

BEYOND GOVERNMENT TRANSPARENCY IN CHINA? THE CHALLENGES TO OPEN PUBLIC ENTERPRISES AND INSTITUTIONS

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I. INTRODUCTION

Since May 1, 2008, the Regulations on Open Government Information (OGI Regulations) enacted by the PRC State Council on April 5, 2007, have formally established a legal mandate for information disclosure from all government agencies nationwide.¹ Over the past 13 years, attention has focused on increasing transparency in a political system long shrouded in secrecy. Scholars have spilled a tremendous amount of ink on this area of law.² Yet one issue remains relatively untrodden, if not unknown, among

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¹ For an early English analysis, see JAMIE P. HORSLEY, CHINA ADOPTS FIRST NATIONWIDE OPEN GOVERNMENT INFORMATION REGULATION (May, 9, 2007), <http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-government-information-regulations/> [<https://perma.cc/MT4J-S8Z7>].

² The Chinese literature on this topic is enormous. With limited space, only English literature will be mentioned here. For monographs, see JONATHAN STROMSETH ET AL., CHINA'S GOVERNANCE PUZZLE: ENABLING TRANSPARENCY AND PARTICIPATION IN A SINGLE-PARTY (2017) (analyzing the practical impact of China's government transparency initiative over the last decade, especially with regard to the anti-corruption fight). For journal articles, see, e.g., Aviva Chengcheng Liu, *Two Faces of Transparency: The Regulations of People's Republic of China on Open Government Information*, 39 INT'L PUB. ADMIN. 492 (2016) (pointing out that Chinese government tailors information disclosure to meet the institutional requirement of strengthening internal accountability mechanisms); Suzanne J. Piotrowski et al., *Key Issues for Implementation of Chinese Open Government Information Regulations*, 69 PUB. ADMIN. REV. 129 (2009) (identifying important issues influencing China's transparency performance such as government capacity, resources, public awareness and so on); Renu Rana, *China's Information Disclosure Initiative: Assessing the Reforms*, 51 CHINA REP. 129 (2015) (analyzing the legal, political and structural problems obstructing the successful implementation of China's transparency law).

scholars and observers interested in the Chinese transparency regime; that is, transparency of public enterprises and institutions.³

“Public enterprises and institutions” is a literal translation of the Chinese term “公共企事业单位.” The term does not translate very easily into English because the West has no close parallel. This type of organization traces back to the pre-reform era when the Chinese government took on expansive political, social, and economic functions through the unique *danwei* system. A *danwei* is an enclosed, multifunctional, and self-sufficient entity, constituting

³ The only English scholarly work on this topic is by Paula Hubbard & Xiao Weibing, *Open Government Information in Chinese State-owned Enterprises*, 22 INFO. SOC’Y 57 (2017) (discussing the patchy implementation of China’s open government information law with respect to its state-owned enterprises). The Chinese scholarship on this issue is also quite sparse with just one monograph and a handful of journal articles. *See generally* GUO TAIHE, GONGYONG QIYE XINXI GONGKAI YANJIU (公用企业信息公开研究) [RESEARCH ON OPEN INFORMATION OF PUBLIC ENTERPRISES] (2015) (discussing generally the status quo of transparency performance of China’s public enterprises); Zhu Mang, *Gonggong Qishiye Danwei Ying Ruhe Xinxi Gongkai* (公共企事业单位应如何信息公开) [How Shall Public Enterprises and Institutions Implement Open Government Information Law], 2 ZHONG GUO FA XUE (中国法学) (2013) (arguing that the open government information law shall apply to public enterprises and institutions to the maximum extent); Zhang Haotian, *Lun Gonggong Qiye de Xinxi Gongkai Zhuti Zige* (论公共企业的信息公开主体资格) [On the Applicability of the Open Government Information Law to Public Enterprises], 2 JIAO DA FA XUE (交大法学) (2016) (identifying the type of public enterprises that should be subject to the open government information legislation); Jun Wang, *Gonggong Qishiye Danwei Xinxi Gongkai: Yiju, Lujing yu Biaozhun* (公共企事业单位信息公开: 依据、路径与标准) [Information Disclosure of Public Enterprises and Institutions: Basis, Path and Standards], 11 ZHONG GUO XINGZHENG GUANLI (中国行政管理) (2018) (suggesting how the OGI Regulations shall apply to public enterprises and institutions); Yi Liang, *Gonggong Qishiye Danwei Xinxi Gongkai de Shiyong Jianshi yu Xiuzheng: Dui Zhengfu Xinxi Gongkai Tiaoli Canzhao Tiaokuan jiqi Xiuding de Pingjia* (公共企事业单位信息公开的适用检视与修正——对《政府信息公开条例》参照条款及其修订的评价) [Evaluating and Improving Information Disclosure of Public Enterprises and Institutions: Assessment of the Referential Article of the OGI Regulations and its Revision], 9 HE BEI FA XUE (河北法学) (2020) (analyzing the revision of the article on information disclosure of public enterprises and institutions in 2019); Haibo Lu, Hongzhi Meng, *Gonggong Qishiye Danwei Xinxi Gongkai de Lujing Xuanze: Xinxing Guanzhuang Bingdu Feiyan Yiqing Yinfa de Falv Sikao* (公共企事业单位信息公开的路径选择——新型冠状病毒肺炎疫情引发的法律思考) [Path Selection of Information Disclosure of Public Enterprises and Institutions: Legal Reflections prompted by the Covid-19 Pandemic], 2 HENAN DAXUE XUEBAO (河南大学学报) (2020) (evaluating the revision of Article 37 of the OGI Regulations against the background of Covid-19 pandemic).

the most basic collective unit in the Chinese political and social order. Politically, *danwei* is a mechanism through which the state controls members of the cadre corps, monitors ordinary citizens, and carries out its policies. Economically and socially, *danwei* fulfills social and communal needs of its members, including housing, dining, education, healthcare, and so on.⁴ A Chinese *danwei* usually falls into one of the three following categories: (1) party and state agencies and departments (called *dangzheng jiguan*), (2) state-owned enterprises (called *qiye danwei*), and (3) state-sponsored institutions (called *shiye danwei*).⁵ In the pre-reform period, while the state-owned enterprises (SOEs) performed primarily productive functions, the state-sponsored institutions played a whole host of nonproductive roles, such as market regulation, research and education, media and press, and service and welfare provision.⁶ Notwithstanding the difference in functions, both SOEs and state-sponsored institutions were essentially funded by the public purse. During the reform era, SOEs and state-sponsored institutions underwent successive rounds of reforms to readjust the state-society relationship in China. The main objective of state sector reform was to downsize government control to leave more space for the market and civil society.⁷ This article does not have the space to engage in extensive discussion of these reforms, though they are of great importance themselves. Suffice to say, until today, such reforms are still unfinished, and public enterprises and institutions continue to perform a variety of public functions and/or to receive public funds. For instance, despite the increasing presence of private universities (including Sino-foreign joint universities), more than 60 percent of higher education institutions in China and all of the most elite ones among them (enlistees of the famous 985 and 211 projects) remain publicly funded,

⁴ See ELIZABETH PERRY & LU XIAOBO, DANWEI: THE CHANGING CHINESE WORKPLACE IN HISTORICAL AND COMPARATIVE PERSPECTIVE 8–12 (Elizabeth Perry & Lu Xiaobo eds., 1998).

⁵ *Id.* at 6–7.

⁶ *Id.* at 7, 9.

⁷ For a recent account of China's SOE and state-sponsored institutions reforms over the years, see LAM TAO CHIU, GLOBALIZATION AND PUBLIC SECTOR REFORM IN CHINA CHINA (Kjeld Erik Brødsgaard ed., 2014), especially Chapters 6 and 7. For relevant discussion from the legal perspective, see Zhou Hanhua, *China's Regulatory Reform: Experiences, Challenges, and Prospects*, 13 U. PA. ASIAN L. REV. 1 (2018).

enrolling more than 70 percent of college students in the country.⁸ Likewise, private hospitals have grown exponentially since the 1990s and in the end of 2017 there were more than 18,000 private hospitals in China, accounting for 60 percent of the total number of hospitals. Yet there were only 490 million visits to these private healthcare institutions, which counted less than 15 percent of total visits.⁹

What then are the legal transparency requirements for these public enterprises and institutions? In Chinese administrative law, the government consists of two types of organizations: one is administrative organs (*xingzheng jiguan*) and the other is the so called empowered organization, which are entities empowered by laws, administrative regulations and rules to perform the functions of public affairs administration (*falü fagui guizhang shouquan zuzhi*).¹⁰ Under the 2008 OGI Regulations, the transparency requirements for these organizations are covered in the first 36 articles. Article 37 goes on to lay the statutory ground for openness of public enterprises and institutions: “Disclosing information that is made or obtained in the course of providing public services by public enterprises and institutions that are closely related to the people’s interests such as education, medical care, family planning, water supply, electricity supply, gas supply, heating, environmental protection and public transportation shall be done with reference to these Regulations. The specific measures shall be formulated by competent departments or

⁸ *Private Universities Increasingly Important in China: Report*, XINHUA (Oct. 18, 2017), http://www.xinhuanet.com/english/2017-10/18/c_136689356.htm [<https://perma.cc/K5GY-HFP5>]; Kai Yu, *The Consolidation of Chinese Private Higher Education*, UNIVERSITY WORLD NEWS, <https://www.universityworldnews.com/post.php?story=20181003094521393> [<https://perma.cc/ZDU4-KGEV>].

⁹ Zheng Yiran, *Future of Private Medical Institutions Looks Promising*, CHINA DAILY (Sept. 21, 2018), <http://www.chinadaily.com.cn/a/201809/21/WS5ba456e5a310c4cc775e780e.html> [<https://perma.cc/F2MQ-5X9U>].

¹⁰ Article 2 of the Administrative Litigation Law prescribes that decisions made by both of these organizations are open to judicial review. Zhonghua Renmin Gongheguo Xingzheng Susong Fa (Administrative Litigation Law of the People’s Republic of China) [中华人民共和国行政诉讼法] (promulgated by Standing Comm. Nat’l People’s Cong., Nov. 1, 2014, effective May 1, 2015), art. 2, <https://www.chinafile.com/ngo/laws-regulations/administrative-litigation-law-of-peoples-republic-of-china-2015-amended-version> [<https://perma.cc/9TND-78R9>] (last visited Apr. 20, 2021).

offices of the State Council.”¹¹ Apparently, public enterprises and institutions are seen to be sufficiently different from the government to warrant a separate clause in the 2008 OGI Regulations; yet they are also considered to be sufficiently similar to the government to disclose information with reference to the 2008 OGI Regulations. So, what is the difference? Why are these strictly speaking non-government organizations incorporated in the government transparency legislation? To what extent is this particular legal requirement implemented in reality? What are the challenges in enforcing compliance with openness requirements from such organizations?

Eleven years after the promulgation of the 2008 OGI Regulations, a set of amendments were introduced for the first time, and the revised law became effective on May 15, 2019.¹² With regard to the public enterprises and institutions, two significant changes have been made in the new Article 55, compared to Article 37 of the 2008 OGI Regulations. First, the OGI Regulations will no longer be the legal basis according to which public enterprises and institutions disclose information; second, citizens aggrieved by non-disclosure decisions made by public enterprises and institutions may appeal to the relevant supervisory administrative departments, which means administrative litigation, the previously available remedy, is no longer available. What are the underlying reasons for these changes? Are they moving in the right direction towards tackling challenges related to the openness of public enterprises and institutions in China?

This article sets out to explore these issues and will proceed in five parts. Part 1 explains the legal framework of open public enterprises and institutions in China, especially what sets them apart from administrative organs and empowered organizations under the 2008 OGI Regulations. The section goes on to reveal the overlooked

¹¹ This is largely based on the translation done by the Paul Tsai China Center at Yale Law School. For the full text, *see* Regulation of the People’s Republic of China on Open Government Information (promulgated by St. Council, Jan. 17, 2007, effective May 1, 2008), https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI-Regs-English.pdf [<https://perma.cc/6PDU-S5TM>] (last visited Feb. 14, 2019) [*hereinafter* 2008 OGI Regulations].

¹² The English translation of the amended OGI Regulations can be found at <https://www.chinalawtranslate.com/en/open-government-information-regulations-of-the-p-r-c-2019/> [<https://perma.cc/4X2N-6JCM>] (last visited Feb. 2, 2021) [*hereinafter* 2019 OGI Regulations].

dualistic structure within China's transparency law and explain the 2019 amendments that reinforce that structure as well as the fourfold conventional wisdom that underpins the recent legal changes. Part 2 reports and assesses the transparency performance of Chinese public enterprises and institutions since the enactment of the 2008 OGI Regulations, particularly in comparison to that of the administrative organs. It will make clear that public enterprises and institutions have had a rather poor transparency record over the last decade or so, due to a lack of hierarchical pressure from the government departments responsible for overseeing their operation. Part 3 proceeds to demonstrate that the Chinese judiciary has been active yet prudent in scrutinizing public enterprises and institutions' compliance with the 2008 OGI Regulations, in spite of the institutional barriers created by the dualistic structure. Part 4 argues that the incorporation of public enterprises and institutions into the OGI Regulations is consistent with both the Chinese constitutional imperative for participatory democracy and the international mainstream of including non-governmental entities performing public functions and/or receiving public funds in the freedom of information legislation. The conclusion summarizes the article and makes proposals for further reforms in this area.

II. THE LEGAL FRAMEWORK OF OPEN PUBLIC ENTERPRISES AND INSTITUTIONS AND ITS RECENT CHANGES

As mentioned above, under the 2008 OGI Regulations, public enterprises and institutions are different from the administrative organs and empowered organizations. The most crucial difference lies in that the 2008 OGI Regulations are not to be implemented *in toto* vis-à-vis public enterprises and institutions. To use the exact wording of Article 37, information disclosure by public enterprises and institutions "shall be done *with reference to* these Regulations," or in Chinese "*canzhao*."¹³ This is clearly distinct from the legal obligations of the government, including administrative organs and empowered organizations, to release information *according to* the 2008 OGI Regulations, or in Chinese "*shiyong*."¹⁴ In other words,

¹³ 2008 OGI Regulations, *supra* note 11, at art. 37.

¹⁴ *Id.* at arts. 3, 4.

there is a dualistic structure internal to China's transparency system: with regards to administrative organs and empowered organizations, the OGI Regulations must be enforced; yet concerning public enterprises and institutions, the OGI Regulations are to be referred to. What explains this embedded dualism? The widely accepted reason is that under Chinese administrative law, only the administrative organs and the empowered organizations are considered administrative subjects (*xingzheng zhuti*), which refer to those organizations that can become defendants in China's administrative litigation or judicial review. Public enterprises and institutions are not administrative subjects since they are not regarded as part of the administrative machinery.¹⁵ Therefore, while both administrative subjects and non-administrative subjects shoulder legal duties to release information under the 2008 OGI Regulations, only the former is subject to administrative litigation prescribed in Article 33 with respect to their disclosing activities.¹⁶ As non-administrative subjects, public enterprises and institutions are in theory immune to the scrutiny of judicial review regarding their disclosing decisions, even though they are legally bound to engage in such activities. Hence there is this distinction between "with reference to/*canzhao*" and "according to/*shiyong*" as the application of the 2008 OGI Regulations to public enterprises and institutions is not wholesale but rather excludes Article 33.¹⁷

¹⁵ Xue Gangling, *Woguo Xingzheng Zhuti Lilun zhi Jiantao* (我国行政主体理论之检讨) [An Critical Assessment of the Theory on Administrative Subjects in China], 6 ZHENGFA LUNTAN (政法论坛) (1998).

¹⁶ As mentioned before, the 2008 OGI Regulations cover both administrative organs and empowered organizations. Yet only the former organs are considered administrative subjects open to administrative litigation.

¹⁷ Hou Xiangdong, *Lun Woguo Zhengfu Xinxu Gongkai Zhidu Biange zhong de Ruogan Zhongda Wenti* (论我国政府信息公开制度变革中的若干重大问题) [On Several Significant Issues Concerning the Reforms of China's Open Government Information System], 5 XINGZHENG FAXUE YANJIU (行政法学研究) 99, 103 (2017). One specific point worthy of clarification here is that in some instances public enterprises and institutions can be proper defendants in administrative litigation. For example, public universities in China have long been subject to judicial review, particularly involving disputes about universities' disciplinary decisions in the forms of revocation of degrees. However, they become defendants in administrative litigation not as non-administrative subjects, but as empowered organizations under Article 8 of the Degree Regulations and Article 22 of the Education Law, which confer degree-conferral power upon universities. See Zhan Zhongle, *Zailun Woguo Gongli Gaodeng Xuexiao zhi Falv Diwei* (再论我国公立高等学校之法律地位) [On the Legal Status of Public

As mentioned above, the 2019 amendments to the OGI Regulations strengthened the dualistic structure, albeit in an altered fashion. Specifically, two major changes were introduced by Article 55 of the amended legislation.¹⁸ First, although the 2019 OGI Regulations still includes one article on transparency requirements for public enterprises and institutions, they will no longer be the legal basis for non-administrative disclosure activities. The newly added Article 55, which replaced the original Article 37, prescribes in its first paragraph that information disclosure by public enterprises and institutions shall now be done according to rules established by the relevant departments under the State Council that oversee public enterprises and institutions, and that the national agency in charge of open government information affairs (i.e. the General Office of State Council) may enact special rules for this area if and when necessary.

On December 21, 2020, the General Office of State Council issued the *Measures for Formulating Public Enterprise and Institution Information Disclosure Provisions*, urging supervisory administrative departments to establish rules in this respect, as required by Article 55 of the 2019 OGI Regulations.¹⁹ Particularly, its Article 5 stipulates that the method of information disclosure by public enterprises and institutions shall mainly be proactive disclosure, and disclosure on request shall not *in principle* be adopted.²⁰ Given that the government is obligated to disclose information both proactively and upon request, this means that disclosure requirements for the public enterprises and institutions are now distinct. Second, in recognition of the institutional limitation on public enterprises and institutions as non-administrative subjects that are immune to administrative litigation, the second paragraph of Article 55 of the 2019 OGI Regulations prescribes that when there are grievances about public enterprises and institutions' openness,

Higher Education Institutions in China], 7 ZHONGGUO JIAOYU FAZHI PINGLUN (中国教育法制评论) 30, 33 (2009).

¹⁸ 2019 OGI Regulations, *supra* note 12, at art. 55.

¹⁹ *Id.* Article 55 of the 2019 OGI Regulations prescribes that the competent departments for open government information work for the entire nation are to draft special provisions as required by actual conditions.

²⁰ The full text English translation can be found at <https://www.chinalawtranslate.com/en/public-enterprise-institution-ogi/> [<https://perma.cc/4X2N-6JCM>] (last visited Feb. 2, 2021) [*hereinafter* 2020 State Council General Office Measures].

citizens must file complaints to the relevant departments overseeing public enterprises and institutions and those departments must promptly handle these complaints and notify the petitioners about the results.²¹ Administrative litigation is no longer available. This has been reaffirmed by Article 8 of the 2020 State Council General Office Measures.

The recent legal changes entrench the dualistic structure within the OGI Regulations system. Previously, public enterprises and institutions shared the same transparency obligations as administrative organs and the empowered organizations, as specified by the 2008 OGI Regulations, but under the 2019 OGI Regulations, public enterprises and institutions now face a new set of special rules established by their oversight government departments (hereinafter the “oversight departments”), or in Chinese *zhuguan bumen*. Based on what has been mandated about the disclosure method by the 2020 State Council General Office Measures, the difference between special oversight rules and the OGI Regulations will indeed be substantive. Moreover, prior to the 2019 amendments, even though public enterprises and institutions were in theory non-administrative subjects, they have remained ambivalent about whether their disclosure activities could be challenged through judicial review. After all, the 2008 OGI Regulations do not unequivocally state that public enterprises and institutions are absolutely exempt from administrative litigation. That is now changed in the 2019 OGI Regulations by Article 51 (stipulating that administrative litigation applies to administrative agencies) and Article 55 (stipulating that citizens ought to challenge public enterprises and institutions’ disclosure decisions via a complaint mechanism) of the draft amendments.²² It has finally been made clear that public enterprises and institutions will be free from judicial review for their open information activities. In summary, it is fair to say that the gap between the non-administrative subjects and the administrative subjects under the OGI Regulations has widened and the dualism embedded therein reinforced.

The rationale behind these changes is four-fold, as explained by the Deputy Director of the Office of Open Government Affairs under the General Office of State Council, who was intimately

²¹ 2019 OGI Regulations, *supra* note 12, at art. 55.

²² 2019 OGI Regulations, *supra* note 12, at arts. 51, 55.

involved in the drafting of the 2019 amendments.²³ First, because public enterprises and institutions do not qualify as administrative subjects, they are usually unable to enter into administrative litigation. Even if they become defendants, it is difficult, if not impossible, for the courts to review the legality of their disclosure decisions because it remains ambiguous how the OGI Regulations apply when they are for reference rather than strict obligation for public enterprises and institutions. Second, the responsibility of ensuring public enterprises and institutions' transparency, including settling grievances arising from lack thereof, is better entrusted to the oversight departments than to the judiciary. Compared to the judiciary, the oversight departments are in a better position to enforce disclosure requirements vis-à-vis public enterprises and institutions since they are directly superior to and in charge of public enterprises and institutions within the administrative hierarchy.²⁴ Third, public enterprises and institutions should be considered regulatees whose transparency obligations are different from the freedom of information requirements that apply more generally to the government, and closer to compulsory disclosure requirements imposed on listed companies or charitable organizations.²⁵ Whereas the former fosters a transparent political regime, the latter aims at a well-regulated market and society. Thus the terms for open public enterprises and institutions should be provided by those rules for specific areas of regulation, for example, special rules promulgated by relevant oversight departments as regulators, rather than by the general freedom of information legislation.²⁶ The fourth and last official rationale is that globally the freedom of information laws primarily target government agencies rather than non-government organizations. By enlisting public enterprises and institutions, the Chinese OGI Regulations deviated from the mainstream in the world. It was deemed necessary to realign with international standards by

²³ Hou, *supra* note 17.

²⁴ *Id.*

²⁵ In China, such disclosure requirements are not specified in the OGI Regulations but in the Securities Law of 2014 (Article 65) and Charity Law of 2016 (Article 69).

²⁶ Hou Xiangdong, *Lun Xinxi Gongkai de Wuzhong Jiben Leixing* (论信息公开的五种基本类型) [On Five Basic Types of Open Information] 1 CHINESE PUB. ADMIN. (中国行政管理) 27, 32 (2015).

taking public enterprises and institutions out of the OGI Regulations.²⁷

The proposed legislation, while perhaps well-intentioned and based on conventional wisdom, is misinformed and misdirected. The rest of this article refutes these four official arguments. The next section will show that over the ten years, between 2008 and 2018 when the recent amendments were first announced, the transparency performance of public enterprises and institutions has been far from satisfactory principally because the oversight departments have done little to tackle the issue of transparency at all.

III. THE LACKLUSTER TRANSPARENCY PERFORMANCE OF PUBLIC ENTERPRISES AND INSTITUTIONS AND ITS CAUSES

As previously discussed, Article 37 of the 2008 OGI Regulations poses a general requirement that public enterprises and institutions in a series of sectors shall disclose information with reference to the OGI Regulations. A comprehensive survey of the transparency performance of public enterprises and institutions is outside the scope of this article. In short, the application of the 2008 OGI Regulations to public enterprises and institutions has been patchy and in fact less effective than to the government agencies, based on existing empirical findings concerning public enterprises in the water supply sector and public institutions in the higher education sector.

By way of example, a recent review of water companies for 31 provinces in China found that their compliance with the 2008 OGI Regulations has been far from ideal based on a number of metrics. First, while Article 31 of the 2008 OGI Regulations demands the issuance of an open information yearbook by March 31 annually, not a single water company has ever done so.²⁸ This is in stark contrast to the government agencies at both the central and local levels who have largely implemented this mandate.²⁹ Similarly, only in three out

²⁷ Hou, *supra* note 17.

²⁸ Hubbard & Xiao, *supra* note 3.

²⁹ This is not to say that there has been a perfect record. For instance, in 2016, two provincial governments were late in publishing their open information yearbook. Yet overall speaking, this is not much of a problem with regard to administrative organs because as early as 2011 all 31 provincial governments

of 31 provinces do a water company's website specify that they accept information requests in its open information guide, or provide a downloadable information request form, as required by Article 19 of the 2008 OGI Regulations,³⁰ whereas nearly all government agencies have set up online channels to receive open information requests.

The same can be said for the universities, whose openness record has been a far cry from impressive. For instance, the Center for Education Law at the Chinese University of Political Science and Law reported in 2011 that although Article 10 of the 2008 OGI Regulations demands disclosure of budgeting information—and specifically Article 7 of the 2010 *Measure for Open Information in Higher Education Institutions* requires universities to proactively disclose their annual budget to the public—none of the 112 universities enlisted in the *211 Project*, a national initiative to recognize the most prestigious universities in China, had ever published such information.³¹ Three years later, in 2014, a more broad-based research effort looking at 521 universities in six provinces found that only eighty-seven publish budget-related

released their yearbooks on time and the quality of such yearbook has been noticeably better over the years. See Wan Jing (万静), *Shengbu Jiguan Xinxi Gongkai Nianbao yi Quanbu Fabu Guojia Minwei Guotu Ziyuan Bu Zhongguo Renming Yinhang yiji Hunan Sheng Jun Wei Anshi Fabu* (省部机关信息公开年报已全部发布国家民委、国土资源部、中国人民银行以及湖南省均为按时发布) [Ministerial Departments have all Published Open Government Information Annual Reports with State Ethnic Affairs Commission, Ministry of Land and Natural Resources, People's Bank of China and Hunan Province Publishing on Time], SOHU NEWS (Apr. 2, 2011, 7:57 AM), <http://news.sohu.com/20110402/n280107345.shtml> [https://perma.cc/63QB-H94L]; Xiao Weibing (肖卫兵), *Jinnian Zhengfu Xinxi Gongkai Nianbao Fabu Gongzuo Liangdian Duo* (今年政府信息公开年报发布工作亮点多) [There Are Many Bright Spots in the Published Open Government Information Annual Reports this Year], WANGYI NEWS (Apr. 7, 2016, 11:27 AM), <http://news.163.com/16/0407/11/BK21MLPC00014AED.html> [https://perma.cc/X7X9-KWR2].

³⁰ Hubbard & Xiao, *supra* note 3.

³¹ Wan Jing (万静), *112 Suo Gaoxiao Wuyi Gongkai Jingfei Laiyuan Niandu Yusuan Juesuan Xinxi* (112所高校无一公开经费来源年度预决算信息) [None of the 112 Universities Publicized Information on Source of Revenue and Annual Budgeting], FA ZHI RI BAO (Dec. 2, 2011), <http://news.cri.cn/gb/27824/2011/12/02/3365s3458452.htm> [https://perma.cc/AK2N-KYKW].

information on their website.³² Another study revealed that out of 343 universities across three provinces, 227 failed to publicize their budget-related information.³³ In comparison, substantial progress has been made in the area of government agencies opening up their budgetary process.³⁴ For instance, in 2013 all central departments and provincial governments and their departments published their annual budgets.³⁵

To be sure, the above is not to imply that government agencies in China practice impeccable transparency. The reality is the opposite.³⁶ But it does show that in relative terms the transparency

³² Chen Ying (陈盈) & Li Lei (李磊), *Gaoxiao Caiwu Xinxi Gongkai de Xianzhuang Tantaoy: Jiyu Gaoxiao Yujuesuan Baobiao Xinxi Gongkai Shuju Shijiao* (高校财务信息公开的现状探讨: 基于高校预决算报表信息公开数据视角) [On the Status Quo of Open Financial Information in Universities: Based on the Data on Open Budgeting Information of Universities] 3 JIAOYU CAIKUI YANJIU (教育财会研究) 45, 47 (2014).

³³ Sun Yingying (孙颖颖), *Zhongguo Gaoxiao Caiwu Xinxi Gongkai Xianzhuang yu Duice Fenxi: Yi Beijing Shi Shanxi Sheng he Jiangsu Sheng Weiili* (中国高校财务信息公开现状与对策分析: 以北京市、陕西省和江苏省为例) [Analysis on Current Status of and Policy Response to Open Financial Information in China's Universities: Evidence from Beijing, Shaanxi and Jiangsu], 3 BEIJING HANGTIAN HANGKONG DAXUE XUEBAO SHEHUI KEXUE BAN [J. Beijing U. Aeronautics & Astronautics (Soc. Sci. Ed.)] (北京航空航天大学学报社会科学版) 116, 118 (2015).

³⁴ Wang Luozhong (王洛忠) & Li Fan (李帆), *Woguo Zhengfu Yusuan Gongkai de Shijian Jinzhan Xianshi Chaju yu Tisheng Lujing* (我国政府预算公开的实践进展、现实差距与提升路径) [Practical Progress, Existing Gaps and Ways of Improvement for Open Government Budgeting Information in China], 10 CHINESE PUB. ADMIN. (中国行政管理) 66, 67 (2013) (suggesting that huge improvement has been made in disclosing government budgeting information in China). Again there are still many lingering problems for government agencies' open budgeting information in China, especially the quality of information disclosure. See Jiang Hong, *Zhengfu Yusuan Xinxi Gongkai Juli Gongzhong Zhiqing Quan haiyou Juli* (政府预算公开程度距离公众知情权还有距离) [There is still Gap between Open Government Budgeting Information and the Rights to Know of the Public], WANGYI NEWS (Dec. 10, 2018), <http://news.163.com/15/0310/10/AKBB414K000150MB.html> [<https://perma.cc/4UKN-5M6Q>].

³⁵ Lu Xin (卢馨) & Fang Ruizi (方睿孜), *Woguo Yusuan Gongkai Jinzhan Wenti ji Jianyi: Jiyu 2013 Nian Woguo Geji Zhengfu Bumen Yusuan Gongkai Xiangguan Shuju de Fenxi* (我国预算公开进展、问题及建议: 基于 2013 年我国各级政府部门预算公开相关数据的分析) [Progress, Problems and Suggestions on Open Budgeting Information in China: Analysis based on Data concerning Open Budgeting Information of Various Government Departments], 7 KUAIJI ZHI YOU (会计之友) 88, 89 (2015).

³⁶ Rana, *supra* note 2 (pointing out the problems and drawbacks in the implementation of China's OGI Regulations, such as the absence of a clear-cut definition of state secrets as an exemption from transparency).

record of public enterprises and institutions has been notably worse than that of administrative agencies. But why? The underlying cause will be presented in the following analysis, which will show that the oversight departments have largely failed to implement the 2008 OGI Regulations with respect to public enterprises and institutions.

Although the last sentence of Article 37 orders oversight departments to formulate specific measures for open public enterprises and institutions,³⁷ there are two significant drawbacks regarding standard-setting in this area. On the one hand, there was serious delay in promulgating such specific measures. The *Opinions on Several Issues concerning the Implementation of the OGI Regulations*, published by the General Office of State Council just days before the OGI Regulations became effective on May 1, 2008 stipulates in Article 19 that the oversight departments shall establish specific measures for open public enterprises and institutions in their fields by the end of October 2008.³⁸ But it turned out that only the Ministry of Transport fulfilled this prescription on time; other oversight departments published required measures behind schedule.³⁹ On the other hand, until recently the oversight departments in the nine areas enumerated in Article 37 have all promulgated specific measures governing open public enterprises and institutions.⁴⁰ But beyond these areas, there is no such initiative taken by oversight departments in the technology, culture, telecommunication, postal service, financial service, or social care sector. Nonetheless, there does exist a need for transparent public enterprises and institutions in these fields.⁴¹ Worse still, some oversight departments even broke their own promise to make specific measures. For instance, on the same day when the 2008 OGI Regulations took effect, the Civil Aviation Administration of China issued the *Specific Measures for Open Government Information of Civil Aviation Administrative Organs*, in which Article 30 provides that it will formulate rules on open public enterprises and institutions

³⁷ 2008 OGI Regulations, *supra* note 11, at art. 37.

³⁸ The full text English translation can be found at https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/CL-OGI-State_Council_Opinions-English.pdf [<https://perma.cc/KA66-7L7F>] (last visited Apr. 20, 2021).

³⁹ For a list of these specific measures, see Hubbard & Xiao, *supra* note 3.

⁴⁰ *Id.*

⁴¹ Zhang, *supra* note 3.

in the civil aviation sector. But ten years later, that promise remains unfulfilled.⁴² Such absence of concrete guidance further compounds the aforementioned ambiguity inherent in the application of the 2008 OGI Regulations to public enterprises and institutions.

Additionally, the enforcement of transparency obligations against public enterprises and institutions, in terms of both top-down supervision and bottom-up pressure, has also been problematic. First, Article 29 of the 2008 OGI Regulations suggests that internal evaluation of open information work should be carried out periodically, and Article 35 authorizes superior administrative organs to correct and punish subordinate agencies' unlawful open information activities.⁴³ This obviously aims to strengthen top-down hierarchical supervision for more transparency. Against this background, over the previous decade, governments at various levels conducted evaluations and published results, sometimes even negative results without the 2008 OGI Regulations explicitly requiring so. For instance, at the central level, since 2008 the Ministry of Land and Natural Resources has organized multiple rounds of top-down assessment on over 400 local branches' online transparency performance.⁴⁴ From 2015, the General Office of the State Council started a nationwide evaluation project looking at thousands of government websites to check their open information

⁴² Likewise, the State Bureau of Forestry promised in 2016 that within a year it would promulgate specific measures on open public enterprises and institutions, which has not been delivered so far. See *Guojia Linye Ju 2016 Nian Zhengfu Xinxigongkai Gongzuo Yaodian Fengong Luoshi Fang'an* (2016 年国家林业局政府信息公开工作要点分工落实方案) [State Bureau of Forestry's Implementation Plans concerning Division of Work in Major Tasks in Open Government Information in 2016], ZHONGGUO LINYE WANG (中国林业网) (May 16, 2016), <http://www.forestry.gov.cn/main/4461/content-872406.html> [<https://perma.cc/EVW5-TQMG>].

⁴³ 2008 OGI Regulations, *supra* note 11, at arts. 29, 35.

⁴⁴ For the latest round, see *Guotu Ziyuan Bu Bangongting Guanyu Kaizhan 2017 Niandu Guotu Ziyuan Zhengwu Xinxigongkai Wangshang Gongkai Zhixing Qingkuang Jiancha Gongzuo de Tongzhi* (国土资源部办公厅关于开展 2017 年度国土资源政务信息网上公开执行情况检查工作的通知) [Circular of the General Office of Ministry of Land and Natural Resources on Carrying out Assessment Work over Online Disclosure of Land Resources Government Information in 2017], SOHU (Oct. 24, 2017, 5:06 PM), http://www.sohu.com/a/200170058_822829 [<https://perma.cc/95W2-T5RF>] (establishing the criteria and schedule for the assessment work).

record every quarter⁴⁵ and sanctioned those government agencies with a poor record. For the evaluation in the first quarter of 2018, 196 responsible officials were investigated and 12 removed from post.⁴⁶ On the local level, in 2017, Gansu provincial government announced that over half of its prefectures were unable to pass the open information work assessment carried out in the previous year.⁴⁷ In early 2017, the chief of a local bureau of commerce in Hainan was disciplined for his bureau's prolonged failure to update its website.⁴⁸ In contrast, top-down supervision for open public enterprises and institutions are virtually non-existent. To date, no oversight department has ever carried out any assessment of public enterprises and institutions' transparency record and there has not been a single incident where officials get sanctioned for violating open public enterprises and institutions obligations.

In a similar vein, compared to government agencies, public enterprises and institutions have also faced less bottom-up pressure for their openness performance. Article 33 of the 2008 OGI Regulations specifies that if citizens find an administrative organ has failed to fulfill its legal obligations with respect to open government information, they may report it to the higher-level administrative organ and the latter should investigate and handle it.⁴⁹ Over the last decade or so, governments at different levels have set up this kind of citizen complaint system. For example, cities such as Shanghai,

⁴⁵ For the latest results, see DIYICI QUANGUO ZHENGFU WANGZHAN PUCHA (第一次全国政府网站普查), <http://www.gov.cn/wzpc/2015/> [<https://perma.cc/8XEJ-Z8Y4>] (last visited June 1, 2018).

⁴⁶ Sha Lu (沙璐), *Quanguo Zhengfu Wangzhan Choucha 12 Ren bei Diaoli huo Mianzhi* (全国政府网站抽查 12 人被调离或免职) [*Nationwide Random Inspection of Government Websites led to 12 Officials Demoted or Removed*], SINA NEWS (May 17, 2018, 01:17 AM), <http://tech.sina.com.cn/i/2018-05-17/doc-iharvfhu1739279.shtml> [<https://perma.cc/XR4D-2RYP>].

⁴⁷ Kang Jin (康劲), *Gansu Banshu Shizhou Zhengfu Xixi Gongkai Shehui Pingjia Bu Jige* (甘肃半数市州政府信息公开社会评价不及格) [*Over half of Prefectural Governments Failed in the Social Assessment of Open Government Information*], OGICHINA (Aug. 22, 2017), <http://www.ogichina.org/article/183/29566.html> [<https://perma.cc/82ML-RRNS>].

⁴⁸ Li Dandan (李丹丹), *Hainan Yi Juzhang yin Guanwang Wei Gengxin Bei Li'an Shencha Shou Dangzhengji Chufen* (海南一局长因官网未更新被立案审查受党政纪处分) [*A Bureau Chief in Hainan was Disciplined due to No Update of Governmental Website*], XINHUA (Feb. 8, 2017, 7:24 AM), http://www.xinhuanet.com/2017-02/08/c_1120427350.htm [<https://perma.cc/ULM3-XL2J>].

⁴⁹ 2008 OGI Regulations, *supra* note 11, art. 33.

Shenzhen and Guangzhou have all put in place online portals to receive OGI-related complaints from the general public;⁵⁰ it was reported that in 2015 four ministries and 18 provincial governments did handle such complaints.⁵¹ Yet it is a different story for public enterprises and institutions in which no complaint channels have been opened up so far. For instance, although the *Guiding Opinions on Open Information Work of Public Enterprises and Institutions in the Transportation Sector* enacted in 2008 required the relevant oversight departments to institute telephone helplines or online channels to accept public complaints, this requirement remains unrealized today.

The discussion thus far demonstrates that, though the superior to public enterprises and institutions within the administrative hierarchy, the oversight departments have been far from effective in promoting transparency in public enterprises and institutions. It is in light of these challenges that the 2020 State Council General Office Measures stresses in Article 8 that oversight departments at all levels shall create a special work system for promptly handling complaints concerning information disclosure by public enterprises and institutions.⁵² Article 9 urges that oversight departments shall establish special responsibility clauses and improve enforcement against violations by measures such as circulating notices of criticism, ordering corrective actions, and enforcing administrative punishments.⁵³ Falling short of directly setting out specific rules to guarantee transparency of public enterprises and institutions, this 2020 document nevertheless intends to tighten up top-down hierarchical supervision by the oversight departments, which is surely to be welcomed. Yet given the less than satisfactory record over the last thirteen years, it is reasonable to doubt that much improvement

⁵⁰ These online portals can be accessed at <http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw9825/index.html> [<https://perma.cc/NP9A-Q6U9>]; http://www.gz.gov.cn/sofpro/otherproject/xxgkyjx/wyts_yqts.jsp [<https://perma.cc/6AWK-QWEF>]; or <http://yjx.sz.gov.cn/> [<https://perma.cc/BWU8-XEJ5>] (last visited June 28, 2018).

⁵¹ CHINA ACADEMY OF SOCIAL SCIENCES, THIRD-PARTY EVALUATION REPORT ON OPEN GOVERNMENT INFORMATION IN CHINA 175 (2015).

⁵² 2020 State Council General Office Measures, *supra* note 20, at art. 8.

⁵³ *Id.* at art. 9.

will come to fruition.⁵⁴ Even if the oversight departments become much more motivated, it actually gets more difficult for them to carry out top-down scrutiny over the public enterprises and institutions due to the absence of information disclosure requests sent by citizens, which is mandated by Article 5 of the 2020 State Council General Office Measures.⁵⁵ Without consistent and widespread bottom-up feedback from citizens disclosure requests and appeals against non-disclosure decisions by public enterprises and institutions, it will remain challenging for the oversight departments to spot deficiencies in an efficient manner.

Therefore, in the foreseeable future, the oversight departments are unlikely to be much more effective in enhancing openness in public enterprises and institutions. There is nothing wrong with the 2020 State Council General Office Measures attempting to ask them to do more on this front, yet it is unwise to do so in a way that cuts off judicial scrutiny over the same issue. As the next section will show, it is precisely the judiciary that has placed active yet prudent scrutiny over the transparency performance of public enterprises and institutions, in spite of the aforementioned institutional limitation.

IV. JUDICIAL REVIEW OF OPEN PUBLIC ENTERPRISES AND INSTITUTIONS AND ITS LIMITATION

Three issues are most critical to judicial review in this field: Who are public enterprises and institutions? Can their disclosure decisions be reviewed in court? And what standard does the court adopt when determining whether a specific piece of information shall be released or not? Respectively, these can be called the problems of identification, admissibility, and judgment. To illustrate the current judicial practice on these issues, I compiled a sample of 108 cases decided by Chinese prefectural and provincial courts between 2011 and 2018.⁵⁶ Overall, the plaintiff's winning ratio is 24%, which

⁵⁴ In fact, the last time any specific rules on open government information requirements for public enterprises and institutions got promulgated was in 2010. See Hubbard & Xiao, *supra* note 3.

⁵⁵ 2020 State Council General Office Measures, *supra* note 20, at art. 5.

⁵⁶ On July 14, 2018, I searched the words "public enterprises and institutions" and "open information" on pkulaw.cn, one of China's major online database for administrative litigation cases, yielding a total of 366 results, among which there

means that in less than one fourth of sample cases, the courts ruled against the public enterprises and institutions defendants for violating legal transparency duties. While this may seem meager, it should not be taken as sign of weak judicial scrutiny.

On the problem of identification, the primary issue is whether the enumeration in Article 37 of the 2008 OGI Regulations should be interpreted as exhaustive or non-exhaustive. If it is exhaustive, then only public enterprises and institutions in the nine listed areas such as education, medical care, family planning, water supply, and so on are obligated to disclose information with reference to the 2008 OGI Regulations. As touched upon above, no oversight departments outside the nine listed areas have ever legislated on open public enterprises and institutions. If otherwise, however, then public enterprises and institutions in other areas should also do the same as long as they are providing public services that are closely related to the people's interests, even if no specific measure is made by oversight departments. Therefore, the scope of Article 37 depends practically on if the courts embrace a narrow or broad reading of the enumerative list. Out of the 108 cases surveyed, 82 judgments ruled that the defendants are public enterprises and institutions, among which 36 are outside the listed categories (see Chart 1). For instance, in a 2013 case in Nanyang City of Henan, the prefectural court recognized the municipal branch of China Mobile as a public enterprise providing public services closely related to people's interests, which shall disclose information with reference to the OGI Regulations, even though the telecommunication industry is not listed in Article 37.⁵⁷ This means that the Chinese courts actually take a quite liberal reading of Article 37 in order to expand its purview to cover as many public enterprises and institutions as possible, despite the lack of an unequivocal statutory basis or specific measures.

were 199 decided by the prefectural and provincial courts. After sifting through and removing the irrelevant and repetitive cases, 108 cases were left for closer examination.

⁵⁷ Wang Jucai Su Zhongguo Yidong Nanyang Fengongsi Xinxi Gongkaian (王聚才诉中国移动南阳分公司信息公开案) [Wang Jucai v. Nanyang Branch of China Mobile] (Nanyang Interm. Ct. May 25, 2013), <https://bit.ly/3ukN7TQ> [<https://perma.cc/5LG7-TJ2Q>].

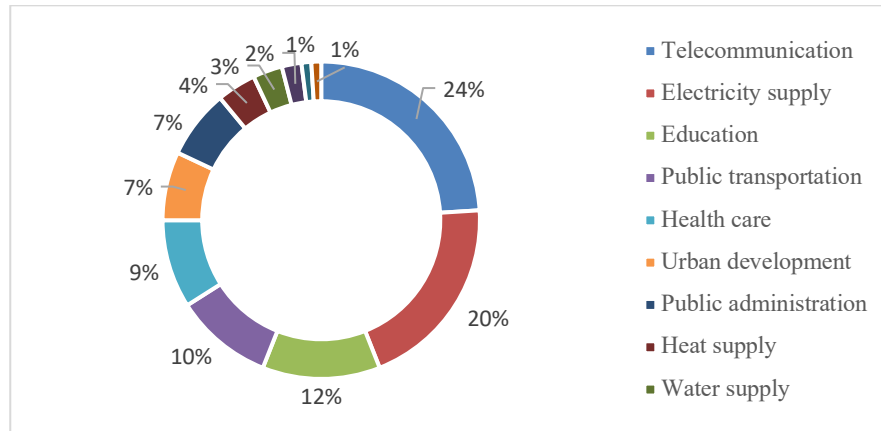


Chart 1

Regarding the problem of admissibility, as mentioned above, because public enterprises and institutions are not considered administrative subjects, they are, in theory, excluded from judicial review. This is the key reason undergirding the dualistic structure embedded in the 2008 OGI Regulations.⁵⁸ But the practice of China's courts tells a different story. Out of the 82 cases where the courts identified the accused party as a public enterprise or institution, there are 76 in which public enterprises and institutions were held to be proper subjects of judicial review. How did the Chinese courts manage to do this? Judging from the court decisions examined in this article, four ways can be identified. First, some courts simply ignored the admissibility obstacle by not mentioning the non-administrative subject status of the accused public enterprises and institutions. Instead, they directly recognized public enterprises and institutions as proper defendants in administrative litigation. For example, in a 2015 case, the Second Intermediate Court of Beijing held that according to Article 37, public enterprises and institutions' open information work shall be carried out with reference to the 2008 OGI Regulations, Article 33 of which stipulates that violation of open information duties can be reviewed in courts. Hence, such alleged infringement by public enterprises and institutions should also be open to judicial review.⁵⁹ Second, some courts did admit that public enterprises and

⁵⁸ See 2008 OGI Regulations, *supra* note 11.

⁵⁹ See Xia Xin Su Beijing Xiehe Yiyuan Xinxi Gongkaian (夏欣诉北京协和医院信息公开案) [Xia Xin v. Beijing Union Hospital] (Beijing Second Interm. Ct. May 18, 2015), <https://bit.ly/3dC4WqQ> [<https://perma.cc/8G29-TS6G>].

institutions are not administrative subjects, but nonetheless ordered that they should be open to judicial review due to their special status. An illuminating example can be found in a 2016 case decided by a court in Nanjing, which pointed out that although the Nanjing Electricity Company was neither an administrative organ nor an administrative subject, it should still be distinguished from an ordinary enterprise.⁶⁰ The court ruled that providing electricity services to the general public, the company was undoubtedly closely related to the people's interests and therefore should be subject to administrative litigation with regard to its open information activities.⁶¹ Third, still there are some courts that identified public enterprises and institutions as empowered organizations, which are susceptible to administrative litigation according to Article 36 of the 2008 OGI Regulations. This is done by taking Article 37 to be an authorizing clause of an administrative regulation (namely the OGI Regulations) for public enterprises and institutions to perform a public function (namely providing public services) so that public enterprises and institutions can qualify as empowered organizations too.⁶² The fourth way is to deny that having the status of administrative subjects is necessary for admissibility in administrative litigation. The reason is that open government information shall be considered as a different kind of administrative action centering on public service from those administrative actions focusing on public administration such as administrative licensing and administrative penalty. Therefore, open government information decisions should be subject to a different set of admissibility rules and

⁶⁰ Nanjing Shi Fengshang Guoji Gongyu Zhuzhai Xiaoqu Yezhu Weiyuanhui Su Guowang Jiangsu Sheng Dianli Gongsu Nanjing Gongdian Gongsu Xixi Gongkai'an (南京市锋尚国际公寓住宅小区业主委员会诉国网江苏省电力公司南京供电公司信息公开案) [Residents' Committee of Nanjing Fengshang International Apartments v. Nanjing Electricity Company of State Grid] Co., Ltd.] (Nanjing Railway Ct. July 27, 2016), <https://bit.ly/2Pwzout> [<https://perma.cc/3UAD-7PYT>].

⁶¹ Residents' Committee of Nanjing Fengshang International Apartments v. Nanjing Electricity Company of State Grid] Co., Ltd. (Nanjing Railway Ct. July 27, 2016).

⁶² Sun Baomei Su Beijing Shi Xicheng Qu Fangwu Tudi Jingying Guanli Zhongxin Xixi Gongkai'an (孙宝妹诉北京市西城区房屋土地经营管理中心信息公开案) [Sun Baomei v. Beijing Xicheng District Housing and Land Management Center] (Beijing Xicheng Dist. Ct. Apr. 14, 2014), <https://bit.ly/3wxgmVb> [<https://perma.cc/3RGM-D26C>].

not require the accused parties to be administrative subjects to qualify as proper defendants in administrative litigation.⁶³

With respect to the problem of judgment, among the 76 cases where the accused public enterprises and institutions were regarded duly defendants, there were only 21 cases in which the courts ruled that public enterprises and institutions broke the law by withholding information that should be disclosed. This means that while Chinese courts have been very liberal in recognizing public enterprises and institutions and their status as appropriate defendants, they uphold a relatively stringent standard when it comes to whether or not the implicated information should be released by public enterprises and institutions with reference to the 2008 OGI Regulations. As discussed before, Article 37 demands public enterprises and institutions to publicize information “made or obtained in the course of providing public services.”⁶⁴ Here, there are two key issues. First, if a piece of information can be categorized as public service information under Article 3, and second, if such public service information shall be made public. For the first question, the implicated information pertains to public services provided by public enterprises and institutions, such as technological standards of electricity supply for an electricity company⁶⁵ and student records for a university,⁶⁶ or related to the infrastructure projects carried out by public enterprises and institutions for the provision of public services, such as construction of port berths by a port management company⁶⁷

⁶³ Peng Wei Su Changsha Yuelu Qu Zhengfu Xinxi Gongkai'an (彭伟诉长沙市岳麓区政府信息公开案 <https://bit.ly/3cTiIpO>) [Peng Wei v. Changsha Yuelu District Government] (Hunan Provincial High Ct. Mar. 24, 2017), [<https://perma.cc/H53P-RRYF>].

⁶⁴ OGI Regulations, *supra* note 8.

⁶⁵ Wang Zhen Bao Su Guowang Shandong Sheng Dianli Gongsu Xinxi Gongkai'an (王振宝诉国网山东省电力公司信息公开案) [Wang Zhenbao v. Shandong Electricity Company of State Grid Co., Ltd.] (Jinan Interim Ct. Mar. 8, 2016), <https://bit.ly/2Oqocii> [<https://perma.cc/JAJ4-J33R>].

⁶⁶ Li Moumou Su Jiaozuo Shifan Gaodeng Zhuanke Xuexiao Xinxi Gongkai'an (李某某诉焦作师范高等专科学校信息公开案) [Li Moumou v. Jiaozuo Normal School] (Jiaozuo Interim Ct. Sept. 18, 2017), <https://bit.ly/2PDQoic> [<https://perma.cc/TA9K-KDSE>].

⁶⁷ Yan Xiantong Su Wenzhou Wenzhougang Jituan Youxian Gongsu Xinxi Gongkai'an (颜贤童诉温州港集团有限公司信息公开案) [Yan Xiantong v. Wenzhou Harbor Group Co., Ltd.] (Wenzhou Interim Ct. Mar. 14, 2017), <https://bit.ly/31Q1T91> [<https://perma.cc/EG3G-X9T6>].

and laying of underground sewage pipe by a drainage company.⁶⁸ Conversely, in those cases where the implicated information is not classified as public service information, the judiciary concludes that the information at hand is about public enterprises and institutions' internal affairs with no direct bearing on the services they provide to the general public, so it need not be made public.⁶⁹ Moreover, on the issue of whether the identified public service information shall be released, the courts relied upon the exemptions prescribed in Articles 8 and 14, which are national security, public security, economic security, social stability, national secrets, commercial secrets, and privacy. For example, in a 2015 case, the Nantong intermediate court in Jiangsu province maintained that a local branch of China Mobile was not violating the law in refusing a citizen's request to release text messages of another customer.⁷⁰ The court reasoned that in pursuance to Article 65 of the PRC Telecommunication Regulations, unless necessary to national security or investigation of a crime and carried out by the public security administration, national security authority, or people's procuratorates according to legal procedures, no organization or individual may access a user's telecommunication content.⁷¹ Hence the plaintiff's request to release another customer's text messages was rejected, and the accused telecommunication company was deemed to be abiding by rather than breaking the law in doing so.⁷²

⁶⁸ You Hanrui Su Beijing Chengshi Paishui Jituan Gongsi Xinxi Gongkai'an (尤瀚睿诉北京城市排水集团公司信息公开案) [You Hanrui v. Beijing Municipal Drainage Company Co., Ltd.] (Beijing Second Interm. Ct. May 14, 2018), <https://bit.ly/2OrMlzH> [<https://perma.cc/LLM7-6N8D>].

⁶⁹ Jia Youbao Su Zhongguo Yidong Shandong Pingdu Fengongsi Xinxi Gongkai'an (贾友宝诉中国移动山东平度分公司信息公开案) [Jia Youbao v. Shandong Pingdu Branch of China Mobile Co., Ltd.] (Qingdao Interm. Ct. Apr. 18, 2018), <https://bit.ly/3fOEEV4> [<https://perma.cc/L3FA-83D6>].

⁷⁰ Wang Dejun Su Zhongguo Yidong Jiangsu Hai'an Fen Gongsi Xinxi Gongkai'an (王德军诉中国移动江苏海安分公司信息公开案) [Wang Dejun v. Jiangsu Hai'an Branch of China Mobile Co., Ltd.] (Nantong Interm. Ct. Mar. 4, 2016), <https://bit.ly/3sYjml2> [<https://perma.cc/G7W7-2GR4>].

⁷¹ Wang Dejun Su Zhongguo Yidong Jiangsu Hai'an Fen Gongsi Xinxi Gongkai'an (王德军诉中国移动江苏海安分公司信息公开案) [Wang Dejun v. Jiangsu Hai'an Branch of China Mobile Co., Ltd.] (Nantong Interm. Ct. Mar. 4, 2016), <https://bit.ly/3sYjml2> [<https://perma.cc/G7W7-2GR4>].

⁷² Wang Dejun Su Zhongguo Yidong Jiangsu Hai'an Fen Gongsi Xinxi Gongkai'an (王德军诉中国移动江苏海安分公司信息公开案) [Wang Dejun v. Jiangsu Hai'an Branch of China Mobile Co., Ltd.] (Nantong Interm. Ct. Mar. 4, 2016), <https://bit.ly/3sYjml2> [<https://perma.cc/G7W7-2GR4>].

The previous discussion indicates that Chinese courts have been very active yet prudent in scrutinizing the transparency performance of public enterprises and institutions, at least prior to the 2019 amendments to the OGI Regulations. First, by adopting a non-exhaustive reading of the enumerative list in Article 37, they have effectively placed more public enterprises and institutions in more areas under information disclosure obligations. Second, by developing a series of ways to recognize public enterprises and institutions as proper defendants in administrative litigation, Chinese courts have successfully subjected open information work of public enterprises and institutions to judicial review. Third, while taking a generous attitude in accepting challenges to disclosure decisions of public enterprises and institutions, Chinese courts have been careful when ordering public enterprises and institutions to release requested information. On the one hand, many courts have displayed respect to managerial independence of public enterprises and institutions by not categorizing information related to their internal affairs without direct bearings on their public service provision as public service information. On the other hand, courts have also made use of the statutory exemptions to open government information in order to prevent information disclosure by public enterprises and institutions from infringing upon public interests, such as national security and privacy. In this circumstance, the ambiguity in applying the 2008 OGI Regulations to public enterprises and institutions has been reduced by a considerable degree.

That being said, the institutional limitation placed over judicial scrutiny in this area by the dualistic structure cannot be ignored or understated. For instance, none of the aforementioned four ways the courts bypassed the admissibility obstacle are based on solid legal ground. It is a long-entrenched rule in Chinese administrative law that to qualify as a proper defendant in an administrative litigation, the entity must have the status of administrative subject. To ignore or deny this is strictly speaking against the law. Similarly, to bypass this via conflating public enterprises and institutions under Article 37 with empowered organizations under Article 36 is also legally dubious because Article 37 should not be seen as authorizing public enterprises and institutions to provide public services, but rather as obligating them to be as open as possible. In this situation, Chinese courts have been walking a very fine line in accepting legal

challenges to public enterprises and institutions' open information work.

Nonetheless, on the whole, it is the courts, not the oversight departments, that have taken the lead in promoting transparent public enterprises and institutions in China during the first decade of enforcement of the 2008 OGI Regulations. Though better positioned to do so, the oversight departments across the country have nonetheless failed to exercise robust hierarchical supervision or exert adequate top-down pressure over public enterprises and institutions to promote better transparency. In contrast, Chinese courts have cautiously but resolutely taken the initiative to ensure that public enterprises and institutions disclose information according to law. Therefore, the conventional wisdom that the oversight departments are effective in and the judiciary is incapable of strengthening open public enterprises and institutions belies the reality. To be clear, this is neither to say that the oversight departments are useless nor that the judiciary alone can do the job. Rather, it is to say that in order to achieve better transparency of public enterprises and institutions, both internal/hierarchical supervision by the oversight departments and external/independent scrutiny by the courts are needed. Seen in this light, the recent legal change to reinforce the existing dualistic structure in the OGI Regulations is problematic, and the more desirable alternative is to remove this structure and place public enterprises and institutions on an equal footing with the government under the same OGI Regulations. On this point, there are two counterarguments remaining to be addressed: first, an open public enterprises and institutions system is by nature different from open government; second, China's practice of imposing legal transparency duties on public enterprises and institutions deviates from the international mainstream practice.

V. CONSTITUTIONAL AND INTERNATIONAL PERSPECTIVES ON OPEN PUBLIC ENTERPRISES AND INSTITUTIONS

The conventional wisdom maintains that regulated public enterprises and institutions should not be subject to freedom of information legislation but should be made open according to compulsory disclosure requirements stipulated by special rules established by relevant oversight departments. This is, however,

rooted in a misunderstanding of the constitutional role of open public enterprises and institutions in China. Admittedly, public enterprises and institutions are regulatees.⁷³ For example, gas companies in China are regulated by the Ministry of Housing and Urban-Rural Development and schools and universities by the Ministry of Education.⁷⁴ This is similar to the situation in the West where public utilities and schools are heavily regulated. Yet in the constitutional sense, public enterprises and institutions in China are also the channels through which Chinese people manage social and economic affairs, just like the government, which is rather different from other countries.

There are three paragraphs in Article 2 of the current PRC Constitution.⁷⁵ The first paragraph lays down the principle of popular sovereignty by prescribing that all power in the PRC belongs to the people. On this foundation, the next two paragraphs set out two forms of people's sovereignty in China. Paragraph 2 reads: "The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power." Paragraph 3 reads: "The people administer State affairs and manage economic and cultural undertakings and social affairs through various channels and in various ways in accordance with the provisions of law." Apparently, in addition to elective democracy embodied in the people's congress system, the Chinese Constitution also embraces participatory democracy through various channels and in various ways.⁷⁶ From the outset, China's initiative on open government

⁷³ This is clearly demonstrated by the fact that both Article 37 of the 2008 OGI Regulations and Article 55 of the 2019 OGI Regulations ask the oversight departments to be responsible for improving transparency of public enterprises and institutions.

⁷⁴ For an analysis of the regulatory landscape of public utilities in China, see Jean-Jacques Laffont, *Management of Public Utilities in China*, 5 ANNALS OF ECONOMICS AND FINANCE 189 (2004) (pointing out that China has a mixed structure of regulatory agencies consisting of both industry-wide and sectoral agencies for public utilities).

⁷⁵ The full text English translation can be found at http://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html [<https://perma.cc/627A-8EAH>] (last visited Apr. 20, 2021).

⁷⁶ For a discussion on participatory governance in China, see Wang Xixin, & Zhang Yongle, *The Rise of Participatory Governance in China: Empirical*

information was intended to enhance participatory democracy. As early as in 2003, five years prior to the implementation of the OGI Regulations, the expert team assembled to draft China's own freedom of information law suggested that, although the Chinese Constitution does not explicitly provide for citizen's right to information, it does provide basis for legislation on open government information through the third paragraph in Article 2 because establishing the right to information is a crucial element to the people's exercising the power to administer affairs of the state, and society and is thereby the concretization of the constitutional mandate.⁷⁷ In 2016, *Opinions on Comprehensively Promoting Open Administrative Affairs* issued jointly by the General Office of the Communist Party of China and General Office of the State Council reaffirmed that promoting open administrative affairs and making public power to operate under the sunshine is of critical importance to the development of socialist democratic politics.⁷⁸ This is not difficult to understand since an open and transparent government is the precondition to the people's effective supervision over and meaningful participation in the government.

The same can be said about open public enterprises and institutions. Circling back to the beginning of this article, public enterprises and institutions are a legacy of China's pre-reform era that continue to perform a variety of public functions and/or receive public funds. In this vein, they are essentially on par with the government as the channels through which Chinese people manage social and economic affairs. Therefore, public enterprises and institutions should be placed under the same transparency obligations as the government in order to enhance participatory democracy in China. As a matter of fact, according to the official narrative in China, historically speaking, open public enterprises and institutions and

Models, Theoretical Framework, and Institutional Analysis, 13 U. Pa. Asian L. Rev. (2018).

⁷⁷ ZHOU HANHUA(周汉华), ZHENG FU XINXI GONGKAI TIAOLI JIANYI GAO; CAO'AN · SHUOMING · LIYOU · LIFA LI (政府信息公开条例专家建议稿:草案·说明·理由·立法例) [EXPERT SUGGESTED DRAFT OF OGI REGULATIONS: DRAFT, EXPLANATION, REASONS AND PRECEDENTS] 43–44 (2013).

⁷⁸ The full text English translation can be found at https://law.yale.edu/sites/default/files/area/center/china/document/2016-2_en_jt_promoting_open_government_opinions.pdf [<https://perma.cc/QMZ8-WN6P>] (last visited Apr. 20, 2021).

open government both originated from the same local initiative called “Two Openly and One Supervision” in Gaocheng county of Hebei province in the late 1980s, aiming at openly disclosing the procedures for accessing public services and the results of public service delivery to accept public supervision.⁷⁹ Specifically, this landmark initiative focused at first on seven local institutions: the bureau of industry and commerce, the taxation administration, electricity supply stations, police stations, bank offices, vehicle administration stations, and epidemic prevention stations. Among these seven institutions, there are four public enterprises and institutions in the electricity supply station, bank office, vehicle administration station and epidemic prevention station sectors.⁸⁰ In this light, from its origin, China’s transparency movement has included open government and open public enterprises and institutions, both of which serve to fulfil the constitutional mandate for participatory democracy in China. Therefore, the dualistic structure in the OGI Regulations that separates the two constitutes a breach of this constitutional requirement and should be abandoned, not reinforced.

On the question whether open public enterprises and institutions in China depart from the international mainstream, it is useful to look at the 2017 *Global Right to Information Rating* conducted by *Access Info Europe* and *Centre for Law and Democracy*, two NGOs based in Europe working on global transparency issues. This rating exercise surveyed the freedom of information legislation of 109 states (China included) around the world according to an index system consisting of 61 indicators. Indicator 12 considers whether the right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.⁸¹ Among the 108 states other than China surveyed, as shown in Chart 2, only 26 have a transparency law that completely

⁷⁹ Stromseth, *supra* note 2, at 34–35.

⁸⁰ Hebei Gaocheng Supervision Bureau (河北省藁城县监察局), *ShiXing Liang Gongkai Yi Jiandu Zhidu, Tuijin Zhengfu Jiguan de Lianzheng Jianshe* (实行两公开一监督制度, 推进政府机关的廉政建设) [Implementing the Two Openly and One Supervision System to Promote Clean Government], in *XINSHIQI DE XINGZHENG JIANCHA GONGZUO* (新时期的行政监察工作) [Administrative Supervision In A New Era] 241 (Li Zhilun (李至伦) ed., 1990).

⁸¹ For the methodology, see *RTI Legislation Rating Methodology*, CENTRE FOR L. & Democracy, www.rti-rating.org/wp-content/uploads/Indicators.pdf [<https://perma.cc/7TRQ-4Q2X>] (last visited Sept. 27, 2018).

excludes application to private entities performing public functions or receiving public funds.

<p>Freedom of information legislation covering private entities performing public functions or receiving public funds (48 states)</p>	<p>Asia (8): Sri Lanka, Kazakhstan, Georgia, Armenia, Kyrgyzstan, Bangladesh, Maldives, Taiwan of China Europe (18): Denmark, Italy, Ukraine, Portuguese, Latvia, Bosnia and Herzegovina, Estonia, Bulgaria, Moldova, Slovenia, Poland, Croatia, Serbia, Ireland, Kosovo, Macedonia, Montenegro, Malta. Africa (11): The Republic of Guinea, South Africa, Nigeria, Liberia, Cote d'Ivoire, Rwanda, Sierra Leone, South Sudan, Mozambique, Kenya, Tunis. South America (11): Trinidad and Tobago, Panama, Mexico, Antigua, Dominican Republic, Nicaragua, Guatemala, Salvador, Columbia, Ecuador, Argentina.</p>
<p>Freedom of information legislation covering private entities performing public functions (22 states)</p>	<p>Asia (6): Israel, Afghanistan, Iran, Jordan, Mongolia, Azerbaijan. Europe (11): Albania, Finland, UK, Hungary, Norway, Switzerland, Czech Republic, France, Liechtenstein, Netherlands, Germany. Africa (3): Angola, Nigeria, Togo. South America (2): Peru, Belize.</p>
<p>Freedom of information legislation covering private entities receiving public funds (12 states)</p>	<p>Asia (5): India, Nepal, Yemen, Indonesia, South Korea Europe (1): Romania. Africa (2): Ethiopia, Burkina Faso. Oceania (1): New Zealand. South Africa (3): Honduras, Brazil, Guyana.</p>

Freedom of information legislation not covering private entities (26 states)	Asia (8): Thailand, Uzbekistan, Japan, Pakistan, Tajikistan, Turkey, Philippines, Vietnam. Europe (7): Sweden, Greece, Belgium, Austria, Lithuania, Spain, Russia. Africa (2): Zimbabwe, Uganda. South America (5): Chile, Uruguay, Jamaica, Saint Vincent and the Grenadines, Paraguay. North America (2): USA, Canada. Oceania (2): Australia, Cook Islands.
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Chart 2

Contrary to the conventional wisdom, therefore, China is in line with most states that have freedom of information legislation to incorporate non-governmental entities performing public functions and/or receiving public funds into such legislation. In this respect, the United States' Freedom of Information Act, which served as a primary inspiration to China's 2008 OGI Regulations, is not a rule but an exception for only covering federal agencies. In fact, there is a notable trend that openness laws passed more recently, especially after 2000, tend to apply to non-governmental bodies, as shown in Chart 3. The Chinese OGI Regulations is therefore actually in tune with the global trend and should not be seen as a deviation from the international mainstream.

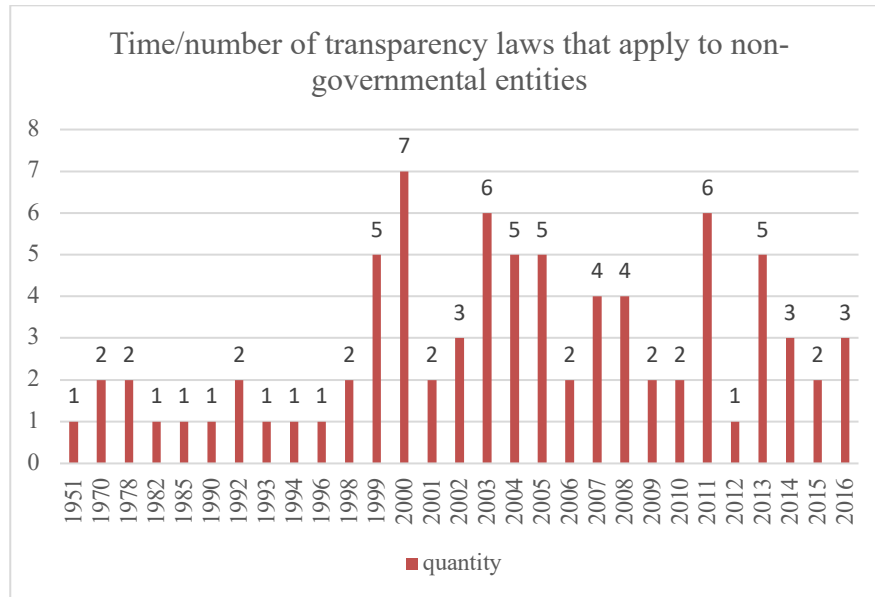


Chart 3

VI. CONCLUSION

This article has tackled a less-researched issue regarding China's first nationwide transparency law: the openness of public enterprises and institutions, namely those entities outside the government performing public functions and/or receiving public funds. Given their public nature, the transparency performance of public enterprises and institutions has huge implications for not only the everyday life of Chinese citizens but also the development of a more open political and administrative regime in the People's Republic. But the dualistic structure in the 2008 OGI Regulations and the 2019 amendments that have further reinforced this structure do more harm than good to promote open public enterprises and institutions in China. They contradict the proven record that it is the judiciary rather than the oversight departments that has taken the lead in promoting openness in public enterprises and institutions during the last decade, notwithstanding the institutional obstacle created by the dualistic structure. The real challenge to open public enterprises and institutions in China, therefore, is more institutional than practical, and the embedded dualism in the OGI Regulations needs to be removed so that public enterprises and institutions can be subject

to the same terms and judicial scrutiny for their open information work as the government.

The question then becomes, how can this be achieved? As mentioned repeatedly in this article, public enterprises and institutions remain non-administrative subjects immune to judicial review. This is why administrative litigation as a remedy has been abandoned under the 2019 OGI Regulations. Without a change in the Administrative Litigation Law,⁸² the only feasible way to bypass this barrier is to make the complaint mechanism a procedural prerequisite for administrative litigation. Specifically, as mentioned, Article 55 of the 2019 OGI Regulations provides that citizens can file complaints against information disclosure decisions by public enterprises and institutions to the oversight departments, which shall then handle these complaints and notify the petitioners about the results. This, however, should not be the end of the matter. Instead, it should be prescribed that the complaint process must be exhausted before the judiciary can step in to review the decisions by the oversight departments in handling citizens' complaints. In this situation, public enterprises and institutions remain directly unreviewable but become reviewable indirectly for their open information work. Meanwhile, it should also be stipulated that public enterprises and institutions will disclose information according to, not just with reference to, the OGI Regulations so that they can be placed under the same transparency terms as the government. Any special rules promulgated by the oversight departments shall not breach the OGI Regulations. The stipulation in Article 5 of the 2020 State Council General Office Measures that largely bans citizens sending disclosure requests to public enterprises and institutions should

⁸² During the deliberation process of the amendments to the 1989 Administrative Litigation Law in 2014, some people's representatives suggested that as the administrative reform deepens in China, more and more self-governing organizations, industrial associations, public enterprises and institutions, and social groups begin to take on public administrative functions that are closely related to the people's interests. The disputes arising as a result demand judicial resolution, and non-administrative subjects should be made susceptible to administrative litigation. However, this suggestion was not adopted in the final version of the 2014 Administrative Litigation Law. See Shi'er Jie Quanguo Renda Changweihui Di Liu Ci Huiyi Shenyi Xingzheng Susongfa Xiuzheng'an Cao'an De Yijian (十二届全国人大常委会第六次会议审议行政诉讼法修正案的意见) [Opinions About Draft Amendments to the Administrative Litigation Law at the Sixth Meeting of the Twelfth National People's Congress Standing Committee] (Dec. 25, 2014).

therefore be reversed. Alternatively, oversight departments should at least make sure that their special rules on transparency of public enterprises and institutions leave room for disclosure upon requests, since Article 5 only states that such a disclosure method shall not *in principle* be adopted. All of this may not guarantee full compliance of public enterprises and institutions with the OGI Regulations, but it surely is a necessary first step in that direction.