

Circumventing Transparency: Extra-Legal Exemptions from Freedom of Information and Judicial Review in China

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INTRODUCTION

The 2007 Regulation on Open Government Information (ROGI) established a right of access to information in China, thereby raising expectations that a freedom of information (FOI) regime is now established to increase transparency in a country with an ingrained culture of secrecy.¹ The general, and legally enforceable, right afforded by the ROGI was seen as having the potential to provide an unprecedented channel by which the public could monitor and check on the government. However, the old regimes, controlling the flow of information in the Chinese party-state, persist despite the regulation's entry into effect on May 1, 2008. The government bureaucracy has also designed measures to restrict the inconvenient effects of the ROGI. Together, these old regimes and administrative measures have exerted a considerable impact on the nascent right of access to information, but have largely been ignored by the scholarly literature. This article explores the complicated relation between the ROGI and the norms deriving from the various authorities with information control powers, and reviews the role of the Chinese courts in settling the conflicts therein and thus affecting the outcomes of transparency reform.

Settling conflicts between FOI law and secrecy norms is crucial to the realization of such law's potential to enhance democratic accountability. FOI law is significant primarily because it seeks to establish disclosure, as the rule, and non-disclosure as the exception. To ensure strict observance of that

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1. *Zhong Hua Ren Min Gong He Guo Zheng Fu Xin Xi Gong Kai Tiao Li* (中华人民共和国政府信息公开条例) [Regulation on Open Government Information] (promulgated by the St. Council, April 5, 2007, effective May 1, 2008) St. Council, April 24, 2007, at http://www.gov.cn/zwgk/2007-04/24/content_592937.htm (China).

rule, international think tanks have recommended a number of best practices for the making and enforcement of FOI laws, such as, providing a complete list of the types of information to be exempt from disclosure; other legislation should not be permitted to extend the exemptions created by FOI laws; and all legislation bearing on the withholding of government information should be interpreted in a manner consistent with the principles underlining the FOI laws.² Viewed in light of these recommended practices, the ROGI's effectiveness in improving transparency and accountability hinges on the extent to which the primacy of the disclosure requirements it mandates is guaranteed over secrecy norms, which in China are not limited to legal norms. Without comprehending the way in which the relation between various norms is handled, we cannot properly assess the protection afforded to the right to information, nor appreciate the real impacts of China's transparency reform and their implications for comparative legal or political studies of FOI.

Current legal studies of transparency in China tend to view the ROGI as the primary legislation governing the disclosure of information, and thus they often review the regulation's implementation and interpretation in isolation from the country's complex regulatory framework of information control. Similarly, evaluations from the social science perspective tend to focus on bureaucratic performance, with little concern for the legal validity of the grounds used to deny information access. Both lines of research have largely overlooked the norms that are generated by the party-state authorities in parallel with, or in the place of, the ROGI to exempt information from disclosure. From the legal point of view, these norms can be called "extra-legal norms" because they are generally not considered sources of law (or legal norms) under the Chinese legal system. Nevertheless, extra-legal norms are widely adhered to because of their political importance within the party-state governance structure. Uncertainties surrounding these extra-legal norms, however, cloud their applicability, rendering them difficult for the public to resolve conflicts between such norms and legal imperatives of disclosure.

Against this backdrop, this article investigates what solutions are available under the Chinese legal system for resolving conflicts of norms in the FOI context, as well as the extent to which the Chinese courts have enforced those solutions and offered a meaningful remedy to violations of the right to information. The remainder of the article is organized as follows.

2. See Toby Mendel, *Freedom Of Information: A Comparative Legal Survey*, 30 (UNESCO, 2nd ed., 2008), https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI_Toby_Mendel_book_%28Eng%29.pdf (citing to the analysis of best practices recommended by Art. 19 and endorsed by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression).

Section II (FOI Exemptions Based on Extra-Legal Norms) introduces the sources of FOI exemption following the ROGI's adoption and identifies three major categories of extra-legal exemptions that significantly restrict the scope of disclosure: (1) documents defining the specific scope of state secrets; (2) directives on the prior approval of information releases; and (3) ROGI implementation measures. It analyzes in depth the nature and validity of each in light of statutory law and legal doctrine on the hierarchy of law. Section III (Judicial Power in Controlling the Validity of Normative Documents) summarizes the judicial powers to scrutinize the validity of norms that contradict upper-level legal norms. Section IV (Judicial Control of Extra-legal Norms of Information Control) then examines, on the basis of representative cases, the judicial review of extra-legal exemptions that fall within categories one and three above but contradict either the ROGI or other laws. By identifying the gaps in the formal hierarchy of law and judicial failure to control invalid norms, the article reflects on how an otherwise promising legal reform in the direction of greater transparency has been impeded by the character of the party-state. Of particular interest is the outstanding issue of the control of extra-legal powers.

It should be noted that, corresponding to the dynamics of politics and law in China, this article combines doctrinal analysis with a legal realist investigation of court decisions. In particular, it examines sample cases that are representative of actual FOI litigation (i.e., judicial reviews of administrative decisions on FOI requests, often named OGI cases by the Chinese courts) for two main reasons. First, unlike in many other jurisdictions, China lacks landmark cases in the sense of establishing a new principle or creating an interpretation of law that the courts are bound to abide by in future. The Chinese judicial system does not follow the principle of *stare decisis*, and no court, including the Supreme People's Court (SPC), acts as the appellate court for all cases. Second, no authority publishes all of the judgments rendered by the thousands of local courts across this vast country without selection or amendments, and there is no comprehensive digest of or indices to Chinese judicial review cases.³ Therefore, instead of relying on a select group of high-profile cases, this article collects sample cases from three sources.

The first source is the seven case collections published by the SPC, or compiled under its supervision. The cases in these collections are generally called "referential cases," and are widely considered by the Chinese legal community to reflect, to varying extents, the intentions of the SPC and its

3. See Yongxi Chen, *Transparency versus Stability: The New Role of Chinese Court in Upholding Freedom of Information*, 9 TSINGHUA CHINA L. REV. 79, 84-88 (2016) (hereinafter "Chen, *Transparency versus Stability*") (discussing in detail the peculiarities of China's appeal system, as well as issues concerning the publication of judgments).

departments in guiding local courts on the adjudication of a particular type of case or application of the law in a particular field. The second source is mainstream legal databases, including China Judgment Online, the official portal designated by the SPC to publish the judgments rendered by courts at various local levels, and ChinaLawInfo, the country's most comprehensive commercial database of cases. In addition to these two sources, which are often regarded as "primary sources" in legal studies, the third source is news reports on open government information (OGI) cases published in 170+ media outlets, including 152 newspapers, sixteen magazines, and four news websites. OGI cases reported by the media (hereinafter "media-reported cases") are more representative of the status of adjudication in two senses: first, they may encompass cases whose judgments are withheld from online publication by the courts for various discretionary reasons, including the political sensitivity or inconvenience of the case; second, they are more evenly distributed geographically than those retrieved from the aforementioned databases and SPC collections.

FOI EXEMPTIONS BASED ON EXTRA-LEGAL NORMS

(A) ROGI: Ambiguous Scope of Exemption

As general legislation governing public access to government information, the ROGI has two features that distance it from the common model of FOI law: First, its stress on an extensive scope of information subject to proactive disclosure and second, its lack of unequivocal exceptions to disclosure. Article 9 of the regulation provides that governments at the central and local levels, as well as their agencies, should disclose on their own initiative any information that "involves the vital interests of citizens" or "concerns issues which need to be extensively known or participated in by the public."⁴ Articles 10 to 12 stipulate the minimum categories of information to be released by agencies at different levels. These categories largely cover the common classes of proactively released information under many FOI laws, including information on government organizations, planning, budgets, public procurement, and public services.⁵ Furthermore, these three articles specify information pertaining to certain kinds of government activities that have repeatedly resulted in violations of personal or property rights and the otherwise unfair treatment of individuals over the past two decades (such as rural land-taking, urban housing demolition, the

4. For the common features of FOI law, see John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information L.*, 58 ADMIN. L. REV. 85 (2006).

5. Helen Darbishire, *Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities*, in THE WORLD BANK 21-22 (2010).

sale of collectively owned enterprises, and the implementation of family planning policies). The extensive scope of the ROGI's proactive disclosure obligation thus suggests an intention to enhance government accountability through transparency. However, the legal liability arising from noncompliance with these obligations is not stipulated.

The ROGI implicitly provides a right to request and obtain information, which constitutes the core of FOI law. Article 13 stipulates that, in addition to the information covered by Articles 9 through 12, citizens "may also, based on the special needs of such matters as their own production, livelihood and research, etc., file requests [to] obtain government information." Contrary to the best practices of FOI law, however, the ROGI does not outline an exhaustive list of exemptions, which is derived from several sources.⁶ First, different parts of the ROGI contain exemption clauses that are usually grouped into a dedicated chapter in most FOI laws. For example, Article 14 prohibits agencies from disclosing information involving state secrets, and allows them to discretionarily withhold information on trade secrets and personal privacy. Further, Article 8 (under "General Provisions") provides that the "disclosure of government information shall not endanger national security, public security, economic security and social stability." All of the categories of information listed are left undefined. Second, as it is an administrative regulation, the ROGI must give way to laws promulgated by the National People's Congress (NPC) that contain secrecy requirements. For instance, the Archives Law (1996) seals documents stored in state archives for 30 years.⁷ Government documents that are not exempt under the ROGI become inaccessible after being transferred to state archives, as confirmed by the judicial interpretations concerning OGI case trials issued by the SPC.⁸ Last, but by no means least, information control measures are further provided under norms that are distinct from laws and the ROGI. Among them, "extra-legal norms," i.e., norms not considered sources of law, create the most problematic exemptions.

6. See Mendel, *supra* note 2, at 34-37, 39-40.

7. *Danan Fa* (档案法) [Archives Law] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 1987, effective on July 5, 1996), Art. 19, 1995 STANDING COMM. NAT'L PEOPLE'S CONG. (China).

8. *Zuigao Renmin Fayuan Guanyu Shenli Zhengfu Xinxi Gongkai Xingzheng Anjian Ruogan Wenti de Guiding* (最高人民法院关于审理政府信息公开行政案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Relating to the Trial of Administrative Cases Concerning Open Government Information] (promulgated by Sup. People's Ct., July 29, 2011, effective August 13, 2011) Art. 7(2), 2011, SUP. PEOPLE'S CT. GAZ. (China).

(B) Extra-Legal Norms for Information Control

In view of the variety of extra-legal norms, they are here divided into two groups for ease of analysis. The first group comprises norms explicitly referred to by the ROGI as “relevant provisions of the State.” They usually regulate secrecy- rather than disclosure-related issues. The most prominent norms in this group are guidelines defining the scope of state secrets and directives on censorship of the news. The second group of norms seek to regulate OGI issues that complement (or, more precisely, restrict) the ROGI, a typical example of which are ROGI implementation measures. To examine the legal force of extra-legal norms (the “relevant provisions of the State” in particular) and the remedies for conflicts between such norms and the law, an understanding of several concepts used by the Chinese legal doctrine pertaining to the hierarchy of law is required.

1. “Provisions of the State,” Guizhang, and “Normative Documents”

The ROGI allows agencies to follow the relevant provisions of the State that require information releases to be approved by the designated authorities. Such provisions revolve around two mechanisms that connect the OGI regime to the pre-existing regimes of information control. Under Article 7(2), the mechanism of “coordinated release” introduces arrangements for news censorship among others. Under Article 14(2), the mechanism of “secrecy examination” brings in the complicated standards of and comprehensive procedures for classification. The subject matter of the two groups of “provisions of the State” is summarized in Table 1, and the nature of those provisions deserve a detailed analysis.

Table 1. “Provisions of the State” referred to by the ROGI

ROGI	Norms referred to	Matters covered	Mechanisms concerned
Art. 7(2)	“Relevant provisions of the State”	release of information subject to prior approval [by authorities]	coordinated release
Art. 14(2)	Laws, regulations and “relevant provisions of the State”	state secrets; submissions of information to relevant government agencies for determination when uncertainties arise concerning whether the information can be disclosed	Secrecy examination

The phrase “provisions of the State” appears frequently in Chinese legislation, and is used mainly for the purpose of making the legislation in question succinct and complementing the stipulated rules with relevant (and supposedly more detailed) norms set elsewhere.⁹ However, the nature and scope of such provisions remain obscure, rendering it difficult to identify the specific provisions to which legislators are referring and to ascertain their legal force.¹⁰ In practice, provisions of the State are often understood as norms set by the administrative authorities, consisting primarily of *guizhang* and other normative documents.¹¹

9. Ruicong Xia (夏瑞聰), *Woguo “Guojia Youguan Guiding” Guiding de Lifa Wanshan* (我国“国家有关规定”规定的立法完善) [On Enhancing the Legislation Concerning The “Relevant Provisions of the State” in China], NO. 3 J. GUIZHOU POLICE COLLEGE C. (贵州警官职业学院学报) 69, 71-72 (2008).

10. *Id.*

11. *Id.*

Under Chinese law, *guizhang* (sometimes translated as “administrative rules”) are rules issued by governments at prescribed levels to regulate administrative matters in their respective jurisdictions or to implement laws, administrative regulations, and local regulations.¹² The enactment of *guizhang* should follow statutory procedures.¹³ *Guizhang* are considered a source of law lying at the lowest level of the hierarchy of law, with legal force weaker than that of a law (adopted by the NPC and its Standing Committee), administrative regulation (made by the State Council), or local regulation (adopted by a local People’s Congress).¹⁴ *Guizhang* are further divided into departmental *guizhang*, which are set by departments of the State Council, and local government *guizhang*, which are set by governments at the provincial and (selected) municipal levels.¹⁵

Guizhang have a clear legal status, whereas “normative documents” constitute a doctrinal concept without statutorily defined boundaries. The latter refer to all kinds of norms issued by the administrative authorities that have a general binding effect on private parties.¹⁶ Given the complexity and extensive nature of government affairs, there is an extremely large quantity of normative documents that vary widely in their forms, purposes, and enacting bodies. Their enactment does not necessarily follow statutory procedures.¹⁷ Given the considerable latitude afforded to various bodies in norm-making, normative documents are plagued by the illegitimate pursuit of self-interest. Many such documents are found to contradict the law or unreasonably constrain the rights of private parties.¹⁸ According to Chinese administrative law doctrine, normative documents are excluded from sources

12. *Lifa fa* (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., March 15, 2000, effective July 1, 2000) Art.82, 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (China).

13. *GuiZhang Zhiding Chengxu Tiaoli* (规章制度程序条例) [Regulation on the Procedures for Making *Guizhang*] (promulgated by St. Council, November 16, 2001, effective January 1, 2002), 2001 ST. COUNCIL GAZ 322, http://www.gov.cn/gongbao/content/2002/content_61556.htm (China).

14. Mingan Jiang (姜明安), *Xingzhengfa Yu Xingzhengsusongfa* (行政法与行政诉讼法) [Administrative Law and Administrative Litigation Law] 56 (Li Xia (李霞) ed., 5th ed., 2011) (hereinafter “Jiang, Administrative Law and Administrative Litigation Law”).

15. *Id.* at 56; see also *Lifa fa* (立法法) [Law on Legislation] Arts. 88-89.

16. Jiang, Administrative Law and Administrative Litigation Law, *supra* note 14, at 176.

17. Haibo He (何海波), *Xingzheng Susongfa* (行政诉讼法) [Administrative Litigation Law], 96 2nd ed. 2016.

18. SPC justices and leading administrative scholars acknowledge that the issue of illegality has persisted in the making of normative documents across the nation. See Jiang Bixin (江必新) & Liang Fengyun (梁凤云), *XingZheng Susongfa Lilun Yu Shiwu* (行政诉讼法理论与实务) [Theories and Practices on Administrative Litigation Law] 1061-64 (2nd ed. 2011); Jiang, Administrative Law and Administrative Litigation Law, *supra* 14, at 177; Haibo, *supra* note 17, at 96.

of law, which means that their legal force is weaker than that of *guizhang*.¹⁹ They nevertheless have strong practical force because government agencies are inclined to rely on them directly in making decisions. Furthermore, because enacting bodies differ greatly in terms of their political and administrative authority, the practical force of the normative documents they issue differs correspondingly within the administrative system.²⁰

Pursuant to the hierarchy of law, the ROGI has stronger legal force than both *guizhang* and normative documents, and it should thus prevail when inconsistent with the latter. However, by instructing government agencies to refer to the “relevant provisions of the State,” which may by nature be *guizhang* or normative documents, the ROGI subordinates its disclosure imperatives to the secrecy requirements imposed by inferior norms. In this regard, the hierarchy of law is circumvented, with provisions of the State generally applicable unless they contradict laws and administrative regulations other than the ROGI.

It is noteworthy that “provisions of the State” may not be limited to administrative norms. It is unclear whether the scope of “State” here encompasses state organs other than the government, such as the courts, Procuratorates, and People’s Congresses.²¹ A further question, whose answer is less apparent than it seems, is whether the “State” can be understood as the combination of the government and ruling party, and whether the purview of state provisions therefore extends to rules created by the Chinese Communist Party (CCP). The CCP officially declared the principle of the “separation of the party from the government” in the late 1980s, and the government system has since exercised administrative powers on its own and gradually adhered to the principle of law-based administration. However, the CCP and its organs still exercise powers in formulating policies and regulating social relations, and such powers may be considered to fall within the jurisdiction of the government (or even legislature) in non-party-state countries. This phenomenon is rarely addressed in mainstream Chinese administrative law doctrine that presumes the government’s exclusive enjoyment of administrative power. As the CCP has long regarded information control as important to the maintenance of the socialist regime, it has been directly involved in regulating the flow of information and generating regulatory norms. Insofar as those norms are concurrently set by the government (the

19. Jiang, *Administrative Law and Administrative Litigation Law*, *supra* note 14, at 180, 383.

20. Mang Zhu (朱芒), *Lun Xingzheng Guiding de Xingzhi – Cong Xingzheng Guifan Tixi Jiaodu de Dingwei* (论行政规定的性质——从行政规范体系角度的定位) [On the Nature of Administrative Provisions: From the Perspective of the System of Administrative Norms], No.1 CHINA L. SCI. (中国法学) 33, 37 (2003).

21. It is also unclear whether the “State” here refers only to central-level state organs (in particular the State Council and its departments) or also includes local-level public bodies that exercise state powers.

administrative branch of the State), they may be considered to fall within the purview of “provisions of the State.” Two kinds of state provisions reflect the sharing of norm-making power between the ruling party and government in China, as analyzed below.

2. State Provisions on Classification

“State secrets” is the foremost category of information that is exempt from disclosure under the ROGI, although the category is principally governed by the Law on Guarding State Secrets (LGSS). Despite amendments to the LGSS in 2010 and passage of the Implementation Regulation of the LGSS in 2014, the confines of state secrets remain ill-defined and expandable to concealing information on the vital interests of citizens. The 2010 LGSS retains the old law’s definition of state secrets, providing for only one substantive element in determining what constitutes a state secret: matters involving “the security and interests of the State whose divulgence may jeopardize state security and interests in the areas of politics, economy, defense, foreign relations, etc.”²² That element has a much broader meaning than that of “national security interests,” which acts as the basis for classification in many countries, because the “interests of the State” exist in virtually everything that sustains the State.²³ Corresponding to this catch-all definition, the LGSS enumerates six broad categories of matters that can be classified, encompassing not only national defense, foreign affairs, and criminal investigations, but also domains more closely linked to private interests, such as economic and social development and science and technology.²⁴ Secret matters of political parties falling into the aforementioned categories can also be identified as state secrets.²⁵ The LGSS entrusts the State Administration for Guarding State Secrets (SAGSS) to create additional categories of classifiable matters.²⁶ It also empowers the SAGSS, together with other relevant organs of the central government and CCP, to formulate provisions governing “the specific scope of state secrets [under each category] and the respective levels of classification.”²⁷ Given the lack of operable standards for classification under the LGSS and its

22. *Baoshou Guojia Mimi Fa* (保守国家秘密法) [Law on Guarding State Secrets] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 1988, amended April 29, 2010, effective October 1, 2010) Art. 2, 1988 STANDING COMM. NAT'L PEOPLE'S CONG GAZ (China) (hereinafter “Law on Guarding State Secrets”).

23. See, for example, David Banisar, *Legal Protections and Barriers on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States* 15-17 (2007).

24. Law on Guarding State Secrets, *supra* note 22, at Art. 9(1)(a)-(f).

25. *Id.* at Art. 9(2).

26. *Id.* at Art. 9(1)(g).

27. *Id.* at Art. 11.

Implementation Regulation, these clauses grant the SAGSS almost unfettered discretion in determining the normative scope of state secrets.

As of 2011, the SAGSS, together with other organs, had issued over ninety documents concerning the specific scope of state secrets in various areas of work (usually called the Scope of Classified Matters) and covering almost every type of government function.²⁸ These documents are the most important classification standards because, by convention, state organs cite them as the principal legal basis for their classification decisions.²⁹ Although rarely questioned in practice, the legal nature of the Scope of Classified Matters is obscure because of the dual status of the SAGSS. The SAGSS is concurrently the Office of the CCP's Central Secrecy Commission and the bureau in charge of secrecy under the State Council, but is organizationally administered within the CCP's central-level system.³⁰ This unique way of functioning indicates the merger of party power with the State's administrative power, which also exists in certain other areas (such as the supervision of party and state officials, administration of the military, and archive administration) and is usually labeled "one institution [with] two names." Similarly, the state secrecy agencies at the local level are simultaneously party organs and government agencies.³¹ This dual status

28. See Luo Jianghuai (罗江淮), *Jianli Yangde, Zhoumi, Kexue de Guojia Mimi Dingmi Jizhi* (建立严格、周密、科学的国家秘密定密机制) [Establishing A Strict, Thorough and Scientific Mechanism of Determining State Secrets], No. 6 SCI. AND TECH. FOR GUARDING ST. SECRETS (保密科学技术), 30 (2011). Some of the *Scope* is itself classified. The covered areas of work include not only national security, defense, and agency personnel management, but also the enforcement of law (e.g., the work of the courts and police) and regulation of industries and businesses (e.g., shipbuilding, forestry, tourism, railways). They even extend to the provision of public services (e.g., education, health, family planning, environmental protection, disaster relief, social security, sports, culture, etc.); See YONGXI CHEN, AN EMPTY PROMISE OF FREEDOM OF INFORMATION? ASSESSING THE LEGISLATIVE AND JUDICIAL PROTECTION OF THE RIGHT OF ACCESS TO GOVERNMENT INFORMATION IN CHINA, 186-87 (2013) (unpublished Ph.D. Thesis, The University of Hong Kong) (hereinafter "Chen, An Empty Promise of Freedom of Information?").

29. Qi Sun (孙琦), *Baomi Shixiang Fanwei Zhiding Gongzuo Zhong de Jige Wenti* (保密事项范围制定修订工作中的几个问题) [Certain Issues concerning the Work of Determining and Amending the Scope of Secret Matters], No. 7 WORK OF GUARDING STATE SECRETS (保密工作), 26 (2011); WRITING GROUP, GUIDEBOOK FOR SECRECY EXAMINATION IN OPEN GOVERNMENT INFORMATION (信息公开保密审查工作手册) 78 (2009) (Most contributors to this guidebook are working staff of the SAGSS.)

30. See SCOPSR, *Guowuyuan Jigou* (国务院机构) [Organs of the State Council] (2017), <http://www.scopsr.gov.cn/zlzx/jggk/gwyjg/index.html> (China) (The nature, function, and internal structure and positions of each state organ (and party organ) are determined by the Central Commission for Institutional Establishment, which itself is jointly established by the CCP Central Committee and the State Council).

31. *Shanghai Shi Guojia Baomi Ju* (上海市国家保密局) [Shanghai State Administration for Guarding State Secrets], *Zhonggong Shanghai Shiwei Baomi Weiyuanhui Bangongshi (Shanghai Shi Guojia Baomi Ju) Jigou Ji Zhineng* (中共上海市委保密委员会办公室 (上海市国家保密局) 机构及职能) [The Institution and Functions of the Secrecy Commission Office of the CCP Shanghai

prompts the question of whether the activities of state secrecy agencies constitute administrative activities that should be governed exclusively by administrative law.³² As that question remains outstanding in legal doctrine, and as judges deem themselves not legally authorized to review the decisions of party organs, the courts refuse to hear challenges to the classification decisions made by state secrecy agencies.³³ It is also unclear whether norms set by the SAGSS are administrative norms, particularly because many of the provisions under the Scope of Classified Matters (hereinafter “the Scope”), as well as those under other SAGSS norms regarding the conditions and procedures for classification, apply to both state and party organs.³⁴ In the same way that the state agencies in charge of secrecy are not purely administrative authorities, provisions under the Scope can be regarded as provisions of the State that go beyond administrative norms and bear the characteristics of political norms set by the ruling party.

However, it is reasonable to recognize certain provisions under the Scope as administrative norms, insofar as such provisions cover only matters of the government. They result from the joint exercise of the norm-making power of State Council departments and the SAGSS in their respective capacities as administrative authorities. In this regard, provisions under the Scope so prescribed are either *guizhang* or normative documents, depending on whether their issuance has followed the statutory procedures for *guizhang*-making. The validity of such provisions also hinges on their compatibility with laws and administrative regulations.

The provisions of the State concerning classification are not limited to the Scope, and many classification standards under its auspices remain vague and malleable.³⁵ Hence, some departments of the State Council have issued

Committee (Shanghai State Administration for Guarding State Secrets)] (2014), <http://www.shbmj.gov.cn/bmj/2013bmj/jgz/jggk/u1a812.html> (China).

32. See Hanhua Zhou (周汉华), “*Baoshou Guojia Mimifa*” *Xiugai Suping* (《保守国家秘密法》修改述评) [A Commentary on the Amendment of the Law on Guarding State Secrets], No. 3 JURISTS REVIEW (法学家) 51 (2010) (On the unsettled debate over the legal nature of the SAGSS); Lei Zheng (郑磊), *Lunding Mishouquan de Guifan Neihan* (论定密授权的规范内涵) [On the Connotations of the Norms Concerning the Authorization of Classification Power], NO.10 LEGAL SCIENCE (法学) 118, 125-26 (2013).

33. Lei, *supra* note 32, at 125; Dong Gao (董晖) & Wang Lingguang (王凌光), *Shilun Dingmi Zhenyi Zhi Jiejue* (试论定密争议之解决) [On Resolving Disputes over Classifications], NO. 3 ADMINISTRATIVE LAW JOURNAL 108-09 (行政法学研究) (2016).

34. E.g., *Guojia Mimi Dingmi Guanli Zanzing Guiding* (国家秘密定密管理暂行规) [Interim Provisions on Determination of State Secrets] (promulgated by St. Secret Admin., March 9, 2014, effective March 9, 2014) Art. 44, 2014 ST. SECRET ADMIN. GAZ. 1 (China) (stipulating that the “central-level State organs” and “provincial-level organs” provided under this Provisions include, respectively, CCP organs at the central level and CCP provincial committees).

35. See Chen, *An Empty Promise of Freedom of Information?*, *supra* note 28, at 188-96. Most of the Scope standards provide for categories of “work secrets” in parallel with the categories of “state secrets,” and mandate the non-disclosure of information identified as the former. Although

complementary measures,³⁶ and it is not rare for local government agencies to issue detailed guidelines to implement the Scope in their respective jurisdictions.³⁷ When such measures or guidelines are repeatedly applied with binding effects in the administrative system, they become normative documents that are of no less practical importance than the Scope, and they often exert a direct impact on the disclosure of information. Their validity is thus an important issue, and is discussed below in the section on judicial review.

3. State Provisions on Prior Approval

Whereas the provisions of the State concerning classification mainly derive from central-level agencies, the SAGSS in particular, the provisions concerning the prior approval of information release come from more diverse sources. Article 7(2) of the ROGI requires government agencies to follow the “provisions of the State,” according to which the release of prescribed information should be approved in advance. Article 7(1) provides that when the information to be released involves other agencies, the confirmation of those agencies is required prior to information release to ensure the “accuracy and consistency” of the information released by different agencies. To illustrate state provisions, the ROGI drafters listed several laws and administrative regulations that designate specific authorities to examine and approve the release of critical statistics, such as those pertaining to economic censuses, plans for the prevention of geological hazards, and the surveying

the formulation of such provisions lacks statutory authorization from the LGSS, the Law on Civil Servants and several other administrative regulations stipulate that civil servants should guard work secrets. The nature of work secrets and their relation to the “provisions of the State” on classification are important issues to be discussed elsewhere because of the word limit for this paper. See Liang Yi (梁艺), *Gongzuo Mimi Buyu Gongkai de Hefaxing Fansi* (工作秘密不予公开的合法性反思) [Reflections on the Legality of Prohibitions on Disclosing Work Secrets], NO.2 PRESENT-DAY LEGAL SCIENCE (时代法学) 48, 48-55 (2015).

36. For example, in relation to the Specific Scope of State Secrets and the Respective Levels of Classification in the Work of Family Planning, jointly issued by the SAGSS and State Commission for Family Planning in 1989, the Commission issued Complementary Provisions in the same year; See *Zhonghua Renmin Gongheguo Baomifa Quanshu* (中华人民共和国保密法全书) [The Complete Companion for PRC Secrecy Law], 368 (Zhidong Li (李志东) & Wenxiang Tan (檀文) eds., 1999).

37. See Sun, *supra* note 29, at 27. A rather interesting example is the provisions jointly issued by the General Office of the CCP Jiangsu Provincial Committee and General Office of the Jiangsu Provincial Government stipulating the procedures for and substantive conditions concerning “secrecy examination” for both party organs and government agencies; See *Jiangsushen Dangzheng JiGuan Xinxi Gongkai Baomi Shencha Guiding* (江苏省党政机关信息公开保密审查规定) [Jiangsu Provisions on the Secrecy Examination in Relation to the Disclosure of Information by Party and Government Organs] (promulgated by Jiangsushen Guojia Baomiju, September 29, 2015, effective on May 1, 2008) St. Gov. Jingjiang (China).

and mapping of the sea.³⁸ In fact, a greater number of the provisions are created primarily for the purposes of media control and propaganda.

The requirements under Article 7 should be understood in light of two other ROGI articles. For example, Article 6 establishes the principle of the “accurate disclosure of information” and urges government agencies to release accurate information to clarify a given situation if they “discover false or incomplete information that affects or might affect social stability or disturb the social management order.”³⁹ In fact, both Articles 6 and 7 echo the government’s duty to proactively select and release certain information for the purpose of scotching rumors in times of emergency under the laws concerning emergency response, but they extend that duty to non-emergency contexts.⁴⁰ Article 8 of the ROGI provides that the disclosure of information shall not endanger social stability. As the concepts of accuracy and social stability are left undefined, the three articles when read together reflect an inclination toward propaganda and censorship. They encourage government agencies to utilize information disclosure to influence public opinion and maintain “social stability” that they themselves discretionally define.⁴¹

Concerning the prior examination of news releases, a prominent type of “provisions of the State” are documents created by the State Council or its departments to implement the Emergency Response Law, i.e., contingency plans that prepare government agencies to deal with unexpected events that

38. *Quanguo Jingji Pucha Tiaoli* (全国经济普查条例) [Regulation on National Economic Census] (promulgated by the Standing Comm. Nat'l People's Cong., September 5, 2004, effective September 5, 2004) Art. 30, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 415 (China); *Dizhi Zaihai Fangzhi Tiaoli* (地质灾害防治条例) [Regulation on the Prevention and Control of Geologic Disasters] (promulgated by the Standing Comm. Nat'l People's Cong., November 24, 2003, effective March 1, 2004) Art. 11, 2003 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 394 (China); see Kangtai Cao (曹康泰) & Qiong Zhang (张穹), *Zhonghua Renmin Gongheguo Zhengfu Xinxigongkai Tiaoli Duben* (中华人民共和国政府信息公开条例读本) [Annotations on the PRC Regulation on Open Government Information] 49-50 (2009). The relevant legal provisions are found in *Cehuifa* (测绘法) [Law on Surveying and Mapping] (promulgated by the Standing Comm. Nat'l People's Cong., December 28, 1992, amended April 27, 2017) Art. 7, 32, 2017 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

39. *Zhonghua Renmin Gongheguo Zhengfu Xinxigongkai Tiaoli* (中华人民共和国政府信息公开条例) [Regulation on Open Government Information] (promulgated by the Standing Comm. Nat'l People's Cong., April 5, 2007, effective March 1, 2008) Art. 6, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 492 (China).

40. See *Zhonghua Renmin Gongheguo Tufa Shijian Yingduifa* (中华人民共和国突发事件应对法) [Emergency Response Law] (promulgated by the Standing Comm. Nat'l People's Cong., August 30, 2007, effective November 1, 2007) Art. 10, 43, 53, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 69 (China) (Art. 53 stresses that the government responsible for handling the emergency concerned should release information on the situation and responsive operations in a “unified, accurate and timely” manner). On the close relation between this ROGI requirement and a variety of similar requirements under the emergency response regime, see Cao & Zhang, *supra* note 38, at 45-47.

41. See Chen, *Transparency versus Stability*, *supra* note 3, at 79-138 (detailing the agencies’ extensive and abusive use of the exemption concerning social stability).

may cause serious social damage, including natural or accidental disasters and public health or social safety incidents.⁴² Although they are called “plans,” many vest the authorities with certain powers and impose obligations on private bodies, notwithstanding their lack of statutory authorization, primarily because the existing legislation fails to address the strong practical need for power distribution and obligation setting.⁴³ Some national contingency plans designate one particular authority to release information, thereby preventing the citizenry from obtaining “inaccurate” information from the various agencies involved in the emergency response. For instance, the Inter-Ministerial Conference of Environmental Protection has been appointed as the sole authority to release information on environmental emergencies,⁴⁴ and the Ministry of Railways is exclusively charged with disseminating information pertaining to serious railway accidents.⁴⁵

More importantly, the authorities concerned are usually required to release only information that meets various standards of political appropriateness. Because those standards embody the propaganda line and policies of the CCP, they are often issued by the party organs in tandem with the government. In its State Contingency Plan for News Releases about Public Emergencies, the General Office of the State Council (GOSC) stresses that the release of information should facilitate the handling of emergencies.⁴⁶ In a related move, the General Office of the CCP Central

42. *Zhonghua Renmin Gongheguo Tufa Shijian Yingduifa* (中华人民共和国突发事件应对 [Emergency Response Law], Art. 3 (as of the end of 2011, contingency plans had been issued by all provincial and prefectural governments and 98% of county-level governments, in addition to over a hundred general or special plans at the national level); See Zhixi Liu (刘志欣), *Zhengfu Yingji Yuan Xiaoli Dingwei Yanjiu* (政府应急预案效力定位研究) [On the Legal Effect of Government Contingency Plan], 29 (2) J. CATASTROPHOLOGY (灾害学) 154 (2014).

43. See Hongchao Lin (林鸿潮), *Lun Yingji Yuan de Xingzhi He Xiaoli* (论应急预案的性质和效) [On the Nature and Legal Effect of Government Contingency Plan], No.2 JURIST REV. (法学家) 22, 24-28 (2009) (discussing the study of 18 national-level special contingency plans and 31 provincial-level general contingency plans); see also Liu, *supra* note 42, at 155 (discussing the provisions in various contingency plans that create powers or impose obligations).

44. *Guojia Tufa Huanjing Shijian Yingji Yuan* (国家突发环境事件应急预案) [State Contingency Plan for Environmental] (promulgated by the St. Council., December 29, 2014, effective December 29, 2014) Sec. 4.6, 2014 ST. COUNCIL GAZ. 119 (China).

45. *Guojia Chuzhi Tielu Xingche Shigu Yingji Yuan* (国家处置铁路行车事故应急预案) [State Contingency Plan for Environmental] (promulgated by the St. Council., January 23, 2016, effective January 23, 2016) Sec. 4.11, 2006 ST. COUNCIL GAZ. (China).

46. *Guojia Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (国家突发公共事件新闻发布应急预案) [State Contingency Plan for Press Release about Public Emergencies] GOSC (2005) (the full text of the plan is not publicly available); See Hong Lei (宏磊) & Tan Zhen (谭震), *Zai Diyi Shijian Qiangzhan Yulunzhi Gaodian — Guowuyuan Xinwenban Fuzhuren Wangguoqing Tan Xinwen Fayanren Zhidu* (在第一时间抢占舆论制高点——国务院新闻办副主任王国庆谈新闻发言人制度) [Grabbing the Commanding Height of Public Opinion As Soon As Possible], 10 INT'L COMMUNICATIONS (对外大传播) 6-13, 19 (2005). The plan evolved from a directive issued by the

Committee and the GOSC jointly issued Contingency Measures for News Reporting on Public Emergencies, which establishes principles on the control of news releases and the guidance of public opinion.⁴⁷ Based on these two central-level documents, a multitude of contingency plans concerning the release of information have been formulated by governments at various levels,⁴⁸ often accompanied by restrictive measures jointly issued by governments and party committees at the same level.⁴⁹ Certain local plans concerning public security emergencies or so-called “mass events” provide for special arrangements.⁵⁰ A common requirement of these local norms is

Propaganda Department of the CCP Central Committee, namely, *Gaijin he Jiaqiang Guonei Tufa Shijian Xinwen Baodao Gongzuo de Ruogan Guiding* (改进和加强国内突发事件新闻报道工作的若干规定) [Several Provisions on Improving and Reinforcing the Work of News Reporting on Domestic Emergencies], *Wenhua Yu Xuanchuan* (文化与宣传) (Cultural Educ.) (2003).

47. *Tufa Gonggong Shijian Xinwen Baodao Yingji Banfa* (突发公共事件新闻报道应急办法) [Contingency Measures for News Reporting on Public Emergencies] 2008 ST. COUNCIL GAZ. (China) (the full text is not publicly available); see Canfa Wang (王灿发); *Dangbao Ruhe Zuohao Tufa Shijian de Yulun Yingdao* (党报如何做好突发事件的舆论引导) [How Should Party Organs Guide Well the Public Opinion on Emergencies] No. 27 PEOPLE'S TRIBUNE (人民论坛) (2012).

48. *Xianshi Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (西安市突发公共事件新闻发布应急预案) [Xi'an City Contingency Plan for Press Release about Public Emergencies] (promulgated by the City Comm. Xi'an, October 24, 2007) 2007 CITY COMM. XI'AN GAZ. (China); *Xianshi Chang'anqu Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (西安市长安区突发公共事件新闻发布应急预案) [Xi'an City Contingency Plan for Press Release about Public Emergencies] (promulgated by the Police Dep't. Xi'an, April 14, 2014) 2014 POLICE DEP'T. XI'AN (China); see, e.g., *Shanxishen Tufa Gonggong Shijian Xinwen Fafu Yingji Yuan* (陕西省突发公共事件新闻发布应急预案) [Shaanxi Provincial Contingency Plan for Press Release about Public Emergencies] (promulgated by the People's Gov't. Shanxi Province, August 28, 2006) 2006 PEOPLE'S GOV'T. SHANXI PROVINCE GAZ. (China) (discussing the hierarchy of contingency plans in Shaanxi province, which were issued by governments at the provincial, prefectural, and district level).

49. *Changdeshi Renmin Zhengfu Guanyu Yingfa <Changdeshi Renmin Zhengfu Tufa Shijian Xinwen Baodao Shishi Fang'an> de Tongzhi* (常德市人民政府办公室关于印发常德市突发公共事件新闻报道实施方案的通知) [Notice of The General Office of CCP Changde City Committee and The General Office of Changde City Government on Circulating Changde City Contingency Measures for News Reporting on Public Emergencies] (promulgated by City Council Changde, May 23, 2017) Art. 3.4, 2017 CITY COUNCIL CHANGDE GAZ. 11 (China); *Changdeshi Renmin Zhengfu Tufa Gonggong Shijian Xinwen Baodao Yingji Yuan* (常德市突发公共事件新闻发布应急预案) [Changde City Contingency Plan for News Release about Public Emergencies] (promulgated by the City Council Changde, June 12, 2015) 2015 CITY COUNCIL CHANGE GAZ. (China); see, e.g., *Hunanshen Renmin Zhengfu Guanyu Yingfa <Hunanshen Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan> de Tongzhi* (湖南省人民政府办公厅关于印发湖南省突发公共事件新闻报道实施方案的通知) [Notice of The General Office of CCP Hunan Provincial Committee and The General Office of Hunan Provincial Government on Circulating Hunan Provincial Contingency Measures for News Reporting on Public Emergencies] (promulgated by the People's Gov't. Hunan Province, November 8, 2006, effective November 8, 2006) 2006 PEOPLE GOV'T. HUNAN PROVINCE GAZ. 29 (China); *Hunanshen Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (湖南省突发公共事件新闻发布应急预案) [Hunan Provincial Contingency Plan for News Release about Public Emergencies] (promulgated by the People's Gov't. Hunan Province, July 7, 2008) 2008 PEOPLE'S GOV'T HUNAN PROVINCE (China).

50. See, e.g., *Zhoushanshi Daguimoxing Shijian Yingji Yuan* (舟山市大规模群体性事件应急预案) [Zhoushan City Contingency Plan for Large-scale Mass Incidents] Sec. 5.4 (2008) (“mass

the submission of information for prior examination by high-level officials, invariably including leaders of the CCP propaganda department.⁵¹ Thresholds are also often set concerning the entities (usually media outlets) that can request and collect information on the spot.⁵² In practice, press conferences are often the sole means of releasing information, as they afford more direct control over the scope of disclosure.⁵³ Therefore, through the channel of contingency plans, a dual-track censorship system has been imported into the emergency information disclosure arena. That dual-track system contains not only state agency orders, which are ostensibly based on legislation, but also, and especially, party organ directives that have strong de facto binding force on media organizations.⁵⁴ Paradoxically enough, in the emergency context in which the public expects greater access to government

incident” is a term generally adopted by Chinese officials to refer to an activity that is undertaken by a number of persons within a limited timeframe and area to express their discontent over or make claims concerning specific subject matter and that affects social order to varying degrees; in political and legal discourse in mainland China, the term alludes to collective resistance against local authorities); see Shizheng Feng (冯仕政), *Shehui Chongtu, Guojia Zhili yu “Quantixing Shijian” Gainian de Yansheng* (社会冲突、国家治理与“群体性事件”概念的演生) [Conceptualizing Public Disorder: State and the Emergence and Evolution of “Mass Incidents” in China], 5 SOC. STUD. (社会学研究) 63, 77-85 (2015).

51. *Fenghuashi Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (奉化市突发公共事件新闻发布应急预案) [Fenghua City Contingency Plan for News Release about Public Emergencies] (promulgated by the People’s Gov’t Fenghua, October 14, 2014) Sec. 5, 2014 PEOPLE’S GOV’T FENGHUA GAZ. 120 (China); see, e.g., *Abazhou Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (阿坝州突发公共事件新闻发布应急预案) [Aba Autonomous Prefectural Contingency Plan for News Release about Public Emergencies] (promulgated by the People’s Gov’t. Abazhou, September 2, 2009) Pt. IV(i), PEOPLE’S GOV’T ABAZHOU GAZ. (China).

52. *Anshunshi Tufa Gonggong Shijian Xinwen Fabu Yingji Yuan* (安顺市突发公共事件新闻发布应急预案) [Anshun City Contingency Plan for News Release about Public Emergencies] (promulgated by the People’s Gov’t. Anshun City, February 28, 2017) Pt. V (iii), PEOPLE’S GOV’T ANSHUN CITY GAZ. (China); *Quanzhoushi Wenhua Guangdian Xinwen Chubanjū Guanyu Jinyibu Chongshen XuanChuan “Sanbao” Zhidu de Tongzhi* (泉州市文化广电新闻出版局关于进一步重申宣传管理泉州市文化广电新闻出版局关于进一步重申宣传管理“三报”制度的通知) [Notice of Quanzhou City Bureau for Culture, Broadcasting, Press and Publication on Re-stressing the System of Three Reports “to Superior Authorities for Approval” in Propaganda Management] (promulgated by the Press and Publication Bureau, June 24, 2013) Pt. I (i), 2013 PRESS AND PUBLICATION BUREAU GAZ. 205 (China); see, e.g., *Kailuxian Tufa Gonggong Shijian Xinwen Baodao Shishi Fangan* (开鲁县突发公共事件新闻报道实施方案) [Kailu County Contingency Measures for News Reporting on Public Emergencies] (promulgated by the People’s Gov’t Kailu County, April 30, 2015, effective July 1, 2013) Art. 3.8, 2015 PEOPLE’S GOV’T KAILU COUNTY GAZ. (China).

53. Ye Hao (叶皓), *Tufa shijian de Yulun Yingdao* (突发事件的舆论引导) [Guiding Public Opinion about Emergencies] 163-76 (2009).

54. Weiwei Liu (劉偉偉), Politics, *Zhengzhi, Shichang Yu Dangbao de Yingxiangli* (政治, 市場與黨報的影響力) [Market and the Influence of Party Organs], 10 TWENTY-FIRST CENTURY (二十一世紀) 121, 121-27 (2009); see ROGIER CREEMERS, ROUTLEDGE HANDBOOK OF MEDIA LAW: MEDIA CONTROL WITH CHINESE CHARACTERISTICS, 275-78 (Monroe E. Price, Stefaan G. Verhulst, et al., ed., 2013) (discussing the dual-track system).

information, it is often able to obtain less information than in the non-emergency context because of the contingency plans referred to by the ROGI.

Similar to the uncertainty over the legal nature of the Scope provisions issued by the SAGSS with dual status, confusion clouds the legal nature of contingency plans that are jointly issued by party committees and governments at various levels.⁵⁵ Insofar as those plans are formulated by the latter in exercising their administrative power, they can arguably be regarded as administrative norms with the qualification of “normative documents.” From a legal point of view, provisions in any normative document that create powers or impose obligations in the absence of authorization by the law are *ultra vires* and should be considered invalid. However, no PRC law explicitly protects freedom of speech or freedom of the media, and the party-state regime of news control remains in operation despite the constitutional changes made since 1949.⁵⁶ As a consequence, before the ROGI’s introduction, there was no institutional channel through which private parties could seek a review of the norms regulating the collection, processing, and release of news.⁵⁷ As of the end of 2015, there had been no reported challenge, in the FOI context, to the legality of jointly issued contingency plans referred to as “provisions of the State” in Article 7 of the ROGI. This lack of challenges is not surprising, as the parties most affected by such plans are journalists. Journalists in China tend to be rather reluctant to confront the authorities (whether party organs or government agencies) in charge of news censorship, as those authorities also exert control over journalists’ professional qualifications and remuneration.⁵⁸

4. Implementation Measures Imposing New Exemptions

Although “provisions of the State” are the most problematic sources of exemption owing to their fluid scope and uncertain nature, documents

55. See Lin, *supra* note 43, at 23-24 (discussing the introduction to the debate surrounding the nature of contingency plans).

56. See H.L. FU & RICHARD CULLEN, *MEDIA LAW IN THE PRC* (1996) (discussing the approaches of media control through secondary regulations and ad-hoc administrative notices in China).

57. Because political freedoms and rights are not “lawful rights and interests” that can be protected under the Administrative Litigation Law, issues concerning news censorship cannot be brought before the courts through judicial review proceedings. See *Xingzhengsusongfa* (行政诉讼法) [ALL (Administrative Litigation Law)], Art. 11 (1989); Qibo Jiang and Yulin Li (姜启波 And 李玉林), *Anjian Shouli* (案件受理) [Case Acceptance] 56 (2008).

58. Dongxiao Li (李东晓), *Jujian Zhengzhi Zhong Guo Meiti Fanfu de Shehuixue Kaocha* (居间政治: 中国媒体反腐的社会学考察) [Intermediary Politics : A Sociological Study Of Anti-Corruption Initiatives Of Chinese Media] 215-16, 220 (2012) (discussing the authorities’ measures to control journalists in various ways); See Qinglian He, *The Fog Of Censorship: Media Control In China* 32-33, 36-38, 40-48 (Paul Frank trans., 2008).

created by government agencies for the sole purpose of handling OGI matters also produce exemptions whose validity is doubtful.

Compared with the pioneering local *guizhang* on OGI promulgated before 2007, the ROGI seemingly provides for fewer categories of exemption.⁵⁹ However, motivated by the practical need to withhold additional categories of information and inspired by the lessons of overseas FOI laws, a host of local governments and central departments have created extra exemptions when setting administrative norms that purport to implement or interpret the ROGI. Most of these extra exemptions cover three categories of information: (1) information concerning the internal administration of government agencies, (2) information on issues deliberated within government agencies, and (3) information whose disclosure would impede law enforcement.⁶⁰ According to comparative studies of FOI laws by Chinese scholars, the second exemption helps to ensure the frankness of discussions among policy- and decision-makers, whereas the third helps to protect the efficiency and fairness of law enforcement.⁶¹ In view of the international experience, government officials contend that the ROGI should not have omitted these exemptions, and thus it is reasonable to include them in the implementation measures.⁶²

Governments at various levels appear particularly eager to exclude information related to the deliberative process. At the central level, for instance, the Ministry of Education, State Administration of Taxation, and State Audit Office stipulate in their respective departmental *guizhang* on OGI that information on the processes of investigation, deliberation, and handling (hereinafter “process information”) should be exempt from disclosure.⁶³ The provincial governments of Heilongjiang, Fujian, Yunnan, and Shanghai and city governments of Nanjing, Ningbo, and Hangzhou provide for a similar

59. Hanhua Zhou (周汉华), *On the Legal Questions of Local Legislation on Open Government Information* (地方信息公开规定法律问题探讨——写在《政府信息公开条例》实施一周年之际) NO. 4 E-GOVERNMENT (电子政府) 52, 52-53 (2009).

60. *Zhiqinquan yu Zhengfu Xinxigongkai Zhidu Yanjiu* (知情权与政府信息公开制度研究) [Research on The Right to Know and Open Government Information Regime] 104-06, 168-83 (Wang Wanhua (王万华) ed., 2013) (hereinafter “Research on the Right to Know”).

61. Weidong Yang (杨伟东), *Zhengfu Xinxigongkai Zhuyao Wenti Yanjiu* (政府信息公开主要问题研究) [Research on Major Issues in Open Government Information] 173-74 (2013); *Research on the Right to Know*, *supra* note 60, at 178-81.

62. Yang, *supra* note 61, at 175.

63. *Jiaoyubu Jiguan Zhengfu Xinxigongkai Shishi Banfa* (教育部机关政府信息公开实施办法) [Implementation Measures on Open Government Information in the Organs of the Ministry of Education], Art. 14 (issued on May 2008); *Guojishuwuzongju yi Shenqing Gongkai Zhengfu Xinxigongcheng* (国家税务总局依申请公开政府信息规程) [Procedures of the State Administration of Taxation for Disclosure of Government Information upon Request], Art. 13 (issued on April 2, 2008); *Shenji Jiguan Zhengfu Xinxigongkai Guiding Shixing* (审计机关政府信息公开规定 试) [Provisions on Open Government Information by Audit Organs for Trial Implementation], Art. 11 (issued on April 30, 2008).

exemption in their local OGI *guizhang*.⁶⁴ According to official annual reports, of the decisions rejecting OGI requests by citing exemptions, 18.9% of those in Fujian province between 2008 and 2012 and 30% of those in Yunnan province between 2010 and 2012 were based on the exemption of process information.⁶⁵

Although there are reasonable grounds for exempting process information under certain circumstances, it is obvious that the ROGI provides no basis for the exemptions introduced by the aforementioned local and departmental *guizhang*. Because *guizhang* can only provide detailed implementation measures within the confines of upper-level legislation, these provisions on extra exemptions are invalid. The illegal expansion of exemptions is, rather surprisingly, further supported by the GOSC, which the ROGI designates as the department responsible for promoting and supervising OGI work throughout the nation. The GOSC successively issued three opinions regarding ROGI implementation (hereinafter “GOSC Opinions”). In addition to setting out concrete measures concerning proactive disclosure and secrecy examination, the Opinions also establish substantive standards on both the standing of OGI requesters and scope of government information.

GOSC Opinion No. 36 (2008) restricts the eligibility of OGI requesters and imposes a need-to-know condition:

An administrative organ may refuse to provide the government information that [is] irrelevant to the requester's special needs such as his own production, living, scientific research, etc.⁶⁶

Some officials believe that this proscription is inspired by Article 13 of the ROGI, which stipulates that citizens may file GOI requests based on their own special needs.⁶⁷ However, that article does not explicitly identify such

64. See Ying Huang (黄莹), *Xingzhengjuguan Guocheng Xing Xinxi Gongkai Huomian Fanwei Zhi Jieding* (行政机关过程性信息公开豁免范围之界定) [On Defining the Exemption of Process Information of Administrative Organs], *SICHUAN JINGCHA XUEYUAN XUEBAO* (四川警察学院学报) [JOURNAL OF SICHUAN POLICE COLLEGE] 21, 25-26 (2013) (discussing local *guizhang* with exemptions related to information on the processes of investigation, deliberation, and handling).

65. These calculations are made by the author based on the annual OGI reports released by the governments of Fujian and Yunnan.

66. *Guowuyuanbangongting Guanyu Shixing Zhonghuarenmingongheguzhengfu Xinxi Gongkai Tiaoli Ruogan Wenti de Yijian* (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) [Opinion of the General Office of the State Council on Several Issues Concerning the Implementation of the PRC Regulation on Open Government Information], Point 14 (issued on April 29, 2008).

67. Zhongle Zhan & Yu Su (湛中乐 & 苏宇), *Lun Zhengfu Xinxi Gongkai Paichu Fanwei de Jieding* (论政府信息公开排除范围的界定) [On the Scope of Exemptions from Open Government Information] NO. 4 *XINGZHENG FAXUEYANJIU* (行政法学研究) [ADMINISTRATIVE LAW JOURNAL] 43 (2009).

special needs as a precondition for the exercise of the right to information. Although the provision's wording creates some ambiguity, that ambiguity could be resolved through contextual or systematic interpretation. The mention of special interests is to allow requesters to gain access to information based on their private interests and needs. Accordingly, disclosure upon request differs from proactive disclosure, which is based primarily on the need to promote the public interest. By requiring an examination of requesters' needs, Opinion No. 36 turns special needs into a restriction on the right to information and makes them a de facto exemption.

GOSC Opinion No. 5 (2010) confirms the needs test created by Opinion No. 36, and further redefines the concept of government information:

Government information to be provided [to] requesters should be formal, accurate and complete; such information can be put to official use by the requesters in their production, daily lives and research, and can be used as documentary evidence in litigation or administrative procedures. Therefore, government information that should be disclosed under the ROGI does not include, in general, information concerning internal administration that is generated or obtained by agencies in their daily work, or process information that is in the course of discussion, deliberation or investigation.⁶⁸

These proscriptions are again unduly restrictive interpretations of the scope of government information. Article 2 of the ROGI defines government information as "information made or obtained by administrative agencies in the course of exercising their responsibilities and recorded and stored in a given form." There is clearly no restriction on the completeness of information or suitability of information for purposes concerning "official use" or "documentary evidence," as stipulated by the GOSC. It is therefore unjustifiable to exclude internal information or process information from the scope of government information subject to disclosure.

Pursuant to the administrative law doctrine, the GOSC is an internal organ of the State Council rather than a department with a full legal personality. As a consequence, norms set by the GOSC are normative documents rather than *guizhang*.⁶⁹ The opinions at issue are, by their nature, interpretations made by an administrative agency regarding a piece of legislation, and hence are binding only on the agency's subordinate bodies,

68. *Guowuyuanbangongting Guanyu Zuohao Zhengfu Xinxi yi Shenqing Gongkai Gongzuo de Yijian* (国务院办公厅关于做好政府信息依申请公开工作的意见) [Opinion of the General Office of the State Council on Undertaking Well the Work of Disclosing Government Information Upon Request], Point 2 (issued on January 12, 2010).

69. Xiangjun Kong (孔祥俊), *Falu Fangfalun Diyi Juan Faluguifan de Xuanze yu Shiyong* (法律方法论 (第一卷) ——法律规范的选择与适用) [Legal Methodology (Vol. I): The Choice and Application of Legal Norms] 56-58, 387 (2006).

not on the courts.⁷⁰ In theory, those opinions should be rendered invalid insofar as they contradict the ROGI, and citizens have solid grounds for obtaining a judicial remedy for decisions that reject OGI requests concerning them. However, the political authority of the GOSC within the administrative machinery and its status as chief supervisor of ROGI implementation are causes for concern to the courts when they are dealing with challenges to the validity of exemptions based on GOSC Opinions. Similarly, the prevailing political line is also a matter of concern when the courts are invited to scrutinize provisions of the State that introduce exemptions on politically sensitive issues. Uncertainty thus surrounds the judiciary's handling of conflicts between the ROGI and the extra-legal norms analyzed above.

JUDICIAL POWER IN CONTROLLING THE VALIDITY OF NORMATIVE DOCUMENTS

According to mainstream administrative law doctrine and Law on Legislation, as noted above, "normative documents" lie at the bottom of the legal hierarchy. These "normative documents" become invalid (i.e., lose their binding force) if they contradict the provisions of higher-level enactments of legislation, including laws, administrative regulations, local regulations, and *guizhang*. However, the Chinese courts' role in controlling the validity of normative documents is rather restricted.

Generally, courts in Western countries enjoy the power to supervise the validity of the normative basis of administrative decisions.⁷¹ In contrast to Western supervisory power, in China scholars divide power into three components: (1) the power to determine the validity of the norm at issue, (2) the power to refuse to apply an invalid norm, and (3) the power to publicly declare a norm invalid.⁷² The Chinese courts do not enjoy the third component of supervisory power, but can be said to enjoy the first and second, as discussed below. Chinese courts can exercise supervisory power through the reviewing the validity of a norm only incidentally when reviewing the legality of an administrative decision made on the basis of that norm.⁷³ Citizens cannot directly litigate a norm's validity as a principal cause

70. Jiang, *Administrative Law and Administrative Litigation Law*, *supra* note 14, at 185-87.

71. See Carlo Guarnieri, Patrizia Pederzoli, et al., *The Power of Judges: A Comparative Study of Courts and Democracy* 144 (2002).

72. *Fagui Shencha yu Fagui Pingjia Yanjiu* (法规审查与法规评价研究) [A Study of The Review and Assessment of Regulations] 184-87 (Jiang Ming'an (姜明安) ed., 2014); see Wu Peng (吴鹏), *Zhongguo Xingzhengsusong Falu Shiyong Zhongdi Faluguifan Shencha* (中国行政诉讼法适用中的法律规范审查) [Review of Legal Norms in the Application of Legislation in China's Administrative Litigation] No. 2 Faxue Zazhi (法学杂志) [Law Science Magazine] 139, 140 (2007).

73. The powers to annul or alter various types of regulations and *guizhang* are distributed by the Law on Legislation to various non-judicial authorities, including the State Council, NPC and its

of action because the creation of norms (whether in the form of *guizhang* or normative documents) is considered an “abstract administrative act,” and thus excluded from the scope of case acceptance for judicial review.⁷⁴

The judicial power to conduct an incidental review of the validity of norms is implied by the 1989 Administrative Litigation Law (ALL),⁷⁵ and further provided for by the SPC. Two separate provisions of the ALL allude to validity control. First, the “incorrect application of laws and regulations” constitutes grounds for judicial review.⁷⁶ Errors in application encompass not only the application of an incorrect legal norm but also the application of a legal norm whose content is invalid, the latter of which entails examination of the norm’s validity.⁷⁷ Second, the courts are not bound by all types of legal norms: they should try cases “according to” (依据) laws, administrative regulations, and local regulations,⁷⁸ but “refer to” (参照) *guizhang*.⁷⁹ Courts that refuse to recognize the validity of *guizhang* that contradict laws and regulations can use the distinction between *guizhang* and higher-level legal norms to do so.⁸⁰ Legislators have made it clear that *guizhang* are excluded from the compulsory criteria for trials (审判依据) for two reasons.⁸¹ First, many *guizhang* are relatively poor in quality, and they often deviate from higher-level norms. Second, if a government agency issuing *guizhang* is sued, and if the *guizhang* it sets are adopted as the criteria for adjudicating

Standing Committee, and governments and People’s Congresses at prescribed levels. The courts can, via the SPC, refer norms deemed invalid to those authorities. See LoL, Arts. 87 and 88 (2000). For a summary of the competent authorities for the annulment of norms, see He, *supra* note 17, at 90.

74. To stress the incidental nature of validity reviews by the courts, ALL, as amended in 2014, stipulates under Art. 53 that if a citizen believes a normative document issued by a department of the State Council or local government to be illegal, he or she can request that the court incidentally review that document when bringing administrative litigation against an administrative decision; *Xingzhengsusongfa* (行政诉讼法) [ALL (Administrative Litigation Law)], Art. 12(2) (promulgated by the NPCSC, April 4, 1989, amended November 1, 2014, effective May 1, 2015).

75. ALL was amended in 2014. Because all of the cases discussed in this article were adjudicated or resolved in accordance with the pre-amended ALL, only the provisions in the 1989 ALL are cited and analyzed hereinafter.

76. “The people’s court shall quash a specific administrative act in any of the following cases: [w]here the application of laws and regulations were incorrect;” See ALL, Art. 54(2)(b).

77. See *Xingzheng Shenpan yu Xingzhengshifa Shiwu Zhiyin* (行政审判与行政执法实务指) [Practical Guidance on Judicial Review and Administrative Enforcement of Law] 675-80 (Cai Xiaoxue (蔡小雪) ed., 2009) (hereinafter “Practical Guidance on Judicial Review”).

78. ALL, Art. 52 (1989).

79. ALL, Art. 53 (1989).

80. Bixin Jiang & Fengyun Liang (江必新 & 梁风云), *Xingzhengsusongfa Lilun yu Shiwu* (行政诉讼法理论与实务) [Theories and Practices on Administrative Litigation Law] 1043-44, 1054-56 (2nd ed. 2011).

81. *Zhonghuarenmingongheguo Xingzhengsusongfa Jianghua* (《中华人民共和国行政诉讼法》讲话) [Lectures on the Administrative Litigation Law] 179 (HU Kangsheng (胡康生) ed., 1989).

the lawsuit, then that agency would actually become the judge of its own case, which goes against the principle of fairness.⁸² For similar reasons, it is generally accepted by SPC justices and scholars alike that, with regard to normative documents, the courts should apply them in accordance with their conformity to higher-level legal norms.⁸³ Moreover, given that a normative document is not a source of law, in practice, the courts accord less deference to normative documents than to *guizhang*.⁸⁴

In judicial interpretations of the ALL issued in 1999, the SPC stipulates that the courts can quote *guizhang* and other normative documents in judgments if these norms are “valid.”⁸⁵ Since the 1990s, the SPC has expressed through a series of judicial replies (批复) the steady policy that judges should directly apply superior legal norms (such as laws and administrative regulations) when they conflict with inferior norms (such as local regulations and *guizhang*).⁸⁶ In 2004, the SPC further issued a comprehensive judicial document concerning the application of law entitled Minutes of the Symposium on the Application of Legal Norms in The Trial of Administrative Cases (hereinafter “the Minutes”).⁸⁷ The Minutes make it

⁸² *Id.* at 176-177.

⁸³ It should be noted that the amended ALL makes the point much clearer. Art. 64 of ALL 2014 explicitly states that when a court finds a normative document to be illegal, it should preclude the document from the basis on which the legality of the administrative decision in question is assessed. Jiang & Liang, *supra* note 80, at 1063-68; *Xingzhengfa yu Xingzhengsusongfa* (行政法与行政诉讼法) [Administrative Law and Administrative Litigation Law] 190, 510 (Jiang Ming'an (姜明安) ed., 5th Ed., 2011); See Practical Guidance on Judicial Review, *supra* note 77, at 660-61.

⁸⁴ He, *supra* note 17, at 96-97.

⁸⁵ *Zuigaorenminfayuan Guanyu Zhixing Zhonghuarenmingongheguo Xingzhengsusongfa Ruogan Wenti de Jieshi* (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) [Interpretations on Several Issues Concerning the Implementation of the Administrative Litigation Law], Art. 62(2) (adopted by SPC on November 24, 1999, effective March 10, 2000).

⁸⁶ See Kong Xiangjun (孔祥俊), *Falu Fangfalun Diyi Juan Faluguifan de Xuanze Yu Shi* (法律方法论 (第一卷) ——法律规范的选择与适用) [Legal Methodology (Vol. I): The Choice and Application of Legal Norms] 211-14 (2006) (detailing an introduction to these replies).

⁸⁷ *Guanyu Yinfa Guanyu Shenli Xingzheng Anjian Shiyong Faluguifan Wenti de Zuotanhui Jiyao de Tongzhi* (关于印发《关于审理行政案件适用法律规范问题的座谈会纪要》的通知) [Notice of the Supreme People's Court on Printing for Distribution the Minutes of the Symposium on the Application of Legal Norms in the Trial of Administrative Cases] (issued by SPC on May 18, 2004) (hereinafter “Notice of the Supreme People's Court on Printing”). These Minutes tackle the problems concerning the application of law that often occur in judicial practice, and establish a series of standards accordingly. Their aim is to provide a statutory basis for the consensus reached in daily trials and to render that consensus clearer and more operable to ensure that local courts can overcome interference by other authorities when they refuse to apply norms set by the latter in contravention of superior norms. Although the Minutes do not take the form of judicial interpretation, the SPC requires local courts to “refer to and implement” their provisions. Therefore, the Minutes are regarded as a quasi-judicial-interpretation and binding on courts at all levels. See Kong Xiangjun in *XINGZHENG SIFAJIESHI LIJIE YU SHIYONG* (行政司法解释理解与适用) [THE UNDERSTANDING AND APPLICATION OF JUDICIAL INTERPRETATIONS RELATED TO

clear that judges should, on their initiative, review the conformity of the norms applied by a defendant with regard to higher-level legal norms:

Currently, many specific administrative acts are based on lower-level norms without reference to higher-level norms. In this situation, in order to uphold the unity of the legal system, the people's courts shall judge whether these lower-level norms conform to higher-level norms when reviewing the legality of the specific administrative acts [at issue]. If the courts find that these lower-level norms contradict higher-level norms, [they] should determine the legality of the challenged specific administrative act according to the higher-level norms.⁸⁸

In the reasoning of the judgment, the people's courts can comment on whether [the] normative document [applied by the defendant] is legal, valid, reasonable or appropriate.⁸⁹

Under to the aforementioned legal provisions and judicial policies, although the Chinese courts are not empowered to invalidate any norm made by the administrative authorities, they nevertheless enjoy the power to identify and refuse to enforce invalid lower-level norms, i.e., *guizhang* and normative documents.⁹⁰ Thus, in the context of FOI litigation, the courts have the power to assess the validity of various norms seeking to limit the scope of information disclosure, to refuse to apply the invalid norms and to quash non-disclosure decisions based on those invalid norms.

JUDICIAL CONTROL OF EXTRA-LEGAL NORMS OF INFORMATION CONTROL

To examine the judicial control of extra-legal norms that bar disclosure, this study retrieves cases from the three sources as introduced in the first section. Two kinds of norms are found to have been most frequently challenged and have significant impacts on the right to information's functions. They are (1) provisions issued by local authorities on the scope of state secrets pertaining to the outstanding issues of political campaigns, and (2) a new exemption created by the GOSC concerning the information on decision-making. Although positive signs of legality review can be detected in a few cases concerning other extra-norms, the judicial handling of those

ADMINISTRATIVE CASES] 353 et seq. (SPC Research Office (最高人民法院研究室) ed., 2009) (explicating the drafting background and legal effect of this judicial document).

88. Notice of the Supreme People's Court on Printing, *supra* note 87, at Section II, Point 1, the Minutes.

89. Notice of the Supreme People's Court on Printing, *supra* note 87, at Section I, the Minutes.

90. See Hanhua Zhou (周汉华), *Xingzhengsusong zhongdi faluwentu* (行政诉讼中的法律问题) [Questions of Law in Administrative Litigation], *Xingzhengsusongfa de xinfa zhan* (行政诉讼法的新发展) [New Developments in Administrative Litigation] 116 (Lu Yanbin (吕艳滨) ed., 2008).

norms tended to be rather unusual. We will begin with those positive signs to set the stage.

A. Positive Signs of Review of Norms

Two cases retrieved from official sources demonstrate that local courts have confirmed their role in reviewing the applicability of pro-secrecy norms. The first, retrieved from China Judgment Online, is *Jiali Industrial (Holdings) Co., Ltd. v. Sanshui District Government of Foshan City* (hereinafter "*Jiali Ltd.*"), which concerned a normative document issued by a provincial government.⁹¹ The defendant government had refused to accept an OGI request because the requester was a Hong Kong-based company, and thus located outside the jurisdiction of PRC law.⁹² During the trial of the first instance, the government further claimed that its decision was grounded in the Guangdong Provincial Procedures for Open Government Information upon Requests (hereinafter "Guangdong Procedures"), which stipulates that requests made by overseas citizens or legal persons should not be accepted. The plaintiff objected on the grounds that Guangdong Procedures was merely an internal document that had not been published and hence did not constitute a legal basis for the defendant's refusal. The court ruled against the government, holding that because the Guangdong Procedures constitutes neither regulation nor *guizhang*, the court would not rely on it in determining the legality of the government's decision.⁹³ In other words, the court disregarded the local norm at issue because it contradicted the ROGI, which imposes no restrictions on the requester's location. In an appeal, the defendant government contended that Guangdong Procedures was consistent with another document issued by an internal section of the GOSC stipulating that government agencies may refuse OGI requests made by overseas citizens or legal persons.⁹⁴ Instead of addressing that contention involving the GOSC-

91. See *Jiali Industry Co. Ltd. v. Foshan District Government of Foshan City* (嘉励实业 (集团有限公司)诉佛山市三水区人民政府), April 11, 2014 (Guangdong High Ct.) (recounting that a company requested that the defendant government disclose a series of documents concerning the granting and revocation of land-use right pertaining to a golf course). See also *Bu Shouli Xinxi Gongkai Shenqing Sanshui Quzhengfu Zhongshen Baisu* (不受理信息公开申请 三水区政府终审败诉) [Refusing to Handle an OGI Request; Sanshui District Government Lost in The Trial of Final Instance], Southern Metropolis Daily, May 21, 2014, at FB04.

92. As a rule, legislation promulgated by authorities in mainland China do not apply to the Hong Kong Special Administrative Region unless explicitly provided for by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which embodies the principle of "one country, two systems." Therefore, Hong Kong is usually regarded as an "overseas jurisdiction" vis-à-vis the enforcement of PRC legislation.

93. *Jiali Ltd.*

94. The document referred to is a reply made by the GOSC's secretariat to a question from the National Development and Reform Commission. See *Guoquyuanbangongtingbishuju Guanyu Waiguo Gongmin Faren huo Qita Zuzhi Xiang Wo Xingzhengjiguan Shenqing Gongkai Zhengfu*

derived norm, the appellate court followed the court of first instance's approach, stressing that Guangdong Procedures, as a normative document issued by the General Office of the Guangdong Government, was inapplicable in the current case.⁹⁵

Whereas *Jiali Ltd.* involved the direct scrutiny of the validity of a norm issued by a local government, the second referential case, retrieved from an SPC publications, reflects a more cautious approach to the validity of normative documents issued by the GOSC. In *Dalian Hualong Holdings Co. Ltd. Tianjin Real Estate Development Co. v. Tianjin Land Resources and Housing Bureau* (hereinafter "*Hualong Co.*"), the defendant bureau had withheld requested information by claiming that it constituted "internal managerial information" pursuant to GOSC Opinion No. 5.⁹⁶ In its judgment, the court quashed the decision solely on the grounds that the bureau had failed to submit the information at issue for the court's scrutiny and hence failed to satisfy its burden of proof. In the case commentary written by the judge adjudicating the case, he declared that the GOSC Opinion was by nature a normative document and should be referred to by the courts only when it did not contradict laws, regulations, or *guizhang*.⁹⁷ This declaration indirectly recognized the necessity of the judicial examination of GOSC Opinions' consistency with other higher-level norms. *Hualong Co.* was thus the first referential FOI case to address the applicability of GOSC Opinions. Nevertheless, the judge proceeded to examine the defendant bureau's argument without any further analysis of Opinion No. 5. Instead, he discussed the appropriate elements of "internal managerial information" and the conditions for its disclosure, which means that he implicitly accepted Opinion No.5's applicability in this case.⁹⁸ The obscure review approach reflected in the case commentary in *Hualong Co.*, combined with the judge's sidetracking toward the issue of burden of proof in his judgment, suggests that he was reluctant to recognize the incompatibility between GOSC documents and the ROGI. In the cases concerning other pro-secrecy norms discussed below a similar reluctance is reflected.

Xinxi Wenti de Chuli Yijian (国务院办公厅秘书局关于外国公民、法人或其他组织向我行政机关申请公开政府信息问题的处理意见) [Opinion of the Secretary Section of General Office of State Council on the Handling of Requests for Government Information Made by Foreign Citizens, Legal Persons and Other Organizations] (issued on June 23, 2008).

95. *Jiali Ltd.*

96. See *Dalian Hualong Group Tianjin Real Estate Development Co. v. Tianjin Land Resources and Housing Bureau* (大连龙华企业集团公司天津房地产开发公司诉天津市国土资源和房屋管理局撤销不予公开告知书案) [Re: Annulment of Nondisclosure Decision], MCAC REPORTS 356 (2013).

97. *Id.* at 359.

98. *Id.* at 360-61.

B. Agency-Made Norms Defining State Secrets

The most significant norms barring disclosure are local agency documents defining state secrets. The LGSS provides only vague categories of secrets and authorizes the NAGSS and other central departments to make provisions concerning the specific scope of state secrets in various areas of government work, i.e., the Scope. Although over 90 Scope have been issued at the national level, covering almost every aspect of state governance, the classification standards therein are often inadequately specific, which leaves room for local governments to create more operable standards concerning information generated or handled in the exercise of their powers. Such derivative standards take the form of normative documents issued by agencies with classification power. In practice, these documents become the direct basis for classification decisions, although they are not sources of law. In fact, their compatibility with the law is often questionable because of China's ingrained culture of over-classification and the lack of any channel under the LGSS by which citizens can challenge a classification decision.⁹⁹

The ROGI's implementation provided an unprecedented opportunity for citizens to question the legality of classification standards through FOI litigation, at least in theory. A series of OGI cases concerning the taking of private property during the political campaigns of the 1950s and 1960s reveal the profound impacts of agency-made norms on core FOI values. As we will see, the courts have largely failed to uphold the legal hierarchy.

1. Problematic Norms Concealing Outstanding Historical Issues

In 2006, the Shanghai housing authority issued a notice categorically requiring the classification of all materials concerning *gongfang* (public housing, particularly that taken over from private parties) as state secrets.¹⁰⁰ Relying on this self-made notice (hereinafter "*Gongfang Notice*"), the authority and its subordinate departments rejected a large number of OGI requests filed by individuals wishing to inspect the historical records on the registration and use of *gongfang* that had once belonged to them or close relatives. Insofar as the *Gongfang Notice* requires registration materials on

99. Only state organs and social units are allowed to request a review of classification decisions made by various decision-makers and then appeal to the state secrecy agencies at prescribed levels. See *Baoshou Guojia Mimi fa Shishi Tiaoli* (保守国家秘密法实施条例) [Implementation Regulation of the Law on Guarding State Secrets], Art. 20 (amended by St. Council on January 17, 2014, effective March 1, 2014).

100. *Shanghaishi Fangqu Tudiziyuan Guanliju Guanyu Jiang Benshi Gongfang Ziliao Leiwei Baomi Ziliao de Tonzhi* (上海市房屋土地资源管理局《关于将本市公房资料列为保密资料的通知》) [Notice of the Shanghai Municipal Bureau of Housing and Land Resources Regarding Classifying as Confidential the Materials Concerning the Gongfang within the Municipality] (issued in 2006).

citizens' properties to be classified, it contradicts the 2007 Law on Property Rights, which stipulates that "any right holder or interested party may apply to inquire about or copy the registration materials, and the registration organ shall not refuse the application."¹⁰¹

The notice was most likely issued in response to the long-standing controversy over the ownership of *gongfang*. *Gongfang* now administered by urban housing authorities include not only state-owned housing confiscated from private owners in accordance with the laws and policies of the early 1950s, but also private housing subject to mandatory leasing by the state in the 1955-1966 period.¹⁰² The second category of housing, called *jingzufang* (state-managed rental of housing), resulted from the Socialist Transformation Campaign of Ownership of the Means of Production, whose goal was the construction of a socially planned economy in the PRC. The central government ordered urban homeowners to hand over any portion of their dwellings that exceeded the State-set quota on the area they were entitled to occupy to increase the housing supply. In 1955 local governments began to manage and rent this housing to the public at a fixed rate, and distributed only part of the rental income to the proprietors. The majority of urban private housing was thus transformed into *jingzufang*, ultimately covering around 100 million square meters and affecting over six million households.¹⁰³ The transformation policy was frequently distorted during its implementation. Many private houses that fell within the quota or should otherwise have legally been occupied by the owners were wrongly subject to mandatory leasing.¹⁰⁴ Although *jingzufang* were no longer freely at their owners' disposal, their private ownership nevertheless remained acknowledged by the State and the law of the day. However, during the turbulent Great Proletarian Cultural Revolution (1966-1976), the proprietors were forced to turn over their title deeds to the housing authorities or simply had their housing seized by Red Guards. None have received the nominal rent on their properties in the years since.¹⁰⁵

101. *Wuquanfa* (物权法) [Law on Property Rights], Art. 18 (2007).

102. See Qun Zhang (张群), *Sifang Gaizao Sanbuqu — Jian Lun Si Quan Yu Renquan* (私房改造三部曲——兼论私权与人权) [The Trilogy of Socialist Transformation of Private Housing: With a Discussion on Private Rights and Human Rights], NO.2 RENDA FALU PINGLUN (人大法律评论) [RENMIN UNIVERSITY LAW REVIEW] 138, 138-50 (2011) (explaining the evolution of policies on the state confiscation and taking-over of private housing before the 1980s); Chenglin Liu, *The Chinese Takings Law from a Comparative Perspective*, 26 WASH. U. J.L. & POL'Y 301, 304-09 (2008).

103. See Liu, *supra* note 102, at 140-45.

104. *Jing Zufang Cuo Gai Cunzai Sida Lishi Yiliu Wenti* (经租房“错改”存在四大历史遗留问题) [The “Wrong Transformation” Concerning State-managed Rental Housing Left Four Issues Unsettled], China Economic Times, April 6, 2005.

105. Liu, *supra* note 102, at 148.

When the ruling party decided to restore legal order and introduced the policy of reform and opening-up in 1978, many *jingzufang* owners (and other proprietors who considered their properties to have been wrongly taken by the state during various political campaigns) filed claims to reclaim their properties. The measures introduced to address those claims differed by locality. In an attempt to attract investment, the governments of some coastal and developed regions gradually began returning *jingzufang* to original private owners who were now identified as overseas Chinese.¹⁰⁶ However, in 1985 the Ministry of Construction issued an opinion declaring that all private housing subject to mandatory leasing was owned by the State¹⁰⁷ despite the Constitution of 1982 stipulating the protection of property rights.¹⁰⁸ The declaration that former owners had lost their ownership has been widely criticized as *ultra vires* by Chinese legal scholars and lawyers.¹⁰⁹ Based on the ministry's opinion, the housing authorities in many cities identified *jingzufang* as state-owned *gongfang*, and continued to rent them out without informing their proprietors and to distribute most of the rental income to themselves. Some housing authorities have even used *jingzufang* to house personnel or other closely connected persons.¹¹⁰ Rapid urban development

106. *Qiao Fang Santou Teng De Fan Nao* ('侨房:'三头疼'的烦恼') [Houses of Overseas Chinese: Three Worrying Issues], SHANGHAI QIAOBAO WANG (上海侨报网) [SHANGHAI NEWS FOR OVERSEAS CHINESE], (September 29, 2010), <http://www.yesqiaobao.com/show.asp?id=2020> (China).

107. *Guanyu Chengshi Siyou Chuzu Fangwu Shehuizhuyi Gaizao Yiliu Wenti de Chuli Yijian* (城乡建设环境保护部印发《关于城市私有出租房屋社会主义改造遗留问题的处理意见》的通知) [Opinion of the Ministry for Urban and Rural Construction and Environmental Protection on the Handling of the Outstanding Issues Caused by the Socialist Transformation of Urban Rented Private Houses] (issued in 1985). See *Bu Fuqian de Shumai* ('不付钱的'赎买') [The Buying-Back Without Payment], CHINA YOUTH DAILY (中国青年报) (December 17, 2003).

108. XIANFA., Art. 13 (1982) (China).

109. Di Wu (吴迪), *Woguo Jing Zufang Quanshu Zhengyi Yanjiu* (我国经租房权属争议研究) [On the Dispute over the Ownership of State-Managed Rental Housing in China] 18-29 (2010) (unpublished Master's Dissertation, Nanchang University). Youxi Chen (陈有西), *Jing Zu Bian Zhengshou de Lishi Cuowu Ji Ziu Gaofayuan de Jiuzheng* (经租变征收的历史错误及最高法院的纠正) [The Historical Wrong in Turning State-managed Leasing into Appropriation And the Supreme Court's Correction], YOUXI CHEN'S ACADEMIC WEBSITE (陈有西学术网) (December 27, 2012), <http://www.chenyouxi.com/cnweb/html/redianguanzhu/201212272173.html> (China). See Qun Zhang (张群), *Juzhe You Qi Qu? -- 1950 Nian Dai de Zhufang Zhengce Pou Xi* ("居者有其屋"?——1950年代的住房政策剖析) ["Letting Residents Own Their Home"? An Analysis of the Housing Policy in the 1950s], NO. 2 MODERN CHINA STUDIES (当代中国研究) 100 (2009), <http://www.modernchinastudies.org/cn/issues/past-issues/104-mcs-2009-issue-2/1096--1950.html> (China) (including reviews by legal scholars). See Zhisheng Gao (高智晟), *Jing Zufang Zhengce de Falu Diwei Ji Jiehue Chulu de Sikao* (经租房政策的法律地位及解决出路思考), [The Legal Status of State-managed Rental Housing and Some Thoughts on the Solution], NO. 10 SOUTH REVIEWS (南风窗) (2004), at 45-48 (discussing lawyers' criticisms).

110. Liu, *supra* note 102, at 154; Can the Law on Rights in rem be Expected to Resolve the Problems over State-managed Rental Housing? (物权法可望破解'经租房'难题?), CHINA ECONOMIC TIMES (November 3, 2004) (China).

and renewal since the 2000s have seen the housing authorities of some large cities, such as Beijing and Wuhan, selling *jingzufang* to lessees or other occupants to facilitate the process of housing demolition and relocation. Although the property developers that buy the land at a price lower than the market rate generally award the occupants some compensation, the legal owners are usually kept in the dark.¹¹¹

This ongoing deprivation of *jingzufang*-related property rights in the absence of legal authorization has provoked an outcry from private owners, some of whom have attempted to sue the housing authorities. However, most local courts refuse to accept their cases, relying on a controversial directive issued by the SPC in 1992 which states that real estate disputes deriving from “historical outstanding issues” are not within the courts’ jurisdiction.¹¹² As increasing numbers of *jingzufang* face demolition and their evicted owners suffer from skyrocketing housing costs, an increasing number of those owners have joined the rights defense movement and petitioned the government through “letters and visits.”¹¹³ Because their only evidence of ownership – title deeds – are kept in the archives of the housing authorities, owners have been demanding access to the deeds, first by resorting to local OGI *guizhang*, and subsequently to the national ROGI.¹¹⁴

It is against this backdrop that the housing authorities in several cities have issued normative documents that classify archival material concerning *jingzufang*, including title deeds and the rental receipts distributed to proprietors.¹¹⁵ Some of these documents, the Shanghai *Gongfang* Notice in

111. Bo Lu (卢波), *Jing Zhufang Zhong de Liyi Geju* (经租房中的利益格局) [The Landscape of Interest in Respect of Jingzufang], NO.1 MAGAZINE OF ECONOMICS (经济月刊) 41-45 (January 15, 2004).

112. *Zuigao Remin Fayuan Guanyu Fangdican Anjian Shouli Wenti de Tongzhi* (最高人民法院关于房地产案件受理问题的通知) [Notice of the Supreme People's Court on the Problem of Accepting Real Estate Cases] (promulgated by Sup. People's Ct., November 25, 1992), 1992 SUP. PEOPLE'S CT. GAZ. 38 (China); see Yukuan Guo (郭宇宽), *Jing Bange Shijie Canquan Jiufen Jing Zufang Wenti Fuchu Shuimian* (经半个世纪产权纠葛 经租房问题浮出水面) [After Half-a-Century Disputes on Ownership, The Issue of Jingzufang Surfaces], SOUTH REVIEWS (南风窗) (2004) (On how the courts in various regions have refused to hear administrative cases concerning *jingzufang*); Jianfeng Zhang (章剑锋), *Jing Zufang Yezhu de Weiquan Zhilu* (经租房业主的维权之路) [Owners' Journey of Defending their Property Rights From Housing Rental], SOUTH REVIEWS (南风窗) (February 15, 2009).

113. See Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STANFORD J. OF INT'L L. 103-79 (2006) (discussing the role of letters and visits in China's legal institutions). See You-Tien Hsing, *Urban Housing Mobilizations*, in RECLAIMING CHINESE SOCIETY: THE NEW SOCIAL ACTIVISM 17, 24-27 (You-Tien Hsing & Ching Kwan Lee eds., 2009) (providing information on *jingzufang* owners' collective protests in recent years).

114. See Chen, *An Empty Promise of Freedom of Information?*, *supra* note 28, at 268-75 (discussing the recent struggles of private owners resorting to local OGI *guizhang*).

115. According to news reports, these “internal documents” were created in the provinces of Hubei, Zhejiang, Jiangsu, Shanxi, and Shandong, among others. See Xuming Fu (傅旭明), *Dangan Baomi Zhengce Buyideng Shi Jiejue Jing Zufang Wenti Sida Guanjian* (档案保密政策不一等是解

particular, have been endorsed by the Ministry of Construction.¹¹⁶ However, it has been reported that some of this classified information can be consulted in the archive divisions of local tax bureaus or the offices responsible for housing demolition.¹¹⁷ The availability of *jingzufang*-related archives in the public domain, as well as the absence of secrecy requirements governing such archives in many cities, casts serious doubt on the necessity of their classification. The purpose of the classification norms is more likely the preservation of illegitimately vested interests than the upholding of any public interest, particularly when the substantial benefits that housing authorities have obtained from their management of *jingzufang* and the illegality of their continued neglect or denial of private owners' property rights are taken into account. Insofar as such norms conceal both violations of the law or administrative irregularities during the historical housing-taking campaigns and the contemporary process of housing transactions, they go against the general spirit of state secrecy laws and suggest that the norm-makers have abused their classification power. Given that the norms are further incompatible with the Law on Property Rights, their expansive application calls for judicial intervention, and the courts should declare them an invalid basis for OGI decisions.

2. Unanimous Avoidance of Legality Reviews

Twelve OGI cases concerning the *Gongfang* Notification are included in the sample collected from legal databases for this article.¹¹⁸ In all twelve cases, the courts upheld the housing authorities' decisions, declaring either

决经租房问题4大关键) [Inconsistency in Archives Classification Policies is Among the Four Major Issues for Resolving State-managed Rental Housing Problems], CHINA ECONOMIC TIMES (February 2, 2005) (China).

116. For example, with regard to the aforementioned Shanghai notice on classifying *gongfang* materials, the Ministry issued a reply of endorsement: Reply of the Ministry of Construction on Endorsing the Classification of Gongfang Archives in the Shanghai Municipality (建设部《关于同意将上海市公房档案资料列为保密资料的复函》).

117. Xuming Fu (傅旭明), "Jing Zufang" Dangan Zhihuo ("经租房"档案之惑) [Puzzles about State-managed Rental Housing Archives], CHINA ECONOMIC TIMES (MARCH 23, 2005).

118. One of the cases was also covered in media reports. See Shi Renxing v. Songjiang District Housing Support and Management Bureau of Shanghai Municipality (施仁兴诉上海市松江区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN [Songjiang Dist. People's Ct. of Shanghai Municipality, 2009], which is reported in *Gongfang Ziliao Leiru Mijian Yinfa Susong Songjiangqu Zhineng Bumen Jiti Pangting* (公房资料列入密件引发诉讼松江区职能部门集体旁听) [Classification of Public Housing Materials Caused Litigation; Personnel of the Songjiang District Housing Authority Collectively Observed the Court Hearing], ORIENTAL DAILY (东方早报) (August 12, 2009) (hereinafter "*Shi Renxing Case*").

that the defendants had correctly applied the law without mentioning the notification¹¹⁹ or implicitly recognizing its legality.¹²⁰

For instance, in a case in which the plaintiff stressed “a lack of legal basis for the defendant’s determination” that the requested historical materials on *gongfang* constituted state secrets, the court held that

[t]his court ascertains that the respondent issued in 2006 [the *Gongfang* Notice] according to the spirit of the Reply of the Ministry of Construction [on Endorsing the Classification of *Gongfang* Archives in the Shanghai Municipality] This court finds that according to the Notice, the requested information belongs to classified materials. [T]he respondent has acted properly in identifying the information as a state secret and withholding it from the plaintiff.¹²¹

In adjudication practice, “acting properly” means that the factual findings of an administrative decision are clear and the application of law correct. In so concluding, the court implicitly accepted the *Gongfang* Notice as valid, but its reasoning is problematic. The notice’s compatibility with the Ministry’s reply does not guarantee its validity. The reply itself is an individual internal decision concerning a specific issue rather than a classification standard provided by the LGSS as grounds for classification. It contradicts the Law on Property Rights in the same way the notice does, and is likely to have been inspired by a similar need to maintain the Ministry’s illegal monopoly over *jingzufang* without private owners’ consent.

The courts’ failure to ascertain the validity of agency-made classification norms has profoundly affected the procedural fairness of administrative litigation. First, as the plaintiffs in some cases have vociferously complained, the defendant agencies are using norm-making as a means of resisting the

119. See, e.g., Pei XX v. Putuo District Bureau for Housing Support and Management of Shanghai Municipality (裴某某诉上海市普陀区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN (Shanghai 2nd Interm. Ct. May 18, 2015) (China).

120. Zhongmoumou Su Shanghaishi Hongkouqu Zufang Baozhang He Fangwu Guanliju (钟某、钟某某诉上海市虹口区住房保障和房屋管理局) [Zhong X & Zhong XX v. Hongkou Bureau for Housing Support and Management of Shanghai Municipality], RENMIN FAYUAN ANLI XUAN, 2011 Shanghai 2nd Interm. Ct. 18 (September 4, 2014) (China). See e.g., Xu Enrong Su Shanghaishi Changningqu Zufang Baozhang He Fangwu Guanliju (徐恩溶诉上海市长宁区住房保障和房屋管理局) [Xu Enrong v. Changning District Bureau for Housing Support and Management of Shanghai Municipality], 2015 Shanghai 1st Interm. Ct. 12 (June 5, 2015) (China).

121. Guomoumou Su Shanghaishi Zufang Baozhang He Fangwu Guanliju (郭某某诉上海市住房保障和房屋管理局) [Guo XX v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2013 Shanghai 2nd Interm. Ct. 166 (April 17, 2013) (China). See Guomoumou Su Shanghaishi Zufang Baozhang He Fangwu Guanliju (郑某某诉上海市住房保障和房屋管理局) [Zheng X v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2010 Shanghai 2nd Interm. Ct. 10 (November 7, 2012) (China) (another case adjudicated by the same court, the plaintiff was more specific in pointing out that the notice was merely an administrative document and should not be recognized as a legal basis. The court disregarded this argument as well.).

ROGI.¹²² When such norms are blindly accepted as legal criteria for adjudicating disputes involving their makers, defendants actually become judges of their own cases, which is the situation that the ALL is precisely intended to avoid. Second, the fact that the *Gongfang* Notice itself is classified makes the case for judicial scrutiny even more compelling. The courts are bound to conduct an in camera review of all evidence involving classified information, whether in FOI litigation or other judicial review proceedings.¹²³ Shirking that review duty renders the evidential rules meaningless because the plaintiff cannot cross-examine evidence even when he or she doubts that classification actually exists or is warranted.¹²⁴ More generally, the courts have also neglected their indispensable role of safeguarding the legality of classification standard-setting. Given the lack of supervision over the delegation of classification power in daily practice, the classification standards formulated by agencies at various levels of government tend to favor over-classification, but are seldom checked by secret-guarding or other government departments.

3. Unjustified Judicial Self-Limitation

Enabling individuals to seek redress for past violations of their rights by the authorities is widely recognized as the main value of the FOI law, and it is as important as the need to subject government decisions to public scrutiny.¹²⁵ That value is represented in OGI requests made by *jingzufang* owners to collect evidence in support of their property claims. However, the collective abandonment by the courts of their legality review duty in the sample cases seems to indicate judicial indifference to it, indifference that

122. Ximou Su Shanghai Shi Hongkouqu Zufang He Fangwu Guanliju (奚某诉上海市虹口区住房保障和房屋管理局) [Xi X v. Hongkou District Bureau for Housing Support and Management of Shanghai Municipality], RENMIN FAYUAN ANLI XUAN 2012 Shanghai 2nd Interm. Ct 359 (October 18, 2012) (China). See Zhengmou Shanghai Shi Zufang Baozhang He Fangwu Guanliju (郑某上海市住房保障和房屋管理局) [Zheng X v. Shanghai Bureau for Housing Support and Management], RENMIN FAYUAN ANLI XUAN 2011 Shanghai 2nd Interm. Ct. 10 (May 6, 2011) (China).

123. Art. 6, Provisions of the Supreme People's Court on Several Issues Relating to the Trial of Administrative Cases Concerning Open Government Information (最高人民法院关于审理政府信息公开行政案件若干问题的规定) (promulgated by Sup. People's Ct. on July 29, 2011, effective August 13, 2011); Art. 37, Provisions on Several Issues Relating to Evidence in Administrative Litigation (最高人民法院关于行政诉讼证据若干问题的规定) (promulgated by Sup. People's Ct. on July 24, 2002, effective October 1, 2002).

124. This classification of the notice was challenged in two cases, although the challenges were not addressed by the courts. See Chen XX v. Baoshan District Bureau for Housing Support and Management of Shanghai Municipality (陈某某诉上海市宝山区住房保障和房屋管理局), RENMIN FAYUAN ANLI XUAN 2012 Shanghai 2nd Interm. Ct (China); see also Shi Renxing Case, *supra* note 118.

125. See Art. 19, Asia Disclosed: A Review of the Right to Information across Asia, 3 (Free Word Centre 2015) (London); Mendel, *supra* note 3, at 5.

stems in large part from Chinese courts' concern over the impact that broad access to historical records would have on so-called "social stability."

Such concern is mentioned in the reports on FOI litigation published by several provincial high courts, with all of the reporting judges concerned finding that a great proportion of OGI requests have the utilitarian purpose of resolving outstanding issues in other fields of law.¹²⁶ The requesters, they claim, are using FOI litigation to place the government under pressure in the hope of "activating" remedial proceedings that have been interrupted for a variety of reasons.¹²⁷ The judges also stress the difficulties of handling OGI cases in which the information at issue was generated during a period in which society was "regulated by special political policies" or in which the legal relations to which the information pertains "had been already stabilized."¹²⁸ Their belief is that because FOI litigation can contribute little to the resolution of the underlying substantive disputes, it will inevitably give rise to subsequent disputes and cause a "waste of judicial resources."¹²⁹ Some high court judges have thus suggested that legality reviews are simply "inappropriate for certain cases."¹³⁰ A number of district court judges have further advocated for courts to refrain from "mechanically" applying the law to prevent "unrealistic judgments" from exacerbating the contradiction. Above all, the courts should help to "eliminate unstable factors."¹³¹ Such a stability-overrides-all mentality has affected FOI litigation in numerous respects, and is well exemplified by the lax judicial control over non-disclosure decisions stating that granting access would endanger social stability.¹³²

126. In judicial practice, Chinese high courts often provide general guidance for the adjudication of certain types of cases within their provincial jurisdiction.

127. Fengqiang Wang(王凤强) et al., *Investigation on Administrative Cases of Open Information in Henan Province* (河南省信息公开行政案件调查), 51 REFERENCE J.R. 107, 110 (2012); Jiangsu Provincial People's High Court (江苏省高级人民法院), *On Difficult Issues in the Trial of Administrative Cases of Open Government Information* (审理政府信息公开行政案件若干疑难问题研究), 54 REFERENCE J. R. 94, 101 (2012); Beijing People's High Court Administrative Division (北京市高级人民法院行政审判庭), *Research Report on Difficult Legal Issues in the Trial of Open Government Information Cases in Beijing* (北京市审理政府信息公开案件疑难法律问题调研报告), in ANNUAL REPORT ON RULE OF LAW IN LOCAL CHINA NO. 1 (中国地方法治发展报告) 120, 122 (Lin Li(李林) & Tian He (田禾) eds., 2015); see e.g., Zhongdong Jiang (蒋中东) & Liangji Ma (马良骥) *Reflections on Practices of Zhejiang Courts Concerning Litigation of Open Government Information* (浙江法院政府信息公开诉讼实践的思考), 49 REFERENCE J. R. 118, 120-21 (2011).

128. Beijing People's High Court Administrative Division, *supra* note 127, at 122.

129. Jiangsu Provincial High People's Court, *supra* note 127, at 101.

130. Beijing People's High Court Administrative Division, *supra* note 127, at 122.

131. Qian Wang (王茜), *On Difficult Issues in Administrative Litigation of Open Government Information* (政府信息公开类行政诉讼案件审判难点调研), 36 REFERENCE J.R. 81, 86 (2009).

132. Regulation on Open Government Information, *supra* note 1, at Art. 8. See Chen, *Transparency versus Stability*, *supra* note 3, at 107-22 (analyzing judicial control of the exemption).

The sample cases considered here were adjudicated in line with the self-limiting approach suggested in the aforementioned reports. The concerns expressed therein, however, cannot justify exempting classification norms from judicial scrutiny. First, the status quo of *jingzufang* being dominated by the housing authorities reflects not an established legal relation but an ongoing contravention of the law. Widespread “nationalization” of private properties in accordance with an internal instruction of the Ministry of Construction constitutes evidence of severe violations of fundamental rights that no legal system should ignore. Substantive disputes over property ownership have persisted for years, and are thus by no means caused by OGI requests. Judicial intervention is absolutely necessary and long overdue. If the courts continue to justify their inaction with reference to the need to respect “special political policies” or “stabilized legal status,” the residuals of the lawlessness that prevailed during the Cultural Revolution will remain despite the Chinese Constitution’s declaration of the need to protect human rights.¹³³ Second, if the courts consider disputes over *jingzufang* ownership to be too complicated to handle, particularly because of the unavailability of evidence, then surely protecting the right to access relevant historical records will help to secure more evidence and thus render the disputes less difficult to resolve. In this regard, OGI is a cost-effective means of enabling the courts to resolve outstanding problems concerning not only *jingzufang* ownership, but also irregularities in determining the scope of *jingzufang* or in the confiscation of other types of private housing. In contrast, tolerating the housing authorities’ attempts to prevent interested parties from collecting evidence by formulating anti-access norms has not stopped *jingzufang* owners from challenging non-disclosure decisions based on those norms. Therefore, the courts’ repeated shirking of their review duty has actually contributed to the waste of judicial resources. Third, it is the illegal nationalization policy that is the primary cause of *jingzufang* owners’ collective resistance to the housing authorities. Continuing to classify historical records will further agitate rather than appease owners, leading to more petitions and protests (which equate to instability in the eyes of local governments), which the authorities purportedly wish to avoid. Only by upholding the hierarchy of law and safeguarding the citizenry’s legal rights can the courts contribute to genuine, and sustainable, social stability. Furthermore, the courts have a constitutional responsibility to strictly apply the law and scrutinize the legality of agency activities. That responsibility should never be overridden by the purported need to “eliminate unstable factors” that are not anticipated or regulated by the law.

133. XIANFA, Art. 4 (1982) (China).

C. GOSC Norms Creating the Exemption of Process Information

If agency-made documents that define state secrets may serve to cover sensitive issues in past political campaigns, the GOSC-imposed additional exemptions can conveniently mask sensitive issues in the governance today. FOI litigation concerning one of the latter, the process information exemption, has increased significantly and posed similarly delicate challenges. In none of the cases collected for this study did the courts address head-on whether it is valid for the GOSC to create that exemption, although some of the courts briefly mentioned the legal nature of GOSC Opinions. On the premise of subtly recognizing the legality of that exemption, the courts attempted to develop different ways of limiting its scope.

1. Referential Cases

In all five of the referential cases adopted in SPC publications, the courts avoided addressing the validity of GOSC Opinion No. 5, focusing instead on defining the concept of process information. It is noteworthy that in certain case reports, the reporting judges (usually members of the collegiate panel that adjudicated the case concerned) prescribe additional limitations on the scope of exemption and associate those limitations with the rationale for withholding process information.

(a) Definitional Restrictions

Exemption was first analyzed as an incidental issue in *Shi Lijiang v. Jiangsu Land and Resources Department* (decided in 2011), in which the defendant's non-disclosure decision was upheld on other grounds.¹³⁴ During the trial, the plaintiff raised the argument that the GOSC had exceeded its authority in barring the disclosure of process information. The collegiate panel adjudicating the case tended to believe that, on the one hand, "exempting process information from the scope of disclosable information conforms better with China's current circumstances as well as the background of the existing system of administrative litigation," whereas, on the other, process information "should be strictly defined."¹³⁵ According to

134. *Shi Lijiang v. Jiangsu Provincial Department of Land and Resources* (史丽江诉江苏省国土资源厅), RENMIN FAYUAN ANLI XUAN 2011 Jiangsu High Ct. (China). Part of the information at issue related to supporting documents for a decision on land appropriation. The court found that the defendant was not at fault for not disclosing that information on the grounds that the request for it was unclear.

135. See *Xueyan Zhao* (赵雪雁), *Shi Lijiang v. Jiangsu Provincial Department of Land and Resources* (Re: Failure to Perform the Statutory Obligation of Disclosing Land Information) (史丽江诉江苏省国土资源厅不履行土地信息公开法定职责案), (2) 79 SELECTED CASES 31 (2012).

the panel, once a decision has been made, relevant opinions, advice, and/or schemes that were variable during the decision-making process become purely factual information, and hence should be disclosed. Furthermore, if process information has practical impacts on the rights of the parties concerned, it should be disclosed as “an exception to the exemption.”¹³⁶ The panel’s view of the legal basis of process information exemption is untenable. Conformity with the nation’s circumstances is not a valid standard of legality. The existing administrative litigation system does not endorse the application of norms that are at odds with upper-level laws and regulations. However, the panel seems to have recognized the potentially negative consequences of applying such an exemption, and suggests ways to alleviate them. First, it proposes imposing definitional restrictions on the concept of process information, including a temporal limit and distinction between facts and opinions. Second, it recommends a balancing test in circumstances in which the requested information affects the requester’s rights. These review standards echo the academic debate surrounding the process information exemption, and serve as embryo tests.

These definitional restrictions were confirmed in *Xu Zhihao v. Guangzhou City Planning Bureau* (2011).¹³⁷ The plaintiff, a villager whose house had been demolished during implementation of a redevelopment project affecting his village, had requested the disclosure of the redevelopment plan. The defendant, Planning Bureau, contended that the plan was an “intermediate-stage result of planning research,” an alternative expression of process information. The court in this case did not address whether the defendant had a legal basis for exempting process information from disclosure, but looked into the nature of such information.¹³⁸ It ruled that the plan at issue was a “terminal result of planning research” rather than a process document for two reasons. First, the defendant had formulated the redevelopment project in accordance with the plan, which meant that the plan had become the basis for an administrative decision on urban planning and was therefore executable. Second, the plan had directly affected the plaintiff’s rights. The court appears to have imposed two definitional restrictions on the concept of process information, namely, (1) process information does not exist in finalized administrative decisions and (2) it has no external effects on individuals. The first restriction was followed in two further referential cases decided in the western province of Shaanxi and

136. *Id.*

137. *Xu Zhihao v. Guangzhou City Planning Bureau* (徐志豪诉广州市规划局), RENMIN FAYUAN ANLI XUAN 2011 Interm. Ct. of Guangzhou City (Chia). See Guangyu Li (李广宇), *Process Information: Xu Zhihan v. Guangzhou City Planning Bureau* (过程信息——徐志豪诉广州市规划局案), 59 REFERENCE J.R. 130 (2013).

138. However, the plaintiff did point out the lack of legal basis concerning this exemption.

south-eastern province of Fujian: *Li Liuxue v. Xi'an City Government*¹³⁹ (2014) and *Yao Xinjin et al. v. Yongtai County Land Resources Bureau*¹⁴⁰ (2014) (hereinafter “*Li Liuxue*” and “*Yao Xinjin*” respectively). Both cases concerned supporting documents for enforced land-taking decisions. The SPC set *Yao Xinjin* as an example of good practice, making it plain that once a policy or decision has been enacted, the research findings, discussion records, requests for instructions, and reports generated in the process of investigation, deliberation, and handling are no longer process information.¹⁴¹

The exemption of materials concerning environmental issues was examined in *Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection* (2012) (hereinafter “*Xie Yong*”).¹⁴² An environmental activist had sought access to the defendant bureau’s pre-qualification opinion regarding a company’s application for a waste disposal license and to the supporting materials for that application, including environmental monitoring reports on the company. The defendant insisted that both the opinion and materials were process information prepared for the reference of the Ministry of Environmental Protection, which was responsible for deciding whether to grant the license. The court held that the documents were factual materials because the license had already been granted by the Ministry, thereby confirming the first definitional restriction above. It then proceeded to discuss, as the case report reveals, the nature of the application materials if the related decision-making had not been completed.¹⁴³ According to the court, documents created in the process of decision-making are not always “variable,” but can be definite or concluding, depending on the extent to which the information therein affects the interested parties’ rights. It distinguished between the two following scenarios. (1) When the agency responsible for pre-qualification holds the opinion that the applicant is unqualified and refuses to refer the application to the agency responsible for final approval, that opinion has a substantive effect on the applicant and other interested parties, and becomes concluding materials. Hence, such an opinion should be disclosed. (2) If the pre-qualifying agency is of the opinion that the

139. *Li Liuxue v. Xi'an City Government* (李六学等诉西安市政府), RENMIN FAYUAN ANLI XUAN 2014 Weiyang District Ct. of Xi'an City (China).

140. *Yao Xinjin et al v. Yongtai County Land Resources Bureau* (姚新金等诉福建省永泰县国土资源局), RENMIN FAYUAN ANLI XUAN 2014 Interm. Ct. of Fuzhou City (China). See *Ten Major Cases Concerning Open Government Information of Chinese Courts* (全国法院政府信息公开十大案例), 65 REFERENCE J.R. 1 (2014), Case 5 (hereinafter “*Ten Major OGI Cases*”).

141. *Ten Major OGI Cases*, *supra* note 140, at 2.

142. *Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection* (谢勇诉江苏省环境保护厅), RENMIN FAYUAN ANLI XUAN 2013 Interm. Ct. of Nanjing City (China).

143. Junfei Lu (陆俊骅), *Xie Yong v. Jiangsu Provincial Bureau of Environmental Protection* (Re: OGI), (谢勇诉江苏省环境保护厅政府信息公开案), 85 SELECTED CASES 3 (2013).

applicant is qualified and refers the application to the approval-granting agency, then that opinion does not entail the final approval of the application, and thus constitutes process information of an indefinite nature. In this regard, the court agreed with the ruling in *Xu Zhihao* in terms of imposing the second definitional restriction, that is, process information has to be variable, and an indicator of variableness is the information having no external effects on the interested parties.

(b) Restrictions on underlying interests

The judgments in all of the foregoing referential cases discuss the concept of process information from a technical perspective. It is only in some of the case reports that the judges display consciousness of the incompatibility between the exemption and the ROGI's legislative intent and probe into the policy goals for the withholding of process information. The judge commenting on *Xie Yong* rightly stresses that disclosure of process information in essence opens up the administrative process. He criticizes the tendency among agencies toward disclosing only information on the results of decision-making, denouncing such a practice for reducing the scope of openness expected and going against the ROGI's goals of increasing government transparency and promoting law-based administration.¹⁴⁴ Similarly, the judges commenting on *Li Liuxue* point out that the categorical withholding of information on an administrative process deviates from the principle of open administration recognized by various laws, impedes effective participation in relevant administrative procedures by affected parties, and hampers public scrutiny of the undertaking of administrative acts.¹⁴⁵

As a remedy, these judges suggest that the exemption be approved only for valid purposes, which they recognize as ensuring the impartiality and integrity of deliberation inside government,¹⁴⁶ ensuring the effective conduct of administrative affairs,¹⁴⁷ and preventing prejudice to the legitimate interests of certain people or the illegitimate enrichment of others.¹⁴⁸ Furthermore, the judges insist that process information should not be absolutely exempt from disclosure, a view explicitly endorsed by the SPC in its comments on *Yao Xinjin*.¹⁴⁹ The judges commenting on *Li Lixue* argue

144. *Id.*

145. Huigen Yuan(袁辉根) & Hui Yuan(袁辉), *Process Government Information Shall Not Be Absolutely Exempt from Disclosure* (政府过程性信息并非绝对不能公开), PEOPLE'S JUDICATURE (人民司法) 91, 91-92 (2015) (hereinafter "*Yuan & Yuan Case*").

146. *Id.* at 93; *Ten Major OGI Cases*, *supra* note 140.

147. *Yuan & Yuan Case*, *supra* note 145, at 93; *Ten Major OGI Cases*, *supra* note 140.

148. *Yuan & Yuan Case*, *supra* note 145, at 93.

149. *Ten Major OGI Cases*, *supra* note 140.

that process information should be disclosed when it affects the intermediate interests of individuals or when its disclosure would enhance procedural fairness and facilitate better decision-making, such as in the case of involving interested parties in hearings and soliciting public comments.¹⁵⁰ The SPC further advises that access to process information should be granted if the needs of disclosure outweigh the needs of withholding.¹⁵¹

The foregoing case reports pertain to the substantive issue of balancing the value for and against process information secrecy, which can be seen as progress in the judicial handling of exemptions with problematic policy goals.¹⁵² Nevertheless, the proposed restrictions remain overly concerned with the protection of interested parties in administrative procedures, ignoring the public interest in enabling access to process information by non-interested members of the public. It is noteworthy that the judges commenting on *Li Liuxue* do touch upon the legal nature of GOSC Opinions, regarding them as interpretations of the ROGI and, more specifically, “extensive interpretations of the scope of exempt information.”¹⁵³ This qualification was expressed for the first time in SPC publications. However, instead of explicitly pointing to the incompatibility between GOSC Opinion No. 5 and the ROGI, the judges advocate only for that opinion’s “restrictive interpretation” so as to bring it into accord with the ROGI’s intent, which, according to them, is establishing disclosure as the rule and non-disclosure as the exception.¹⁵⁴

2. Media-Reported Cases

Although the referential cases discussed above demonstrate an increasingly clear policy orientation (particularly those heard after 2011), the attitudes of local courts remain diverse, as demonstrated by the media-reported cases considered in this section. Although attempts were made in these cases to justify the exemption of process information with particular policy reasons, each had its own flaws.

(a) Discordant Definitions of Process Information

Different local courts have defined the concept of process information differently. For example, the definitional restriction concerning the incompleteness of decision-making was adopted in *Chu Xiangshan v. Rugao*

150. *Yuan & Yuan Case*, *supra* note 145, at 93. The judges justify their argument with reference to Art. 9 of the ROGI, which stipulates the general scope of information to be proactively published.

151. Ten Major OGI Cases, *supra* note 140.

152. AMIN PASHAYE AMIRI, *FREEDOM OF INFORMATION AND NATIONAL SECURITY: A STUDY OF JUDICIAL REVIEW UNDER U.S. LAW 34-35* (Herbert Utz Verlag, 2014).

153. *Yuan & Yuan Case*, *supra* note 145, at 92.

154. *Yuan & Yuan Case*, *supra* note 145, at 92.

City Public Security Bureau (2013) (hereinafter “*Chu Xiangshan*”), which pertained to law enforcement records.¹⁵⁵ The plaintiff, a Jiangsu villager, had reported to local police, via a 110 emergency call, that he was being harassed by unidentified persons who were pressing him to accept compensation for the demolition of his house. Without knowing the result of the subsequent police dispatch, he filed a request for the relevant records. The court held that the police have a statutory obligation to keep records on 110 dispatches and that those records do not count as process information once a dispatch has been accomplished.

In contrast, the same restriction was rejected in two other cases. First, in *Wu Chongbiao v. Guangdong Provincial Land Resources Department* (2013), the court declared that the supporting materials for land-taking submitted by the land authority for the provincial government’s approval did constitute process information despite the approval being granted as long ago as 1993.¹⁵⁶ Second, in *Zhao Zhengjun v. Commission of Health and Family Planning* (2013) (hereinafter “*Zhao Zhengjun*”), a high-profile case concerning food safety, the Beijing first intermediate court ruled that committee deliberation records on national standard-making equated to process information irrespective of whether the standards had been made.¹⁵⁷

These disagreements over the definition of process information derive from different perceptions of the rationale for protecting such information.

(b) Interpretations Based on Social Stability Concerns

Maintaining social stability is frequently quoted to justify the process information exemption. In *Chu Xiangshan*, the court admitted that “no provision in the ROGI mentions process information or its being exempt from disclosure.” Yet it tried to maintain compatibility between Opinion No.

155. *Chu Xiangshan v. Rugao City Public Security Bureau* (储祥山诉如皋市公安局), RENMIN FAYUAN ANLI XUAN 2014 Intern. Ct. of Natong City (China) (hereinafter “*Chu Xiangshan Case*”). The judgment of first instance was made in 2013. See 江苏判决首例公安拒绝公开接处警信息案件, 法制日报, CHINA DAILY, February 4, 2014, http://www.chinadaily.com.cn/micro-reading/dzh/2014-02-24/content_11278273.html.

156. *Wu Chongbiao v. Guangdong Provincial Land Resources Department* (吴崇彪诉广东省国土资源厅), RENMIN FAYUAN ANLI XUAN 2013 Guangdong High Ct (China). See 征地审批不公开 村民诉省国土厅案开庭, 南方都市报, CHINA TRANSPARENCY, August 15, 2012, <http://www.chinatransparency.org/article/180/14851.html>.

157. *Zhao Zhengjun v. National Commission for Health and Family Planning* (赵正军诉国家卫生和计划生育委员会), RENMIN FAYUAN ANLI XUAN 2013 1st Intern. Ct. of Beijing (September 18, 2013) (China). See *Beijing First Intermediate Court Rendered First Instance Judgment in the Case Concerning the National Standard for Raw Milk* (北京一中院对生乳新国标会议纪要信息公开案作出一审判决), BEIJING FIRST INTERMEDIATE PEOPLE’S COURT NET (北京市第一中级人民法院网) December 16, 2013, <http://bj1zy.chinacourt.org/article/detail/2013/12/id/1445766.shtml> (hereafter “*Beijing Court Rendered First Instance Judgment*”).

5 and the ROGI, declaring that the aim of the exemption was to “prevent the disclosure of *uncertain* information from affecting national security, public security, economic security or social stability,”¹⁵⁸ a requirement imposed by Article 8 of the ROGI, echoing the attempts of some local governments to employ that article to justify the exemption of process information, as stipulated by some local OGI *guizhang* but absent from the ROGI.¹⁵⁹

Such attempts are tenable only if Article 8 provides comprehensible definitions of the policy goals of withholding the information concerned.¹⁶⁰ The extreme vagueness of the concept of social stability makes it infeasible to restrict the corresponding scope of process information. “Causing harm to social stability” has proved to be a widely abused ground for rejecting OGI requests.¹⁶¹ Further, local courts have largely tended to allow agencies to invoke this ground to obstruct disclosures that might facilitate collective actions to defend property or provoke serious criticism of local governments despite such disclosures usually being crucial to the protection of individuals’ “intermediate rights” without affecting the overall social order.¹⁶²

The resort to Article 8 also entails intense scrutiny of how the disclosure of process information might affect social stability, scrutiny that is often evaded by the Chinese courts. We can draw lessons from the ineffective judicial control of a related exemption of process information that is unequivocally based on social stability concerns. The 2008 Shanghai OGI *guizhang* allow agencies to withhold “information in the process of investigation, deliberation or handling whose content is not determined and hence whose disclosure may affect [social] stability.”¹⁶³ That exemption has been used extensively to withhold supporting documents on land appropriation or housing demolition decisions from the individuals affected by those decisions. A search by the author of the Chinese Judgments Online database for the 2008-2012 period identified seven cases concerning that exemption. In all seven cases, the courts upheld non-disclosure decisions without determining what type of social stability would be harmed by

158. *Chu Xiangshan Case*, *supra* note 155.

159. See discussion in *supra* Section: FOI EXEMPTIONS BASED ON EXTRA-LEGAL NORMS.

160. There are surely scenarios in which the premature disclosure of information created in the process of policy-making would illegitimately enrich certain people with privileges, cause unnecessary fear or disorder in the public, and affect public order and security.

161. See Jiangsu Provincial High People’s Court, *supra* note 127, at 94; Shipan Lai (赖诗攀), *Wenze, Guanxing Yu Gongkai: Jiyu 97 Ge Gonggong Weiji Shijian de Difang Zhengfu Xingwei Yanjiu* (问责、惯性与公开: 基于97个公共危机事件的地方政府行为研究) [Accountability, Inertia and Publicity: A Study of Local Government Behavior Based on Ninety-Seven Public Crisis Cases], 10 JOURNAL OF PUBLIC MANAGEMENT (公共管理学报) 21, 21-24 (2013).

162. See Chen, *Transparency versus Stability*, *supra* note 3, at 126-27.

163. *Shanghai Provisions on Open Government Information* (上海市政府信息公开规定) (promulgated by Shanghai Government on April 28, 2008, effective May 1, 2008), Art. 10, Para. 1.

disclosure or how likely it was that such harm would be caused.¹⁶⁴ This indifferent posture was criticized by an SPC justice in a collection of exemplary OGI rulings.¹⁶⁵ In addition, the seven retrieved cases show that the Shanghai courts endorse a broader concept of process information than that framed by the Shanghai OGI *guizhang* of 2004, insisting that process information persists “regardless of whether or not the government decision has been made.”¹⁶⁶ In this regard, relying on the need to maintain social stability does not necessarily reduce the scope of process information, and nor is it helpful to distinguish between the reasonable and unwarranted withholding of such information.

(c) Interpretations Aimed at Protecting Deliberation Frankness

In addition to social stability, deliberation frankness is proclaimed by some local courts as an important interest protected by the process information exemption. The discussion on that interest often occurs in cases in which the OGI request is not related to the plaintiff's personal rights. In a typical such case, *Zhao Zhengjun*, a consumer rights activist, requested the meeting minutes of the Review Committee on the National Standards for Raw Milk.¹⁶⁷ Given that the new standards approved by the Ministry of Health differed greatly from previous standards, including a reduction in the required protein content and significant increase in the tolerable number of bacteria colonies, Zhao worried that the standard-setting process may have been unfairly influenced by large raw milk enterprises. He thus approached the Ministry, which had organized the review committee, for information on the parties that had been engaged in drafting or advising on the standards and on the handling of objections to the draft standards by the review committee.¹⁶⁸ At the time the request was made, memories of the melamine-tainted milk scandal of 2008 were still fresh in the public mind, and the public was thus deeply concerned about the potential for the new national standards

164. See, *Wang Bingting v. Hongkou District Government of Shanghai Municipality* (王炳庭诉上海市虹口区人民政府), Shanghai High Ct. 2010.

165. GUANGYU LI (李广宇), 100 SELECTED CASES ON OPEN GOVERNMENT INFORMATION (政府信息公开判例百选) 269 (2013).

166. *Meng X v. Hongkou District Housing and Land Administration of Shanghai Municipality* (孟某诉上海市虹口区房屋土地管理局) 2008 Hongkou District Ct. of Shanghai Municipality (September 22, 2008). *Shanghai Provisions on Open Government Information* (promulgated by Shanghai Government on January 20, 2004, effective May 1, 2004), Art. 10(4).

167. Li Li (李丽) & Bobo Zhang (张咄咄), *Shengru Xinguobiao Dingde Name Di, Laobaixing Neng Zhidao Juece Guocheng Ma* (生乳新国标定得这么低, 老百姓能知道决策过程吗) [As Regards the Low National Standards of Raw Milk, Can the Common People Know about the Decision-Making Process?], CHINA YOUTH DAILY, 7 (2012).

168. Bing Sun (孙斌), *Weishengbu Beipanling Xianqi Dafu Xinxi Shenqing* (卫生部被判令限期答复信息申请) [Ministry of Health Ordered to Reply to Information Request within the Prescribed Period], DAHE DAILY, (2012).

to further undermine the safety of milk products. The media also paid close attention to the controversy.¹⁶⁹ The Ministry of Health rejected Zhao's request on the grounds that the requested record should be disclosed by the review committee rather than the Ministry itself. In the litigation against that rejection, the court held that the committee was a constituent part of the Ministry, and ordered the latter to re-handle the request.¹⁷⁰ The Ministry of Health (which became the Commission of Health and Family Planning in 2013) rejected the request a second time, claiming that the minutes were covered by the process information exemption. Upon hearing the follow-up litigation, the same court accepted this argument.¹⁷¹

In its judgment, the court first agreed that "there is no legal basis for categorically exempting information [regarding] the process of administrative decision-making from disclosure" because increasing the transparency of government work and promoting law-based administration are the ROGI's legislative intent.¹⁷² It then pointed out that the "sufficient presentation of different views can ensure the making of correct decisions, and is equally important for achieving the purpose of promoting law-based administration." Because the "disclosure of information on ... exchanges of views inside ... agencies, whether during or after the process of decision-making, can hinder the frank expression of opinions," such information should be exempt from disclosure.¹⁷³

The court in this case resorted to a purposive interpretation of Opinion No. 5 to demonstrate its compatibility with the ROGI, although it did not do so successfully. Law-based administration is a general value that includes different dimensions associated with various exigencies of the law. As a legislative intent of the ROGI, the promotion of law-based administration is realized by subjecting the administration to scrutiny by the public or affected parties. Such promotion is distinct from, and stands in tension with, the promotion of law-based administration that is served by legitimate secrecy. The court confused the two. Although the protection of frankness during deliberation is a desirable policy goal in its own right, it does not fall within the confines of the ROGI's legislative intent.

169. Guangzhou Jian (简光洲), *Naiye Biaozhun Muhou de Liyi Jiaoliang* (奶业标准幕后的利益较量) [Contest of Interests behind Milk Industry Standards], *ORIENTAL DAILY* (2012), A18.

170. Zhao Zhengjun v. Ministry of Health (赵正军诉卫生部) 2012 1st Interim. Ct. of Beijing Municipality (October 17, 2012).

171. Jian An (安健), *生乳新国标会议纪要信息公开案宣判 消费者起诉原卫生部被驳回* (Judgment Was Pronounced on the OGI Case of Meeting Minutes about the New National Standards for Raw Milk; The Consumer's Litigation against Former Ministry of Health Was Rejected), *PEOPLE'S COURT DAILY* (2013).

172. *Beijing Court Rendered First Instance Judgment*, *supra* note 157.

173. *Id.*

Setting aside the issue of validity, the court's approach in *Zhao Zhengjun* suffers other substantive defects. First, the disclosure of minutes does not necessarily hinder the frank expression of opinions. If opinions on drafted national standards are disclosed in isolation from information on the identities of the committee members who expressed them, those members would not face personal criticisms or other pressures and, accordingly, would not be deterred from continuing to voice their views in subsequent deliberations. The distinction between pre- and post-decision disclosure is not as insignificant as purported by the court. The post-decision disclosure of minutes exerts much less of an impact on committee members' incentives because different members deliberate on different standards. Second, as framed by the court, the exemption is still categorical in the sense that it is not balanced against other public interests. Given that the government has repeatedly failed to regulate the milk industry to ensure food safety, the public has a compelling need for knowledge of the debates that take place inside the body responsible for setting milk safety standards. Disclosure of that knowledge can thus reduce the room for rent-seeking and correct biases toward parties with vested interests in future standard-making. In this context, public access to meeting minutes is indispensable for reaching correct (in the sense of unprejudiced) decisions on standards, and thus overrides the need to provide a stress-free environment for deliberation. After all, committee members have a statutory responsibility to express views that they believe will serve the public good. The possibility of public criticism is a risk they accept when they accept committee membership. The *Zhao Zhengjun* court's overemphasis on the confidentiality of internal deliberations is based on insufficient consideration of China's complicated governance problems.

Compared with the total submission to local agency-issued norms that classify materials on state infringements of property rights, the courts showed subtle intentions to restrain the norms that conceal information on the process of decision-making. They imposed restraints not through a direct review of the GOSC Opinions' validity – despite their clear contravention of the ROGI, but through restrictive interpretations of the concept of process information. The indirect manner of control stems from the judiciary's reluctance to confront the GOSC which wields high political authority. It also indicates that the courts prioritized the pragmatic needs of the administration over their constitutional responsibility to uphold the unity of the legal system. Some judges claim that it is “substantively reasonable to endorse the formally invalid exemption” because the ROGI fails to incorporate a useful exemption that is available in most FOI laws.¹⁷⁴ The claim clearly violates the principle

174. Yang, *supra* note 61, at 180.

of legality on which the whole system of judicial review grounds. And the courts seemed to seek substantive reasonableness only in the measures restricting transparency. The ROGI also fails to follow most FOI laws to unequivocally allow access to information based on all needs. In this regard, it is substantively reasonable as well to remove the needs test imposed by the GOSC, but the courts showed no interest in endorsing that removal.

That said, a handful of local courts expressed concern over the impacts of that exemption on the openness of administrative decision-making process, and undertook initiatives to curb them. The SPC made a recommendable move to synthesize those local initiatives into more systematic definitional restrictions. The distinction between facts and opinions and preclusion of information concerning taken decisions are broadly consistent with the exemptions pertaining to government deliberative process under other FOI laws. In addition, some judges make tentative suggestions to delimit the exemption's purposes and temper the exemption with a balancing test. Whereas the SPC promoted these progressive review approaches to abate the exemption's consequences, adjudication on the ground tended to be rather inconsistent. The media-reported cases reveal judicial refusals to restrict the exemption in different contexts, ranging from land-taking information that directly involves the requesters' substantive rights to food safety information that does not directly relate to the requesters' own rights but concerns the public. The deference was associated with the courts' overemphasis on secrecy in the officials' deliberation; they failed to assess whether deliberation frankness will be truly hampered by disclosure. Although in one media-reported case the court followed the SPC-recommended definitional restrictions, it still linked process information to an absolute need to maintain social stability, a need whose content is highly uncertain and politicized. In all the cases analyzed in this section, no court has ever examined the critical question on how the interest in concealing process information should be evaluated against the countervailing public interests in disclosure, such as making sounder decisions through public participation and better defense of the affected parties' rights.

CONCLUSION

The finding that the courts avoided reviewing the validity of different extra-legal exemptions sheds new light on China's changing regulatory landscape of information access. In this concluding section, it is argued that the courts play no more than a marginal role in controlling extra-legal secrecy norms, and that the unsuccessful resolution of conflicts of norms renders the ROGI fall short of a genuine FOI law. The circumvention of legal imperatives on disclosure can be partly attributed to the party-state dualism in the exercise of powers. To give due effect to transparency law entails not

only legislative amendments but also substantive reforms that champion the supremacy of law in the whole political system.

The Chinese courts have the responsibility and power to uphold the hierarchy of law in the context of government information disclosure, that is, to scrutinize the conformity of pro-secrecy norms to the ROGI and other laws or regulations, and to reject the application of any norm that contradicts the latter. However, they abandoned this responsibility in most of cases analyzed in the preceding sections. Overall, the judicial treatment of exemptions based on invalid norms is closely associated with the political sensitivity of the matters regulated by the norm at issue or to the political authority of the norm-maker. And it is conventional for Chinese judges and officials to consider matters that are highly embarrassing or inconvenient to the CCP or government as politically sensitive. On the one hand, legality review was explicitly undertaken of the norm formulated by a local government that pertained to a procedural question, i.e., the requester's qualification, without involving any substantive issue on the requested information. On the other hand, legality review was completely withdrawn from the norms formulated by a local agency and endorsed by a central department that mandate classification of materials pertaining to the pre-1980 nationalization of private houses. The materials involve not only the rupture of the legal order during past political campaigns but also the nationwide illegal occupations of private houses by agencies till today, and highlight unsettled historical issues that question the ruling party's credibility in securing citizens' property rights. Between these two extremes in the rigorousness of examination lie an evasive review approach, under which the court dodges reviewing the norm's validity but interprets the norm in a restrictive manner. This approach was applied to the invalid exemptions formulated by the central government's general office, a politically powerful organ which the courts hesitate to overtly criticize. By narrowly defining the constituent elements of "internal managerial information" and "process information", the courts seem to share with the GOSC the policy-making role in determining the eventual scope of the two exemptions. However, the judicial restrictions were not realized through the enforcement of the legal hierarchy, but hinged instead on the courts' own discretion which is hardly predictable. Whereas some courts introduced restrictions to align the exemptions with the common standards of other FOI laws, others absolutized the not necessarily justified policy goals of the exemptions and disregarded all the public interests that support disclosure. And the judicial restriction became plainly nominal in a case concerning the controversial milk standard-setting process, whose exposure is likely to arouse public anger at the central authorities' incompetence in guaranteeing food safety. The deference to invalid exemptions on politically sensitive matters indicate that the courts have

largely failed to offer remedy to violations of the right to information which were based on the most significant categories of extra-legal norms.

Given almost free rein, the extra-legal norms that preserve the traditional ways of information control under the socialist system triumph over the transparency requirements under the ROGI, and inhibit the ROGI's democratic functions. The expandable scope of state secrets obstructs the revelation of historical truth and the redress of outstanding wrongs. The unconditional sealing of information concerning deliberative process prevents the public participation in policy-making and hinder the parties affected by administrative decisions from defending their substantive rights. The insistence on prior approval and centralized release of information renders it impossible for the public to use OGI as an alternative channel to access news on maladministration or abuse of power that is otherwise censored. The malleable extra-legal exemptions also erode the ROGI's progressive stipulations on proactive disclosure of information concerning the public's intermediate interests. Thus, the ROGI falls short of a genuine FOI law that mandates disclosure be the rule and permits no exemptions unless they are definite and explicitly prescribed by the law itself. More importantly, an allegedly reformative system of transparency has been assimilated by the pre-existing regimes of information control, at least to a great extent. Based on the general law governing information access, the OGI system had the potential to break through and substitute the variety of information control measures that were primarily based on state policy documents and party directives. Yet it refers or yields to those measures when the information at issue pertains to matters that need to be monitored and participated by the public but are considered sensitive by the CCP and government. The selective enforcement of the ROGI by the courts further gives legal endorsement to the practices of concealment whose legality used to be obscure.

The circumvention of transparency requirements is caused by not only the flaws in the ROGI, but also the peculiar disposition of power in the party-state and the incomplete legal regulation of the exercise of power. First, the ruling party retains the power to make policies to be immediately enforced by state organs in the fields that it esteems vital to maintain the single-party rule, two typical fields being state secrecy and news censorship. The formulation and implementation of policies in those fields are based on the fusion of state powers into the party, and have not been subject to the legal system that regulates formal state powers (in particular the administrative power). The introduction of a law on information access does not change the extra-legal nature of the policies in those fields, but merely presses state organs to adjust the relation between legal rules and extra-legal policies. The policies on information control have prevailed as most officials refrain from questioning the party's yielding of legislative and administrative power.

Secondly, the courts in the party-state are not independent from the party, nor the ultimate arbitrator in resolving the conflicts of norms. In the institutional setting that judicial personnel are controlled by the party and local courts are funded by local governments, judges are tempted to consider the political implications of their rulings and hesitate to unconditionally uphold the primacy of law. And under the constitutional framework, the courts also lack the power to directly invalidate norms conflicting with upper-level legislation, a power that is shared instead between the people's congresses and the governments at different levels.

The ROGI's embeddedness in the Chinese party-state should thus be taken into account for a better understanding of the transparency reform's prospects. Amendments to the ROGI and other laws (e.g. deleting the ROGI's clauses that refer to provisions of the State, and specifying classification standards under the Law on Guarding State Secrets) are undoubtedly necessary for clarifying the legal confines of exemption, but are far from sufficient for curtailing the expanding of exemption in practice. The introduction of FOI-like law is in fact a component of the reform package through which the ruling party seeks to increase government accountability without affecting the fundamental political structure. When the reform touches on the integration of the party and State, in the field of information control in particular, it inevitably faces the political limits set to the whole legal system. In this regard, the efficacy of FOI law, like that of other contemporary legal reform in China, hinges on the extent to which the activities of all political actors, including the party, are subject to legal regulation.