004. An accompanying amendment for the first time enshrined the notion of respecting and protecting human rights in China.

While economic growth has lifted hundreds of millions of Chinese out of poverty over the past few decades, this has occurred primarily in the industrial eastern part of the country. The government admits there are at least 85 million rural residents who live on less than US\$75 per year and cannot afford quality food, education and health care. Pressing problems such as sharp rural-urban and regional disparities, environmental degradation and rampant corruption, which estimates value at some 3-5% of GDP,³ are giving rise to increasing social unrest. Concern over instability prompted the current leadership to focus on better balanced and sustainable development rather than growth for its own sake, as well as on new mechanisms to help better manage change.

³ "China's Corruption Crackdown," *FriedlNet*, March 16, 2003, at <http://www.friedlnet.com/news/03031602.html>.

Amidst all this change, political reform has been modest. The Party, comprised of some 6.5 million members, or about 5% of the population, seeks to maintain tight control over policy formulation and implementation, and Party functionaries often concurrently hold government positions, creating what is commonly referred to as the Chinese “Party-state.”

Under China’s Constitution, all power belongs to the people, and state power is exercised by the people through the National People’s Congress (NPC) and local people’s congresses at the provincial, county and township levels. The State Council, China’s Cabinet appointed by the NPC, is the highest executive body, overseeing China’s central ministries and the work of local governments. The people’s courts, also answerable to the NPC, are part of the administrative structure. The standing committees of the congresses, not the courts at the same level, interpret the national or local laws, for example. The Constitution further specifies that the Communist Party of China is the sole political party in power. Other political parties and non-governmental or civic groups and associations are tightly regulated and subject to official approval and registration.

The current constitutional structure provides for a four-tiered system of direct elections for deputies to people’s congresses at the township and county level, and indirect elections for the provincial and national people’s congresses. The congresses at each level, rather than the populace at large, elect the government and judicial officials at the same level. Slates of candidates at all stages and all levels are largely controlled by the Party. The system as designed, lacking truly open, competitive and direct elections, fosters vertical patron-client relations between the Party leaders at higher levels who recommend the candidates for lower level Party, congressional, government and judicial positions, and horizontal accountability between local government and judicial officials on the one hand and the congress and Party organization at the same level that actually elected them on the other. Consequently, congressional deputies and government officials have felt little sense of accountability to the people they ostensibly represent, and the Chinese people have traditionally known little about their representatives and the matters they are handling, even though China’s Constitution calls on the people to “supervise” government work.

Change is occurring, however. Since the early 1980s, the Party has endorsed direct, competitive and non-partisan elections at the most local level of governance, in China’s 700,000 villages where some 900 million rural citizens live. While the Party recognizes that electing one’s leaders at a very local level can foster greater trust and stability, it is hesitant to introduce that practice at higher, more formal political levels, where candidates are less well-known, issues become more complex and voters are more likely to organize around different issues, building pressure to permit competing political parties to represent their interests. Stimulated by successful experience with the village election model, however, the Party is permitting experiments with more competitive (but non-partisan) congressional and direct governmental elections at the township and county levels, as well as promoting directly-elected urban community councils. Elections within the Party itself are becoming more open and competitive. Party policy purports to support the strengthening of what it refers to as “socialist democracy,” to better allow the

people to make their will known and to supervise government, all under the leadership of the Party, however.

What explains these changes? To over-simplify, the Party leadership seems to recognize that, in order to maintain the Party's legitimacy, curb corruption and address the complex issues of governance amidst rapid development, the traditional model of governance must be adjusted. China's leaders acknowledge that a modernizing China requires a government that is efficient, law-abiding and relatively open, one that facilitates, rather than controls, social and economic development and one that enjoys the trust of the Chinese people. To this end, the current leadership seeks to foster what the Party calls "political civilization," which encompasses development of the "rule of law" and of certain more democratic mechanisms to implement the constitutional right and duty of Chinese citizens to serve as "masters of their country" and "supervise" government. Such mechanisms include, importantly, greater access to government information.

III. Development of Government Transparency in China

From the Countryside to the City

The current emphasis within the Party and government on greater openness of information and of government affairs generally traces its origins to the collectivization and commune ideology of the Party, with its legacy of farmer participation at the commune (now the village) level and expectations of transparency, especially in local finances.⁴ This tradition helped shape the more recent development of directly elected and self-governing villager committees and the related "open village affairs" program.⁵

Villagers spontaneously organized the first largely autonomous villager committees in 1980 to manage communal properties and agricultural production.⁶ The dismantling of the rural communes following the Cultural Revolution (1966-76) left a vacuum in political, production and community organization in China's vast and impoverished countryside below the township level, as well as a legacy of mistrust between farmers and Party cadres. Party leaders supported the advent of directly elected villager committees, hoping the system would promote stability and economic prosperity by allowing villagers to choose leaders they trusted, by making those leaders directly

⁴ ZHOU HANHUA, ed., *WO GUO ZHENGWU GONGKAI DE SHIJIAN YU TANSUO* [MY COUNTRY'S EXPERIENCE WITH AND CONSIDERATION OF OPEN GOVERNMENT AFFAIRS], China Law Publishers, 2003, at 89 [hereafter **ZHOU HANHUA 2003**] at 95-97

⁵Zhou Hanhua, "Open Government In China: Practice And Problems," in this volume; Jamie P. Horsley, "The Democratization of Chinese Governance Through Public Participation and Open Government Information, POLITICAL CIVILIZATION AND MODERNIZATION IN CHINA, VOL. 3: THE POLITICAL CONTEXT OF CHINA'S TRANSFORMATION (Renmin University, Beijing, 2004) at 569.

⁶In the Guangxi Zhuang Autonomous Region, Sichuan and Hebei provinces. See, Jamie P. Horsley, "A Legal Perspective on the Development of Electoral Democracy in China: The Case of Village Elections," and sources cited therein, in C. STEPHEN HSU, ED., *UNDERSTANDING CHINA'S LEGAL SYSTEM* (New York University Press, 2003), at 295 et. seq.

accountable to their constituents and by implementing a system of open village affairs, which emphasized financial disclosure on the part of the elected village leaders.

Despite unevenness of implementation, the village open affairs and self-governance program was highly popular among the people and higher-level officials where it was implemented well. By the late 1990s, the “open village affairs” program was evolving into a broader “open government affairs” movement that was promoted in top-level Party and government policy documents.⁷

The adoption by the NPC in November 1998 of the permanent Organic Law on Villagers Committees (the VC Law)⁸ marked a significant advance in the institutionalization of more open governance at the village level. The VC Law requires directly elected villagers committees (VCs) to implement the “four democracies” of direct democratic election of VC members; democratic decision-making through the villager assemblies comprised of all eligible voters; democratic management by the VCs; and democratic supervision by the villagers under new systems of “openness in village affairs.” VCs must publish financial information, in particular, at least once every six months and guarantee the truthfulness of the information disclosed, as well as respond to inquiries from the villagers. Villagers refer to this disclosure system as the “Sunshine Project.”⁹

In a March 1999 speech on villager self-rule, a vice premier described a growing rural concept of a “right to information” tied to economic development: “Following the deepening of rural reform and development of the market economy, farmers’ thinking, concepts and value orientation have undergone profound changes. Their sense of democracy and their sense of participating in the management of economic and social affairs have constantly increased. And more and more they want to have the right to information, dialogue and decision-making. They long for direct participation in making decisions on major affairs in the village and the management of village affairs.”¹⁰

Meanwhile, in the cities urbanites were increasingly leaving the “iron rice bowl” of guaranteed employment by the government or state-owned enterprises and institutions,

⁷The Communiqué of the Fifth Plenum of the 15th Party Congress in October 2000 encouraged openness in “government affairs” and “factory affairs,” as well as “village affairs,” thus officially expanding the scope of the “openness” program beyond the village. Communiqué of the Fifth Plenum of the Fifteenth Central Committee of the CCP, October 11, 2000, in Chinese at:

<http://www.people.com.cn/GB/channel1/10/20001012/268296.html> ; in English at: http://english.peopledaily.com.cn/200010/11/eng20001011_52364.html.

⁸Article 2, <<*Zhonghua renmin gongheguo cunmin weiyuanhui zuzhi fa*>> [Organic Law on Villager Committees of the People’s Republic of China], adopted and effective November 4, 1998; Chinese text available online at: <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=21056>, and an informal English translation at: <http://www.lawinfochina.com/dispecontent.asp?ID=988&DB=1>.

⁹ZHOU HANHUA 2003, *supra* note 4, at 83.

¹⁰Jiang Chunyung, “*Ba cunmin zizhi zhejian rang jiuyi nongmin dangjia zuozhu de dashi banhao*”, <http://www.univillage.org/czht10.htm> ; in English, “Do Well Matter of Primary Importance Which Allows 900 Million Peasants to Become Masters of Their Own Affairs,” *Beijing Renmin ribao* [People’s Daily], March 3, 1999, translated in FBIS Article ID: FTS19990318000285, Document Number: FBIS-CHI-1999-0318.

which had included employer-provided housing, schooling, medical treatment and retirement benefits, to pursue entrepreneurship or work for the emerging private sector. As their numbers swelled, and as concepts of property rights developed with the advent of private housing and business ownership, the demand for greater information relating to business and the economy as well as social services grew. Residents and businesses, for example, needed information on urban development plans in order to make decisions about where to invest in a new home or office building.¹¹ The development of China's stock markets prompted establishment of new information disclosure standards systems to promote greater corporate transparency.¹²

In the year 2000, a detailed joint Party and State Council notice¹³ officially extended the open affairs program from the village to the township, which is the most basic level of formal government in China. The notice emphasized publicizing all financial affairs and making it "convenient" for the people to supervise the work of township governments by providing more information and involving the people more in decision-making. Townships were instructed to set up public bulletin boards, much as was the practice in villages, and adopt other means to regularly communicate with the public. The notice further instructed the higher-level county governments to prepare for instituting open government affairs programs. By 2003, the even higher-level municipal governments were directed to implement systems of open government affairs.¹⁴

Technological Impetus

While the substantive notions of government transparency were beginning to spread throughout Chinese government, Chinese universities and agencies were constructing a technical platform that would support and further promote this information transformation. In the early 1980s, the Chinese government took the first steps to use new

¹¹"Zhengfu xinxi bu gongkai shimin ke qisu" [If Government Information is Not Open, City Residents May Sue the Government], March 4, 2003, quoting Li Li, Director of the Guangzhou Municipal Government Office of Legislative Affairs, at:

<http://www.southcn.com/news/gdnews/gdtodayimportant/200303040378.htm>; "China Strives to Promote Transparent Government," Xinhua News Agency, November 30, 2004, at:

http://english.people.com.cn/200411/30/eng20041130_165654.html.

¹²China Securities Regulatory Commission, "Information Disclosure and Corporate Governance in China," 2000, at: <http://www.china.org.cn/english/government/114996.htm>.

¹³December 6, 2000 Circular *Zhongfaban* [2000] No. 25, Issued by the General Office under the CCP Central Committee and State Council General Office on "Implementing in an All-Around Manner the System of Opening Government Affairs to the Public by Organs of State Power in Towns and Townships throughout the Nation," BEIJING XINHUA DOMESTIC SERVICE in Chinese, translated in FBIS Article ID: CPP2001010500097, December 25, 2000; Chinese text of <<*Zhonggong zhongyang bangongting, Guowuyuan bangongting guanyu zai quanguo xiangzhen zhengfu jiguan quanmian tuixing zhengwu gongkai zhidu de tongzhi*>> at: http://www.cass.net.cn/chinese/s04_nfs/rdi2/regulation/regulation1.htm.

¹⁴"Wu Guanzheng Stresses at the National Teleconference on Openness in Government Affairs the Need to Advance Openness of Government Affairs in Depth and Earnestly Safeguard the Fundamental Interests of the Broadest Masses of the People," Xinhua Domestic Service, September 25, 2003, translated into English by World News Connection, FBIS Document Number FBIS-CHI-2003-0925, AFS Document Number CPP20030925000144; short article on the speech, in Chinese "Shenru tuijin zhengwu gongkai qieshi weiwei hao zuiguangda renmin de genben liyi" at <http://search.people.com.cn/was40/people/GB/rmrblx.jsp?no=0>.

information technologies such as computers and the Internet to make government information more accessible throughout government itself, to strengthen the capacity to share information in support of government-directed industrialization and economic development, and make government more efficient. In December 1999, the Party established a Leading Group on National Informatization to set policy in this area. A State Council Information Office was subsequently set up to carry out “informatization” policies, and it was decided to develop a government “Intranet” to build a government database and share information.

The initial emphasis of China’s “E-government” program was on internal sharing of information among different agencies and vertically from the center to the localities to facilitate all kinds of government services and functions, including tax collection, foreign trade and technological development, rather than providing greater information to the Chinese public. Through linking of databases, for example, tax authorities discovered that many companies that were registered with the industrial and commercial bureau had not registered with them to pay corporate income tax.¹⁵ As the information database grew and technology advanced, this program established the technical platform for and a new norm of sharing more and more information. Central and local government agencies began making an ever-increasing amount of information about government functions and activities, and providing administrative services, to the public over the Web. These new practices and changing attitudes toward the utility of a freer information flow spurred development of open government affairs programs.¹⁶

The rapid spread of Internet use, buttressed by the proliferation of Internet cafes for those without access to their own personal computers, extended the information revolution more and more to the ordinary citizen. As of the end of 2004, more than 87 million registered Chinese used the Internet¹⁷ to access all kinds of information, including information held by their government. Technology is clearly playing a large role in promoting the greater sharing of information in all sectors of government and society in China today.

WTO Commitments

China's accession agreements with the World Trade Organization (WTO) in December 2001 added impetus to the movement toward greater openness by requiring the country, as an international commitment with other member countries, to make trade-related rules and requirements transparent. China agreed to only enforce those laws, regulations and other measures that have been published and are widely available; make those measures available to WTO members before they are enforced absent emergency

¹⁵ “Zhengfu xinxi gongxiang wuda ganga” [Five Big Embarrassments in Government Information Sharing], on the website of the Hunan Information Industry Association, no date, at: <http://www.hnija.cn/xxhlt/200410210142.htm>.

¹⁶ See, e.g., Professor Zhou Hanhua’s paper in this volume, “Open Government In China: Practice And Problems,” and his recent article, “Zhongguo de zhengfu xinxihua ji qi mianlin de shijian wenti” [Government Informatization in China and the Practical Problems It Faces] , February 27, 2004, at: <http://www.iolaw.org.cn/paper10.asp>.

¹⁷ “Rural Children to Have Easier Access to Information,” *China Daily*, December 11, 2004.

conditions; designate an official journal for the publication of relevant legal and policy documents; provide an opportunity to comment before measures are implemented; and establish one or more enquiry points where requesters can obtain information within 30-45 days. Standard WTO rules do not generally require, as does China's accession protocol, that its members must establish enquiry points or provide a public comment period before a trade measure can be implemented. These commitments were specifically negotiated with China in order to compel changes in China's underlying legal system to facilitate greater transparency.¹⁸

China's leaders at all levels take these commitments seriously, conscious also that review mechanisms have been established under the WTO to monitor China's compliance with its accession agreements. They have organized extensive training sessions throughout the country and study tours abroad to investigate means of implementing government transparency. WTO transparency obligations are constantly cited by Chinese reformers in support of efforts to promote greater information disclosure and open government. Implementation of these commitments is less than perfect,¹⁹ but transparency at all levels of Chinese government is improving.

Leadership Support

Although the drive for greater transparency, especially in financial matters, most notably derived from China's farmers, they do not appear to have lobbied for change in any organized or well-articulated manner. Indeed, Chinese law and policy prohibit citizens from forming issue-oriented associations without official approval and do not provide clear channels for input into the policy process. The Chinese experience differs, then, from diverse countries like India, Peru and Romania, where grassroots activism played an important and public role in bringing about access to information legislation.²⁰ Although social organizations, including business associations and consumer and environmental groups, may well be engaged in pressing for more open information, information on any such activities is not readily available. Instead, it appears that China's academics and political leadership at various levels have spearheaded the movement for greater information openness in and beyond China's villages.

As gleaned from Party and government policy statements and academic writings, the leadership's motivation to move toward greater openness turned on a combination of pragmatic goals: to involve a wider spectrum of the public in making increasingly complex policy decisions and laws to support China's drive for economic development; to curb rampant corruption with its negative economic and social consequences; to

¹⁸See, summary in United States General Accounting Office, "World Trade Organization: Analysis of China's Commitments to Other Members" (October 2002) at 9, 47-49.

¹⁹See, e.g., "China's WTO Implementation: An Assessment of China's Third year of WTO Membership," Written Testimony by the US-China Business Council, Federal Register, Volume 69, Number 145, 45369-45370 (July 29, 2004).

²⁰See, Shekhar Singh, "Social Mobilization and Transparency: The India Experience," in this volume discussing the work of the Mazdoor Kisan Shakti Sangathan (MKSS); UNITED NATIONS DEVELOPMENT PROGRAMME, RIGHT TO INFORMATION: PRACTICAL GUIDANCE NOTE (2004), at 16-17, at: <http://www.undp.org/oslocentre/docs04/RighttoInformation.pdf>.

establish new mechanisms to ensure social stability and build trust in government; and to comply with China's transparency commitments in its 2001 WTO accession agreements.

The leader most associated with China's modern economic reform process, Deng Xiaoping, as early as 1984 endorsed the development of information resources to serve modernization.²¹ His vision and support boosted China's embrace of information technology. "Informatization," the technological side of open information, is now a strategic priority in China's Tenth Five-year Economic Plan (2002-07) and is recognized as key to achieving modernization.

Deng's successor, Jiang Zemin, developed leadership support of the "open government affairs" program, first introducing the concept officially in his report to the 15th National Party Congress in 1997.²² He subsequently stressed the need to "keep the people informed" and strengthen "openness in government, factory and village affairs," as well as "citizens' participation in political affairs in an orderly manner," in his report to the 16th National Party Congress in November 2002.²³ Jiang and the Party thus set the necessary policy framework for greater access to government information and decision-making processes. State Council Premier Wen Jiabao, who is responsible for carrying out Party policy through government action, then called specifically, in his government work report to the annual meeting of the National People's Congress (NPC) in March 2004, to establish a system of "open government information" and to increase transparency of government work, in order to keep the people informed so they can exercise supervision over government work.²⁴ Thus, by the Spring of 2004, China's Party and government leaders were talking explicitly about the importance of institutionalizing open government information (OGI).

IV. The Policy and Legal Framework for Greater Information Openness

Policy Framework

China's fundamental policy goal is social stability so the country can pursue rapid economic development. China has moved cautiously from a highly centralized, planned

²¹ "Zhengfu xinxi gongxiang wuda ganga" [Five Embarrassments to Sharing of Government Information], website of the Hunan Information Industry Association, at: <http://hnia.cn/xxhlt/200410210142.htm>.

²² "Hold 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," September 12, 1997, Section VI on Reforming the Political Structure and Strengthening Democracy and the Legal System, at: <http://www.fas.org/news/china/1997/970912-prc.htm>; Chinese text at: <http://xcb.yzu.edu.cn/jdzz/jzm/gjqz.htm>.

²³ "Build a Well-off Society in an All-Around Way and Create a New Situation in Building Socialism with Chinese Characteristics" [*Quanmian jianshe xiaokang shehui, kaichuang zhongguo tese shehui zhuyi shiye xin jumian*], Part V on Political Development and Restructuring, delivered November 8, 2002, available at <http://big5.china.com.cn/chinese/2002/Nov/233867.htm>; English translation available at: http://english.peopledaily.com.cn/200211/18/eng20021118_106983.shtml.

²⁴ Section III, Government Self-Improvement; the Chinese text of the Premier's Report on the Work of Government, delivered March 5, 2004, is available at: <http://www.peopledaily.com.cn/GB/shizheng/1024/2394441.html>. The official English translation is available at: http://www.chinadaily.com.cn/english/doc/2004-03/16/content_315302.htm.

economy to a mixed economy that is replacing government mandates with more market-oriented mechanisms, while retaining a single-party political system. That system must find ways to accommodate increasingly divergent social, economic and political demands and an increasingly assertive public opinion made even more influential through the spreading use of the Internet.

The Fourth Plenum of the 16th Party Central Committee in September 2004 called for Party members to improve their ability to run an increasingly complex nation, admitting in an unusually self-critical public statement that some of its own leaders lack quality, capability, integrity and close ties to the people. The document warns that the "life and death of the Party" could hang in the balance if the Party's governing style does not become more responsive to the people.²⁵ It calls for supporting and improving open government affairs and systems to keep the people informed so they can better supervise government work. Moreover, the Party endorsed "open Party affairs," with greater transparency in Party work so that Party members can better understand and participate in internal Party work, themes that echo and should lend further support to transparency developments on the government side.

No official Party or government document has articulated the details of what a formal OGI system might be. However, the Secretary of the Party Central Committee's Secretariat and Deputy Secretary of its Discipline Committee; He Yong, who also heads a Party Leadership Group on Open Government Affairs that was established in 2003, advocated in November 2004 that open government affairs be standardized so that society can better supervise government work, calling for affirmative disclosure of specified types of government information along the lines of the categories of information required under local OGI legislation to date. He is the first high-level Party official to state publicly that, apart from state secrets, commercial secrets and individual privacy, all matters related to the interests of the people in the exercise of administrative power must be affirmatively disclosed to society.²⁶

It is clear that a combination of economic and political factors is driving the Party leadership toward recognition of the need to change its style of governance and to promote greater transparency. Just as financial oversight was the primary motivation for greater transparency in village affairs, so the economic imperative to permit the free flow of information in order to realize sustainable economic development has been a driving force in the open information developments at the national level. The Chinese government has long been the primary producer, repository and publisher of all kinds of information relating to social, economic and political affairs. An oft-quoted statistic estimates that 80 percent of all useful information in China is held by the government,

²⁵ "Chinese Communist party Publishes Key Policy Document on Governance Capability," in *People's Daily* (English) online, September 26, 2004, at: http://english.peopledaily.com.cn/200409/26/print20040926_158378.html; and links to other sections of the policy document.

²⁶ "He Yong: Henzhua gongzuo luoshi, quebao zhengwu gongkai gongzuo qude xin chengxiao" [He Yong: Resolutely Grasp the Carrying out of Work, Ensure that Open Government Affairs Work Achieves New Results], November 20, 2004, <http://www.mwr.gov.cn/index/soo41120/43092.asp#>.

and that most of this information is not public.²⁷ Chinese scholars point out that a monopoly on information leads to waste of and inefficient allocation of resources, corruption and fraud, as well as policy-related constraints. One example concerns 100 counties in Shanxi province that applied for approval to build power plants utilizing their rich coal reserves, only to discover after a year of wasted effort that the existing power grid in the region could no longer accommodate any more power plants.²⁸

Despite the absence of national OGI legislation, a conducive policy framework is encouraging central government ministries to grant greater public access to their files and share an ever-wider array of information with the public, posting more and more information on their official websites and implementing a recently introduced government spokesperson system. For example, the Ministry of Foreign Affairs in 2004 announced new measures to open its archives and declassified some 10,000 items from between 1949 and 1955, the first batch of diplomatic files to be released since 1949.²⁹ The National Auditing Office (NAO) decided in 2003 to make all its annual reports public and for the first time released the entire text and posted it on the NAO website. In the past, these reports had been submitted only to the State Council and the NPC.³⁰ In 2004, the NAO created a national “audit storm” with its public report that 41 ministries under the State Council had misappropriated as much as the equivalent of US\$171.56 million, including the embarrassing news that the State General Administration of Sports had embezzled US\$15.83 million from the country’s 2008 Olympics special construction fund.³¹

Since its embarrassing initial cover-up of the Severe Acute Respiratory Syndrome (SRAS) outbreak in early 2003, China is becoming more open in disclosing news about disasters, which typically have not been reported. Observers were surprised when China, not known for transparency regarding its military, reported a fatal submarine accident in May 2003, and the Chinese press covered a series of troubling mining tragedies in the autumn of 2004.³² The State Council Information Office announced that government agencies will make more information accessible to the press and the public in 2005.³³

²⁷Li Jin, “*Cong Henan Pingxing teda sharen’an kan gongmin de zhiqingquan wenti*,” *Criminal Law Review*, available at: <http://www.iolaw.org.cn/paper10.asp>, citing for the 80% figure a study by Sun Yunchuan and Gao Jiubing, “*Zhengfu wangshang xinxi ciliao huanjing guanli yanjiu*,” *Tushuguan zazhi*, 1999-1-1; see, also, “*Zhou Hanhua: Women weishenma xuyao zhengfu xinxi gongkai zhidu*” [Zhou Hanhua: Why We Need an Open Government Information System], November 22, 2002, at http://chinese.mediachina.net/index_news_view.jsp?id=53801. “

²⁸“China Strives to Promote Transparent Government, Xinhua News Agency,” November 30, 2004.

²⁹ See, “China Declassifies First Diplomatic Files, January 19, 2004, available online at: http://news.xinhuanet.com/english/2004-01/19/content_1283797.htm; and <<Waijiaobu dang’anguan kaifang dang’an zanxing banfa>>, released in January 2004 and available online at: <http://www.fmprc.gov.cn/chn/wjb/zjzg/dag/xgxx/t80375.htm>.

³⁰ “Auditing Reports to Open to Public,” *China Daily*, July 5, 2003.

³¹ “Premier Welcomes Audit Report on Government Departments,” *People’s Daily*, July 5, 2004.

³² Robert Marquand, “New Openness in China Disaster,” *The Christian Science Monitor*, November 29, 2004; and Anthony Kuhn, “Chinese Submarine Accident Kills All 70 Aboard,” *Los Angeles Times*, May 2, 2003; “Accidents Reporting Shows a More open Government,” Xinhua News Agency, December 14, 2004, at: <http://www.china.org.cn/english/government/114996.htm>.

³³ “State to Speed Up Public Info Flow,” *China Daily*, December 29, 2004, at: http://www.chinadaily.com.cn/english/doc/2004-12/28/content_404046.htm.

These are just a few examples of diverse areas in which the practice and culture of greater openness is expanding.

The Legal Framework for Information Access

While open government information is now endorsed as a policy matter, China still lacks national OGI legislation, and Chinese law does not provide clearly for information rights. Efforts to promote greater transparency under the “informatization” and “open government affairs” programs mentioned above have met with resistance from officials accustomed to preserving a shield of secrecy around themselves and their work. Despite high level articulation of the importance of open government affairs, that program was never institutionalized in a uniform manner throughout the country. Without clear legal requirements, governments and local bureaucrats have been free to decide how and to what extent to publicize government information and operations. Indeed, existing legislation, such as the Law on Guarding State Secrets, the State Security Law and the Archives Law, emphasizes secrecy, not disclosure of government-held information.

In recent years, however, the State Council and some local governments have undertaken to “legalize” the open government affairs program through OGI legislation. An important accomplishment of China’s emerging OGI legal framework is that it establishes, for the first time in China’s long and rich history, rights on the part of the Chinese people to obtain government information and enforceable obligations on the government’s part to disclose information.

Development of Basic Concepts

China’s Constitution does not specifically address information rights. However, certain constitutional principles do establish a legal basis for OGI and open governance. Article 2 stipulates the foundational principle that all power belongs to the people and that the people are to manage state affairs and economic, cultural and social affairs through various channels and in various ways.³⁴ Article 3 makes the nominally elected congresses at all levels responsible to the people and subjects the congresses to supervision by the people. Article 27 requires state agencies and functionaries to maintain close ties to the people, heed their opinions and accept their supervision, while Article 41 grants citizens the right to criticize and make suggestions regarding government agencies and their functionaries. These constitutional principles provide a framework for more participation by Chinese citizens in all kinds of decision-making and other forms of supervising government. China’s citizens cannot exercise these rights without adequate information.

³⁴ Constitution of the People’s Republic of China, adopted and promulgated on December 4, 1982 by the Fifth Session of the Fifth National People’s Congress, as revised as of March 22, 2004, is available in Chinese at: http://news.xinhuanet.com/newscenter/2004-03/15/content_1367387.htm, and in English translation (with amendments through 2004 at the end) at <http://english.peopledaily.com.cn/constitution/constitution.html>.

As the open village affairs program gained in popularity and began to influence higher levels of administration at the grassroots level, economic pressure, including from increasingly significant foreign investors, prompted the central government to begin publishing more government documents and legislation. Before 1991, little government information was made public directly. It was primarily shared with lower level government agencies and only on a needs-to-know basis with others outside government.³⁵

Spurred on by the growing demand of foreign trading and investment partners and China's desire to re-join the General Agreement on Tariffs and Trade, in March 1992 the State Council issued a directive to publish all national foreign trade and investment laws, regulations and policies.³⁶ A 1992 United States-China market access document called on the Chinese government, in a section entitled "transparency," to publish on a regular and prompt basis all legal and policy documents pertaining to trade matters.³⁷ Meanwhile, on the domestic front, China's 1993 consumer protection law was apparently the first Chinese legislation to enunciate a "right to know," stipulating that consumers enjoy the right to know and request accurate information about products or services that they buy, as well to know information about the protection of consumers' rights and interests.³⁸

Other national legislation soon established additional principles of openness. A 1996 revision of the Statistics Law added the system of regularly publishing comprehensive statistics and requiring the results of statistical investigations to be published.³⁹ The Administrative Licensing Law (ALL) passed in August 2003 and effective July 1, 2004 stipulates that the government licensing and approval process shall be open, unless state secrets, commercial secrets or individual privacy are involved.⁴⁰ Moreover, the ALL gives the public the right to inspect agency records relating to supervision of the implementation of licensed activities. The September 2003 Law on Environmental Impact Assessment promotes public participation in assessing the environmental impact of projects, and establishes a system to share environmental impact assessment

³⁵ Zhou Wei, "Zhongguo gonggong xinxi gongkai falu zhidu de tedian, wenti yu fazhan" [The Special Characteristics, Issues and Development of China's Legal System for Open Public Information], *Journal of Administrative Law* (No. 4, January 2002) at 2 [hereafter "**Zhou Wei**"].

³⁶ *Id.*; see <<Guanyu chongshen zhiding, fabu quanguoxing duiwai jingmao fagui, zhengce youguan guiding de tongzhi>> [Notice on Reaffirming the Provisions on Formulation and Publication of Nationally Applicable Foreign Trade and Investment-Related Laws, Regulations and Policies], issued by the General Office of the State Council on March 26, 1992, available online at: <http://www.law-lib.com/lawhtm/1992/8471.htm>.

³⁷ Memorandum of Understanding Between The Government of The United States of America and The Government of People's Republic of China Concerning Market Access, signed October 10, 1992, available online at: <http://www.tcc.doc.gov/cgi-bin/doi/cgi?204:64:03522014:193>.

³⁸ Article 8, <<Zhonghua renmin gongheguo xiaofeizhe quanyi baohufa>> [Law of the People's Republic of China on Protecting Consumers' Rights and Interests], Chinese version available at: <http://www.eguo.com/channel/xiaofeiflfg/1.htm>; English version available at <http://www.qis.net/chinalaw/prclaw26.htm>.

³⁹ Zhou Wei, *supra* note 35, at 3.

⁴⁰ <<Zhonghua renmin gongheguo xuke fa,>> adopted September 27, 2003 and effective September 1, 2004, Chinese text at: http://www.law-lib.com/law/law_view.asp?id=79264.

information with the public.⁴¹ A local example is Shenyang Municipality's pioneering legislation on "public participation in environmental protection."⁴² It stipulates that environmental information is a public resource and provides for "environmental information rights," as well as participation rights.

While additional examples could be cited, existing legislation provides at best a piecemeal approach to making government information more accessible, without detailed procedures and without any overarching legal framework that would ensure that administrative agencies would respect, and the people's courts would enforce, access rights. That is what a national "freedom of information" or "open government information" statute could provide.

Draft National OGI Legislation

Apart from the policy statements mentioned earlier on promoting openness in village and government affairs, no national legislation or detailed guidance was developed to support the open government affairs program. Seeking to institutionalize these concepts, deputies to the annual meeting of the National People's Congress filed proposals in 2001, 2002 and 2003 urging the drafting of a national OGI law to satisfy the citizens' right to know, fulfill WTO commitments, help in legalizing government work, strengthen society's ability to supervise government and realize the economic value of information resources.⁴³

These legislative proposals led to inclusion of a draft OGI law in the five-year legislative plan of the Tenth NPC (2002-07), and may have prompted the State Council Information Office to task the Chinese Academy of Social Sciences (CASS), in May 2002, with researching and drafting legislation on open government information. CASS formed a research group headed by CASS law professor Zhou Hanhua, who conducted extensive research on information access laws around the world.

One of the group's first dilemmas was whether to draft a law or an administrative regulation. A law passed by the NPC could create new and enforceable rights, which local legislation cannot, and could cover the courts and the people's congresses as well as government agencies. However, drafting and deliberating national laws in the NPC

⁴¹ <<Zhonghua renmin gongheguo huanjing yingxiang pingjia fa>>, adopted by the National People's Congress Standing Committee on October 28, 2002 and effective September 1, 2003, at: <http://www.sepa.gov.cn/eic/649645345759821824/20021204/1036227.shtml>.

⁴² See testimony of Brian Rohan of the American Bar Association and translation of the Draft Shenyang Municipal Measures on Public Participation in Environmental Protection at the website of the Congressional-Executive Commission on China, <http://www.cecc.gov/pages/roundtables/012703/index.php>. The Chinese text is available on the website of Shenyang's Central Business District at: http://www.cbd.gov.cn/channel/kejiao/0007/a002/news_paper/200282821647.stm.

⁴³ "Guangyu zhiding "Zhengfu xinxi gongkai fa" de yi'an" [Proposed Bill relating to Formulating an Open Government Information Law], April 1, 2002, at: <http://www.zgrdxw.peopledaily.com.cn/gb/paper289/1/class028900004/hwz204840.htm>; and "Lianghui daibiao ti'an: zhiding <<Zhengfu xinxi gongkai fa>>" [Deputies Propose Bill on Open Government Information Law], March 20, 2003, at: http://www.gov.cn/news/Detail.asp?sort_id=8604.

takes a much longer time than formulating State Council regulations. In the interest of developing a nationwide legal basis for OGI as quickly as possible, the research group decided to take the regulatory route. Their experts' proposed draft of National Open Government Information Regulations (the "Draft National OGI Regulations") was submitted to the State Council in July 2002.⁴⁴ That draft, which has not been officially published, is still under consideration. As happened in other Asian countries such as South Korea and Japan, China instead proceeded to permit local experiments with open information systems to gain experience before introducing an OGI system on a nationwide basis.

Local Experimentation

Academics and government officials in the commercial city of Guangzhou (Canton) in China's southern Guangdong province were among the first to begin drafting local OGI legislation. Exposed early on to foreign trade and investment via nearby Hong Kong, Guangzhou had been an early proponent of the open government and E-government programs, and already had developed detailed local rules to implement open government affairs. Prompted to take additional concrete steps by an early 2002 central directive on further promoting open government affairs, the Guangzhou Office of Legislative Affairs contracted with academics at Guangzhou's Zhongshan University and formed a working group in June 2002 to draft municipal-level provisions establishing a system of open government information (the "Guangzhou OGI Provisions").

The Guangzhou drafters say they did not have contact with the CASS research group in Beijing, and came up with idea of OGI legislation on their own, prompted by their experience with village affairs transparency movements in Guangdong province and the open government affairs program in Guangzhou, as well as overseas research conducted by Guangzhou-based officials and academics in Great Britain and the United States. The Guangzhou draft apparently was circulated for discussion at a nationwide administrative law conference the summer of 2002. While much of the terminology and ideas in the Guangzhou OGI Provisions is quite different, some of their language is the same as that in the Draft National OGI Regulations, so there appears to have been at least some cross-fertilization, probably at that point. In any event, the Guangzhou OGI Provisions, approved by the Guangzhou Municipal Government on October 30, 2002 and effective

⁴⁴ See, Zhou Hanhua, "Open Government In China: Practice And Problems," in this volume. See, also, ZHOU HANHUA, ED., *ZHENGFU XINXI GONGKAI TIAOLI ZHUANJIA JIANYIGAO* [PROPOSED SCHOLARS' DRAFT OF OPEN GOVERNMENT INFORMATION REGULATIONS] (China Law Publishers, 2003). The Scholars' Draft sets as its legislative purpose the protection of the public's exercise of the "right to know" and of public participation in the management of state and social affairs, promotion of the flow of government information and supervision of government agencies in the exercise of their powers in accordance with the law. It creates the presumption of information access, with non-disclosure being the exception, and gives all natural persons (thus apparently covering foreigners), legal persons and other organizations the right to obtain or access government information, except as otherwise provided by that regulation or other law. Substantially in accord with local legislation passed to date, the Scholars' Draft lists seven exemptions from disclosure that, with the exception of the exemption for "state secrets," which under current law is overly-broad, conform generally to international practice.

January 1, 2003,⁴⁵ made history by establishing unprecedented rights of access to government information in China.⁴⁶

The government of Shantou municipality, located in one of Guangdong province's special economic zones, followed closely behind, as did the international commercial hub and special municipality of Shanghai, which adopted China's first provincial-level OGI legislation (the "Shanghai OGI Provisions") in January 2004.⁴⁷ In February 2004, the business center of Shenzhen in Guangdong province passed China's first "online OGI" provisions.⁴⁸ By the end of the year 2004, over 24 provincial and municipal-level governments had adopted OGI legislation, and the spread of local OGI legislation nationally seemed to be accelerating.

New Information Rights

Breaking the deeply-entrenched tradition of government secrecy, these local OGI provisions all establish a presumption that government-held information should be accessible, making non-disclosure the exception rather than the norm. They aim to protect the "right to know" of individuals and organizations, a right that does not appear in China's Constitution and is not defined, specifically as such, in any national law to date. They establish two fundamental and, for China, novel ideas: that Chinese government agencies have an *obligation* to disseminate on their own initiative and disclose upon request most of the information that they hold, and that Chinese citizens have a *right* to access such information.

To emphasize this concept, the Guangzhou OGI Provisions define individuals and organizations as "persons with the right to access," and government agencies and their functionaries as "persons with the obligation to make public." While the Shanghai OGI Provisions do not use those terms, they similarly provide that citizens, legal persons and other organizations have the *right* to request information from government agencies and, conversely, they impose a legal *obligation* on government agencies to disclose all

⁴⁵ LIU HENG, *ZHENGFU XINXI GONGKAI ZHIDU* [THE SYSTEM OF OPEN GOVERNMENT INFORMATION], China Social Science Publishing House (2004), at 192-93.

⁴⁶ <<*Guangzhoushi zhengfu xinxi gongkai guiding*>> [Open Government Information Provisions of Guangzhou Municipality], available online at: <http://www.gz.gov.cn/egov/sqgk/200309170002.asp>; see, Jamie P. Horsley, "China's Pioneering Foray into Open Government," *The China Business Review*, July-August 2003 at 40; also carried at <http://www.freedominfo.org/news/guangzhou> (posted July 14, 2003, together with an English translation by the author).

⁴⁷ <<*Shanghaishi zhengfu xinxi gongkai guiding*>> [Open Government Information Provisions of Shanghai Municipality], available online at: http://www.chinacourt.org/flwk/show1.php?file_id=91244; see, Jamie P. Horsley, "Shanghai Advances the Cause of Open Government Information in China," at <http://www.freedominfo.org/news/shanghai/index.htm>, posted April 20, 2004, together with an English translation of the Provisions by The China Law Center, Yale Law School.

⁴⁸ <<*Shenzhenshi zhengfu xinxi wangshang gongkai banfa*>> [Measures of Shenzhen Municipality for Online Open Government Information], February 25, 2004, at: http://www.chinacourt.org/flwk/show1.php?file_id=92369. The Shenzhen Measures, which went into effect April 1, 2004, require government agencies to disseminate and post online on their own initiative some 35 items of information, but do not provide a mechanism for requesting information that is not disseminated.

information not covered by a specified exemption.⁴⁹

The local provisions further establish another new right, that of any person to access information concerning himself that is held by a government agency, as well as to request correction of any errors or inaccuracies in such information. Individuals have not to date had the right to review personnel files maintained on them, for example. Such files might contain information on high school and university transcripts, work records and employers' comments. Although individuals have had no right to inspect such files and correct or challenge any erroneous or negative information, they have had to pay an annual fee to government agencies that maintain the files and for release of such files to prospective employers and others. In the past, companies could not sign a contract with a new employee without first obtaining the personnel file.⁵⁰ Accordingly, the right to request access to one's personnel file is important for confirming and correcting information as citizens seek to change jobs and as China begins to establish a consumer credit information system.

The local OGI provisions all specify a non-exhaustive list of broad categories of information that must be disseminated on the government's own initiative, a useful device in a country without a developed concept of "public record" information and where government is not accustomed to sharing information. In addition to development plans, municipal rules and regulations, budgets and actual expenditures, and information about each government agency, these provisions require publication of information on issues of particular public concern, such as epidemics (like the 2003 SARS outbreak), natural disasters and other emergencies, and land use plans and approval documents relating to rural land requisition and urban redevelopment involving demolition of existing structures and relocation of residents. The sometimes forcible expropriation of land and homes of farmers and urban residents due to rapid development has led to protests, litigation and a general public outcry for more transparency and what Westerners might refer to as procedural due process. Making the land use planning and development process subject to mandatory public disclosure, together with providing opportunities for the affected public to express their views on such plans, should help regularize this often controversial process.

Under these OGI provisions, citizens are also given the right to request information from government agencies that has not already been disseminated, a right that Chinese citizens have never enjoyed before. Information required to be disclosed affirmatively is generally published in periodic local government gazettes, local media and on the local government website, as well as made available at the agency itself for ease of public access. Under most local OGI provisions, each government agency is to compile and update a catalogue of government information that it holds, as well as a

⁴⁹ The Guangzhou OGI Provisions specifically apply to foreigners requesting information, but other local OGI provisions are typically limited to Chinese citizens and organizations. Nonetheless, some localities such as Shanghai have announced that foreign individuals, legal persons, organizations and news media will in practice be given equal access to government information.

⁵⁰ See, e.g., "Resistance Rises Against Personnel Files," *Shanghai Daily*, February 17, 2003, at: <http://www.cbiz.cn/NEWS/showarticle.asp?id=1772>.

guide on how to access that agency's information. Most OGI localities have already developed standardized request forms and user guides.

Exceptions to the Rule of Access

The local OGI provisions follow international practice in establishing categories of information that are exempted from the disclosure obligation, including private information about individuals, commercial secrets, state secrets and information regarding matters still under deliberation. One goal of international legislation in this area is to specify with as much precision as possible the scope of necessary exceptions to the rule of openness, so as to prevent them from becoming huge loopholes for government non-disclosure. In China, the concept of a "commercial secret" has been under development for several years, although the precise contours are not yet well defined.⁵¹ However, notions of individual privacy and the protection of personal data, nowhere clearly expressed in law, remain to be fleshed out,⁵² and the most troublesome exemption is that for "state secrets."

Invocation of the overly broad Law on Protecting State Secrets, adopted in 1988,⁵³ can still basically eviscerate the disclosure mandate of all OGI legislation in China. This law defines "state secrets" broadly as being "matters that affect the security and interests of the state." This definition is illustrated with broad categories of information including secrets concerning "important policy decisions on state affairs," "economic and social development," science and technology, and criminal investigations, as well as the more conventional areas of national defense and diplomatic affairs. Public health information -- including information about diseases not yet listed by the Ministry of Public Health as a contagion that should be announced to the public -- is, for example, apparently treated as a state secret under existing implementing regulations. Chinese officials and scholars have called for revision of the law to more clearly distinguish between what should be kept confidential and what can and should be disclosed. Although work on a comprehensive revision is in fact underway, a revised State Secrets

⁵¹ Article 10(3) of the Law of the People's Republic of China Against Unfair Competition defines "commercial secrets" broadly to mean "technical information or operating information that is not known by the public, can bring about economic benefits to the rightsholder, has practical utility and about which the rightsholder has adopted secrecy measures." <<Zhonghua renmin gongheguo fan buzhengdang jingzheng fa >>, adopted September 2, 1992 and effective December 1, 1993, available at http://www.isinolaw.com/jsp/law/LAW_Articles.jsp?LangID=2&CatID=503&langswitch=1; English translation available online at: http://www.isinolaw.com/jsp/law/LAW_Articles.jsp?CatID=385&LangID=0&StatutesID=131669&ChapterID=-1.

⁵² Although privacy rights have been asserted in some cases, there is no law clearly establishing such rights. Instead, the Constitution, Article 38, protects "personal dignity" and Article 40 protects the freedom and privacy of correspondence. Article 101 of the General Principles of Civil Law protects the right of reputation, without defining the concept. Recently, regulations on the use of computers and the Internet prohibit damaging "privacy," again without defining the term. See, Yingxi Fu-Tomlinson, "Personal Data Protection in China," *The China Business Review* (July-August 2002) at 36.

⁵³ Adopted September 5, 1988, effective May 1, 1989, English translation available at <http://www.intellnet.org/documents/000/060/65.pdf>; text of Chinese original, <<Zhonghua renmin gongheguo baoshou guojia mimifa >>, available at <http://www.sss.net.cn/sassnews.asp?NewsID=766>.

Law is not yet on the NPC legislative plan. Pending national action, local governments and requesters alike will be challenged to find ways to narrow its reach.

Open Decision-making

A major innovation of many local OGI provisions, not included in the Draft National OGI Regulations, is the stipulation that certain decisions should be announced during the drafting process for public input before they are finalized and implemented. These stipulations seek to further institutionalize mechanisms for greater public participation endorsed by the Party and authorized by the Legislation Law of the People's Republic of China.⁵⁴ These mechanisms include publication by people's congresses and government agencies of draft legislation and policies to solicit public input in writing, as well as holding public hearings on selected legislation or administrative rules deemed to affect "vital" public interests.

Following a trend set by the Guangzhou OGI Provisions, for example, the Shanghai OGI Provisions require the advance publication for comment of draft decisions, municipal rules and plans that affect the "major interests" of Shanghai residents or have a "major social influence." Indeed, the Shanghai Government Legislative Affairs Office adopted a public participation procedure in formulating the Shanghai OGI Provisions. It published a draft for comment in two local newspapers and on the official Shanghai government website, and consulted various legal scholars, government officials, foreign experts, enterprises and non-governmental organizations. This was the first time the government had sought public input on a draft regulation prior to adoption, although the Shanghai Municipal People's Congress had published several draft laws for comment, and occasionally held hearings on them, in the recent past. Shanghai and other local governments that include such a requirement in their OGI legislation are breaking additional new ground in terms of institutionalizing public participation and open government generally.

Implementing Open Government Information Systems

A major challenge of OGI legislation is to make it workable, to ensure that citizens actually use the law and that government agencies actually provide required and requested information.⁵⁵ The pioneering Guangzhou OGI Provisions, for example, went into effect amidst great fanfare on January 1, 2003. But those provisions were entirely ignored by government officials, media and citizens when the SARS crisis that apparently started in or around Guangzhou first became public in February 2003.⁵⁶ Even

⁵⁴ <<*Lifa Fa*>> [The Legislation Law], adopted by the National People's Congress on March 15, 2000, effective July 1, 2000, available in Chinese at: <http://www.china.org.cn/chinese/SFKSZN-c/82314.htm>, and in English at: http://www.novexc.com/legislat_law_00.html.

⁵⁵ See the discussion of the importance of implementation in Laura Neuman and Richard Calland, "Establishing a Robust Transparency Regime: The Implementation Challenge - Theory & Practice, With Special Reference to Latin America, the Caribbean, and South Africa," in this volume.

⁵⁶ News of the spread of the strange new disease that came to be known as SARS first spread on panicked rumors reported around February 8, 2003. When the Guangzhou Municipal Government and the Guangzhou Public Health Bureau held separate press conferences on February 11, apparently no-one

in the United States, where the media and citizens groups are more accustomed than in China to pressing the government for information, it took years for people to begin to recognize the usefulness and effectiveness of the Freedom of Information Act (FOIA) in opening government files to the public.

Shanghai has done a particularly impressive job of spreading the word about their new OGI system. Citywide, 15 municipal agencies felt to be particularly closely related to the interests of the public, including education, urban planning, social security and labor, were selected for special training to get their information access systems established by the date the Shanghai OGI Provisions went into effect.⁵⁷ Outreach programs to potential users included business associations, lawyers groups, social organizations engaged in issues such as environmental and consumer protection, urban community councils, universities and scholars, the media and other groups, as well as government officials unaccustomed to the practice of openness. One wealthy district in Shanghai has incorporated training residents on how to access government information over the Internet into the community-based citywide program to put “one million families on-line.”

In the first month after the Shanghai OGI Provisions took effect, the government reported that 21.64 million people searched for information on their website, and various government agencies received 63,600 phone inquiries. The 15 key agencies reported 989 requests for government information, to which 947 replies had been sent by month’s end. Within five months, 12 administrative reconsideration cases had been filed with different government agencies, plus four lawsuits. Media also reported that the city of Wuhan, whose OGI provisions went into effect July 1, 2004, had ordered reconsideration of a request for information from the labor bureau by a laid-off worker that had been denied in August. These private enforcement actions indicate that at least some segments of the population in Shanghai and Wuhan are familiar with and using the new OGI legislation.

Most of the local OGI provisions stipulate administrative penalties for government officials who do not disclose required information or otherwise violate requirements, and call for periodic investigations by local supervision agencies and government legislative affairs offices. Shanghai went a step further in requiring annual reports on what information was disseminated, statistics on disclosure requests and the types of information that were either disclosed or denied based on an exemption, statistics on any lawsuits or complaints received, major problems and plans for improvement. Adopted from U.S. practice, this mechanism essentially incorporates OGI implementation into the performance reports of each agency and helps ensure they will pay at least minimal attention to carrying out the new system so they have something to report.

mentioned or asked about the applicability of the Guangzhou OGI Provisions. See, “More Information Please: Epidemic Tests Government’s Resolve,” *Beijing Today*, February 28, 2002.

⁵⁷ See, Shanghai’s government website, the top right-hand corner of which is devoted to open government information, at <http://www.shanghai.gov.cn>.

Another way to help ensure implementation is to give citizens effective administrative and judicial remedies to compel government agencies to make government information public. Under the local OGI provisions and current Chinese law, residents are afforded only the traditional remedies of administrative complaint or administrative reconsideration by the agency that handled the information request in the first place, administrative litigation in the courts over specific government action or inaction, and civil suits for compensation in the event a violation of the provisions results in direct economic loss. Despite the initial positive result in the Wuhan case cited above, many Chinese scholars believe that the administrative remedies are unlikely to provide a neutral remedy in many of these cases, and administrative litigation is available under existing law only in cases of infringement of personal or property rights.⁵⁸ Whether the people's courts will accept cases involving new "information rights" that are created by municipal or provincial level governments and not endorsed by a national law passed by the NPC, and how they will enforce the local OGI provisions, thus remain to be tested. Observers note that China's courts are not truly independent and have little latitude to interpret legislation. However, the Shanghai courts set a positive example by accepting jurisdiction over the first known lawsuit under local OGI provisions in China. That lawsuit was filed in June 2004, just a little over one month after the Shanghai OGI Provisions came into effect,⁵⁹ and the hearing was held in August 2004. The decision is still pending in a municipal district court.

To avoid the shortfalls of the existing legal system, local governments might experiment with new institutions such as an independent information commission with adjudicatory powers, whose decisions could still be appealed to the courts, as is the case in the State of Connecticut⁶⁰ and, more recently, in Mexico.⁶¹ However, the Chinese observe that such commissions are relatively expensive to maintain and would be yet another innovation to manage as they work to introduce the unprecedented OGI system. Another possible approach would be to establish an independent OGI office authorized to provide professional but non-binding advisory opinions to both requesters and government agencies, as is done in the State of New York,⁶² or an ombudsman system as is adopted in some other countries. Shanghai's mayor promised to establish a neutral body to handle OGI complaints,⁶³ and the filing of the first lawsuit in Shanghai led to

⁵⁸ Administrative Litigation Law of the People's Republic of China [*<<Zhonghua renmin gongheguo xingzheng susong fa>>*], Chinese text at: <http://www.molss.gov.cn/correlate/xzssF.htm>; English translation available online at: <http://www.jc-lawyer.com/english/ArticleShow.asp?ArticleID=845>.

⁵⁹ "Lawsuit Over Access to Housing Archives," *China Daily*, July 5, 2004.

⁶⁰ See the homepage of the Connecticut State Freedom of Information Commission at: <http://www.state.ct.us/foi/>.

⁶¹ Mexico's Ley Federal de Transparencia y Acceso a la Informacion Publica Gubernamental, adopted April 30, 2002, establishes an independent Federal Institute of Access to Public Information to oversee the government's information management and declassification practices, and to promote the right of citizens to obtain government information. See, Kate Doyle, "Mexico's New Freedom of Information Law, April 11, 2002", available online at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/index.html>.

⁶² See the homepage of the New York State Committee on Open Government within the New York Department of State at: <http://www.dos.state.ny.us/coog/coogwww.html>.

⁶³ "Han Zheng zai 'Shizhang rexian' yu shimin gonghua zhengfu xinxi gongkai," April 30, 2004, at: http://www.shanghai.gov.cn/node_2314/node2315/node4411/userobject21ai52708.html.

consideration of forming an experts committee to advise on issues relating to OGI implementation.

V. Contemporary Challenges

Prospects for National OGI Legislation

China's local OGI provisions are important first steps on the road to a national open government information law that will empower China's citizens to participate more actively in the management of their own lives and country. China's leaders appear to accept that a free flow of information can foster better economic decision-making, curb corruption, build trust in government and thus contribute to economic development and overall social and political stability. Just how free and open that flow should be has not yet been settled, however.

In the wake of widespread criticism of the Chinese government's secretive handling of the 2003 SARS crisis, which drove home the point that China is enmeshed in a global world that demands greater transparency, State Council Premier Wen Jiabao and other Chinese leaders and academics called for greater information openness.⁶⁴ Many observers predicted that the central government would move quickly to adopt national OGI legislation.⁶⁵ Although the State Council did act to promulgate national regulations on handling public health emergencies that called for timely, accurate and comprehensive sharing of information with society,⁶⁶ deliberation on national OGI regulations has apparently been postponed, possibly to give local experiments –such as those in Guangzhou and Shanghai -- time to flesh out the many challenging issues of regulation and enforcement in this uncharted territory.

Nonetheless, open government information has become a national policy. In his report to the NPC annual meeting in March 2004, Premier Wen set as a task for government self-improvement the establishment of an OGI system and increased transparency of government work, to facilitate the people's knowledge and their supervision of the government.⁶⁷ The State Council's 10-year program to implement "administration in accordance with the law," announced soon after the close of the NPC

⁶⁴Sun Yafei, "*Feidian: Jiasu xinxi gongkai bufa*" [SARS: Increasing the Pace of Information Openness], *Nanfang Zhoumo*, April 31, 2003, <http://www.nanfangdaily.com.cn/zm/20030501/xw/tz/200304300462.asp>; see, also, op-ed piece in the People's Daily Online (English version), June 8, 2003, entitled "SARS: A Valuable Lesson for Chinese Gov't to Learn."

⁶⁵ Sun Yafei, "*Feidian: Jiasu xinxi gongkai bufa*" [SARS: Increasing the Pace of Information Openness], *Nanfang Zhoumo*, April 31, 2003, <http://www.nanfangdaily.com.cn/zm/20030501/xw/tz/200304300462.asp>.

⁶⁶*Wen Jiabao qianshu guowuyuan ling gongbu shixing <<Tufa gonggong weisheng shijian yingji tiaoli>>*, [Wen Jiabao Signs State Council Order to publish and Implement "Regulations on Emergency Response to Public Health Incidents"], at: http://news.xinhuanet.com/newscenter/2003-05/12/content_866362.htm, May 12, 2003.

⁶⁷ *Supra* note 24.

meeting, includes OGI as an important component.⁶⁸ That program talks, importantly, of the public's *right* to request open government information and calls on government agencies to facilitate that process.

The concept of a "right to know" first appeared in scholarly literature in the early 1990s, and is now frequently cited in scholarly articles and media reports. It was mentioned in an important Party document issued by the Fourth Plenum of the 16th Party Congress Central Committee in September 2004 as one of the Chinese people's "democratic rights" that need to be protected.⁶⁹ The right to know was also listed as one of the civil and political rights China is protecting as part of its human rights program, in China's "white paper" on Progress in China's Human Rights Cause in 2003,⁷⁰ released by the State Council Information Office on March 30, 2004.

High-level policy statements are important, but only when information rights are granted status under national law will they be certain of legal protection throughout China and by the people's courts. The drafting of a national OGI law, which has been placed on the NPC legislative agenda for the current session running through 2007, will be important in itself and should also spur necessary work on related legislation, such as revising the State Secrets Law, drafting a privacy or personal information protection law and expanding the scope of administrative and judicial relief explicitly to cover information rights.

Just as local experimentation often precedes central action, it is not unusual for China first to adopt administrative regulations at the State Council or ministry level, to gain experience while the supreme lawmaking body, the NPC, mulls over more comprehensive legislation on point. This approach is the one apparently being followed in the case of China's national OGI legislation.

Openness with Chinese Characteristics

The development of open government information in China over the past quarter century is noteworthy in several respects.

First, China is moving toward greater openness without having first undergone a democratic transition, even though information access is commonly associated with democratic values. Motivated primarily by its desire to ensure stability and continued economic growth at home, China's authoritarian leaders seem to accept that more open

⁶⁸ <<*Quanmian tuijin yifa xingzheng shishi gangyao*>> [State Council Outline on Implementing the Comprehensive Promotion of Administration in Accordance with the Law], adopted and effective March 22, 2004, available online at: http://news.xinhuanet.com/zhengfu/2004-04/21/content_1431232.htm, at paragraph 10. An English language article generally describing this Outline, "Guideline to Build Law-Based Government Publicized," published by *china.org.cn* on April 22, 2004, is available online at: <http://www.china.org.cn/english/government/93677.htm>.

⁶⁹ *Supra* note 25.

⁷⁰ "2003 nian zhongguo renquan shiye de jinzhan (*quanwen*) in Chinese, at: <http://www.people.com.cn/GB/shizheng/1026/2418866.html>; an English translation of which appears at [http://english.peopledaily.co.cn/whitepaper/hr2004/hr2004\(2\).html](http://english.peopledaily.co.cn/whitepaper/hr2004/hr2004(2).html).

information benefits economic and social development. But they see it as a two-edged sword. While loosening the reins on day-to-day governance and encouraging a more open style of governance with “supervision” by the people and the media, the Party still attempts to retain tight control over information flows and media reportage, issuing directives prohibiting or limiting reporting on corruption scandals, farmer protests and other sensitive news from time to time. Current Party General Secretary Hu Jintao, heralded as a populist who “puts the people first,” has acquiesced in, if not led, a crackdown on free speech and the increasingly daring Chinese press. Faced with widespread unrest in the cities and the countryside during 2004, officials have detained, demoted or arrested scores of prominent academics, writers, journalists, lawyers, peasant activists and whistleblowers who are perceived to criticize the Party or the government or who otherwise champion the causes of disaffected petitioners.⁷¹ Those targeted are frequently accused of revealing state secrets. Forty-two journalists and Internet dissidents are in Chinese prisons, more than any other country, according to the Committee to Protect Journalists.⁷² The actual implementation of the open government information policy clearly tests the new “liberalism” attributed to the Hu Jintao-Wen Jiabao government.

It can be a struggle for citizens in well-established democracies like the United States to obtain information from reluctant government officials. Information disclosure in a single-party state like China is likely to be even more of a challenge, subject to strong political, even more than legal, constraints, although Party officials may well point to the “state secrets” or other exemptions from disclosure under OGI legislation to justify withholding politically sensitive information. The first OGI lawsuit filed in Shanghai is a good example of the problem. The requester sought access to seemingly innocuous real estate records from 1946 to 1968. While complicated legal issues delayed the court in reaching a resolution, officials reportedly feared the requester’s motive was to seek documentary evidence to redress confiscation of real estate taken during the excesses of the Cultural Revolution (1966-76), during which many citizens lost property. Using information access laws to open up past wounds, which in China could include those dating back to the original Communist revolution, various political and economic campaigns since then and the more recent 1989 Tiananmen Square actions, is a phenomenon encountered in transitional countries around the world. The perceived threat of such use of information access laws to political stability may seem even greater in a country ruled by unelected leaders, and is undoubtedly part of the calculus behind the cautious approach to adopting such legislation in China.

A second notable aspect of China’s growing government transparency as compared with other international experience is the relative absence of organized non-governmental or civil society input in the process. While the current OGI program in China can be traced to the grassroots self-governance movement for China’s 900 million farmers, the

⁷¹ Jonathan Watts, “Writer Held as China Turns on Intellectuals,” *The Guardian*, December 22, 2004; Joseph Kahn, “China’s ‘Haves’ Stir the ‘Have Nots’ to Violence,” *New York Times*, December 31, 2004; Edward Cody, “China Condemns Whistle-Blower: Official Denounced for Posting Letter Alleging Corruption in Communist Party,” *Washington Post*, August 16, 2004.

⁷² Nicholas Kristof, “China Has a Lot of Work to Do,” *New York Times*, December 2, 2004.

dynamic of its evolution seems to have been interaction between a generalized social and economic demand (probably made much more specific at times in certain localities), and leadership acquiescence and support. Well-placed and influential academics, local officials and other individuals that represent widely shared views may be active behind the scenes in promoting this process, but the articulation of the need for and development of OGI in China has had a definite elitist rather than a popular flavor. As civil society begins to develop and become more independent and active in China's restrictive political-legal environment, and as it begins to realize the benefits of recent developments in open information, it may begin to get more involved in pressing for greater information access. Whether and how an emerging civil society in China might contribute to promoting open government information will be issues worth watching.

Third, the Chinese leadership's early embrace of the technology that makes possible development of an "information society" to support economic development allowed creation of a technical platform that has facilitated China's gradual move toward more open information. Promoters of more open government information may well have used the leadership's fascination with technical and "scientific" programs to support economic development to lay not only the technical foundation but also to introduce new practices of sharing information to advance the much broader development of OGI policies and practices.

Fourth, while domestic concerns and developments can explain the impetus that has led to greater information transparency in China, international pressure and experience have also been brought to bear. China's transparency commitments in its 2001 accession to the WTO are taken seriously by China's leadership and used as an argument by OGI promoters in support of the need for OGI legislation. Drafters at the national and local levels are all looking to learn from international experience, through research programs, international conferences and soliciting the input of foreign practitioners and legal scholars.

Fifth, the spread of transparency in China has been incremental, based on a variety of complementary developments and experimentation conducted in different localities and within different bureaucracies with the approval of the center, as opposed to a distinct national reaction triggered by political crisis or scandal. Nevertheless, it is striking how quickly China's nascent OGI movement is growing at local provincial, municipal and lower levels to create new rights and impose new obligations with consequences for noncompliant government officials. From a handful of OGI provisions in place at the beginning of the year, by the end of 2004, the number exceeded 24 at just the provincial and municipal level, not counting all the counterparts at lower district and agency levels.

It is unclear to what extent local legislation can actually create new rights that will be enforced by the people's courts, or to what extent both the people, not accustomed to having the right to request all kinds of information from their government, and the government bureaucrats guarding the gates to the agency files, will actually implement this important new system. While statistics and the filing of lawsuits and administrative actions indicate that Shanghai and Wuhan residents seem to be learning about and

utilizing their new OGI system, officials in Changchun, the capital of Northeast China's Jilin province, attribute the low number of visitors to the Changchun Archives Administration to search for information since local OGI legislation went into effect September 30, 2004, to unfamiliarity with the new system.⁷³

Nonetheless, these new OGI systems are introducing new practices of openness and attempting to change attitudes and the way citizens relate to their government, and vice-versa. Local governments are adopting slogans like "transparent government," "service-oriented government," "accountable government" and "law-abiding government" to describe how they see their role vis-à-vis society. One example of the new attitudes being promoted by the current government is the licensing law that took effect July 1, 2004,⁷⁴ which many Chinese see as truly revolutionary. That law seeks to restrain the exercise of administrative power by restricting the number of government agencies that have authority to regulate activity through licensing and introduces the concept that government should intervene only where individual initiative or the market cannot adequately do so. Transparency requirements permit citizens to monitor implementation of the licensing system. As one Chinese official describes the impact of the Administrative Licensing Law, in the past Chinese viewed law as a means to control the people; now law is also being used to control government behavior.⁷⁵

Can a non-democratic China achieve true freedom of information, and accountable government? In democracies, citizens can use the electoral process to bring pressure to bear even on unelected bureaucrats. Even more direct pressure can be applied through an independent judicial system that has the authority to enforce government compliance with the law. In China, in contrast, the Party ultimately controls the government personnel system and the courts. Although Chinese citizens can sue government agencies for abusive acts or failure to act as required by law under the 1989 Administrative Litigation Law, that law's coverage is narrowly drawn and courts are frequently reluctant to accept cases that involve untested rights -- since they are only supposed to apply and not interpret the law -- or politically sensitive issues.⁷⁶ Thus, Chinese citizens basically lack the means to compel government compliance with newly emerging rights of information.

While Chinese officials do not have to account to the people in regularly scheduled and competitive elections, and are still infrequently held liable in the courts for their actions or inaction, they nonetheless clearly understand that their credibility and the legitimacy of their leadership depends in large part on being responsive to the concerns and needs of their people. No government official welcomes public scrutiny of his or her decisions. Yet the promoters of OGI include government and Party officials, as well as scholars well versed in international practice. Many officials embrace these programs because they sincerely believe these mechanisms will help them do a better job, will help China develop on a sounder basis and will help ensure social stability in these times of

⁷³ "Changchun Opens Government Information," *China Daily*, November 23, 2004.

⁷⁴ *Supra* note 40.

⁷⁵ Private communication to the author, July 2004.

⁷⁶ The Administrative Litigation Law is cited *supra* note 58.

rapid change. Apart from those matters of great political sensitivity, serious implementation of open government information systems could prove to be an important mechanism to help ensure that government becomes more responsive, if not strictly accountable, to the people. In that sense, putting in place new systems of open government information to permit citizens to exercise their nascent “right to know” can prove to be a democratizing force in China. Whatever the end result, it is undeniable that a new culture of openness is being fostered in China today, with the cautious acquiescence and support of the Communist Party. Translating that culture into written law can only reinforce this positive trend.