The Restraint of the Government Information Disclosure Discretion: A Response from the Perspective of Standardization

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ABSTRACT

There is real necessity of the existence of the discretion in the process of government information disclosure, which is the requirement for coping with regional differences, law lagging and multidimensional personalized demands of information disclosure. But the right of discretion may be over-interpreted and abused if it is used autonomously and improperly. Establishing the government information open ISO quality management standardization system and realizing the standardization of the operation process, in theory, can effectively deal with the generalization and even abuse of the right of discretion. You can promote the government information disclosure to become precise, legalized and transparent from the start, if the method of upper and lower law, standardization and individuation, mandatory standards and voluntary standards, the relationship between national standards and local standards is correctly handled.

INTRODUCTION

Since the implementation of the Regulations on Open Government Information (OGI), by its very nature, it is an interaction and game process between the government, as an information provider who take the initiative to disclose information, and the citizens, who have the massive personalized information demanders. Along with the legitimacy of the discretion and the lack of binding force of external checks and balances, the response, timeliness, specificity, comprehensiveness and other performance indicators of government information disclosure are also questioned. Meanwhile, government information disclosure websites (web pages) are uneven in quality, some of which are keeping pace with the time, while others are in a state of "hibernation" or selective disclosure. The number of government information disclosure, the initial period, update or not and so on are not limited by the law, but all depends on the decision of the government departments. This will lead the information that the government discloses not to meet the needs of the masses, which means that the supply and demand of the information will be out of balance. How to limit and restrict the right of discretion in the government information disclosure, and improve the quality and efficiency of the

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government information disclosure system? This article attempts to respond to it and seek solutions from the perspective of standardization.

THE TWO SIDES OF THE DISCRETION IN THE GOVERNMENT INFORMATION PUBLICITY

Whether it is efficiency oriented or citizen oriented, public service process has freedom of discretion in different degrees.¹ We can't judge whether freedom of discretion is right or not from itself. All the things, such as the diversity, complexity and dynamic, and the lag of legal regulation of the government information disclosure, have annotated the existence of the right of discretion and provided the legitimacy of the operation. However, it is the excessive liberalization and autonomy in the process of implementing that makes the discretion be covered with a negative veil.

The Necessity of the Existence of the Right of Discretion in the Government Information Publicity

Discretion is beneficial to make up for the deficiency of the law, and to achieve the justice of a case. Since the Open Government Information Regulations (OGI) was adopted in April 2007, the process of information disclosure has been getting better. But it is insufficient for the hysteretic principles of OGI Regulations to deal with the real problems in the process of information disclosure nowadays. The flexibility of discretion makes up for the deficiency of the law. When confronted with individual demands of the citizens, administrative law enforcers can take different measures according to the specific issues. This can not only safeguard the legitimate right and interest of the citizens, but also help to maintain the dignity of the law, and to achieve the justice of the law.

With the increasing of the number of the application-based publicity cases, it is helpful for discretion to improve administrative efficiency. In recent years, the number of the application-based applications has spurted. Faced with thousands of packaged applications, especially the applications with no legal provisions, the administrative personnel should adopt consultation mechanism to respond flexibly and achieve one-stop service. As a result, not only will the public demands for information be realized, but the administration efficiency of the local government will be improved.

Although there are differences between different regions in the development of government information publicity, using the right of discretion can help the local government to adopt different methods according to the specific situation. Actually, the government information disclosure has changed as the level of economic development since OGI Regulations was adopted in 2007. The developed areas, such as Shanghai, Beijing, Guangzhou, where the local government takes advantage of its resources, have made significant breakthrough in building information network platforms, opening information in priority areas, and even establishing the application-based publicity system. In contrary, in mid-west regions, the construction of the information public platform is lagging behind, the online service channel is blocked, and the relative coordination of relationship between government and citizens is quite poor. Appropriate discretionary power, on one hand, can help the government disclose the information according to its own development and the limitation of the law, on the other hand, can prevent the phenomena, such as “one-vote negation system”, “one size fits all”, from happening in the performance assessment.
The Rational Behaviors in the Performance of the Discretion of Government Information Disclosure

“Every coin has two sides”, freedom of discretion is not exception, while the lack of regulation of the discretion will become a 'Damocles sword', hanging above the head, which leads the government information to disclosure deviance from its initial aims.

The scope of the information disclosure is determined by the government, which is made a “private domain” at last. The government information publicity is a product of the state’s will and social’s effort. In fact, staffs in government agency are neither angel nor devil, there is a possibility of that people to choose the best for themselves in accordance with "Bounded Rational People", and "economic man hypothesis". Due to absence of standardizations system in the process of information disclosure, a large number of random behaviors have appeared, for instance, refusal to open, or selective disclosure, or conditional disclosure, or postpone the open, or no way to link and the like. They also avoid themselves getting into potential troubles as far as possible, so that interests of the department themselves can be protected from being involved. The publicly-available content, methods and procedures change as its institution. From the perspective of hierarchy establishment of local government, the government information disclosure management agencies has the same level with other government agencies, so they have no direct leadership and supervision rights to ensure other departments to cooperate with them.

The absence of application-based publicity system leads procedural legality to be questioned. More than three ones of ten information disclosure cases announced by the Supreme Court of Shandong Province are related to procedural disputes in public, including ways of application, deadline of the reply, etc.² Taking the methods of application-based publicity for example, according to the OGI Regulations, if applicants want to know more about the government information, they should submit a written application (including the data message), while oral application can be used under exceptional circumstances. That is to say, applicants are admitted to adopt all the ways besides oral ones generally. However, in fact, nothing but the online application and written forms can be accepted by the civil servants. In the micro era, many government departments have launched official accounts to promote their work, while some citizens are rejected when applying for information publicity through the official accounts, such as Micro-blog and WeChat, just because such application ways are identified as irregular. Now that Vmeti Media has been used as a way of spreading information, and admitted by the government, why ordinary citizens are not permitted to apply for information disclosure by it? Is this behavior consistent with procedural legality? As the proverb goes: one may steal a horse, while another may not look over the hedge.

In order to reduce the risk of administrative litigation, civil servant tend to shirk the duty of information disclosure. Due to local governments’ incomplete performing their duties and violating relevant regulations, the same administrative penalty cases have been managed differently, which caused increasing administrative disputes. It is reported that the Supreme Court of Chongqing dealt with 283 cases about government information disclosure in 2014, which has risen four times compared with 2013. In all the concluded cases, the rate of government organizations losing lawsuits even reached 22.3%.³ Therefore, speculation actions were used to reduce the risk of administrative litigation by some department staff. They failed to perform the obligation of processing or segmentation information, and even created procedural barriers to make troubles for
applicants. For example, the rule “Three Needs” (short for “production, living and scientific research and other special needs”) of government information disclosure has often been used as an excuse to reject applicants. However, the OGI only promulgate this rule to list possible reasons for citizens to apply, not stress that these reasons are necessary, and indicate that citizens are admitted to applicant information discloses on their own grounds no burden of proof.

WHY IS DISCRETION ABUSED IN THE PROCESS OF GOVERNMENT INFORMATION DISCLOSURE?

As Montesquieu puts it, “In the legislative process, you’d better give up these statements, such as exceptions, restrictions or constraints, when the law does not need to use them, because those details will give birth to new details.” These statements give lawmen greater administrative discretion, while related supervision and restraint system is not in place, so that administrative discretion, in the realization of a case of justice, but also brings in a legal authorization mind contrary phenomena.

The Subject of Specific Information Disclosure Discretionary Behavior is Uncertainty, Which Leads to Information Gap Easily

One of the necessary conditions for the discretion to function is that the subject of discretion must be clear, to be able to investigate the responsibility of the relevant actors in the abuse of discretion. The uncertainty of the government information disclosure institutions and personnel results in specific administrative responsibilities not being divided clearly. Some government departments are not professional public institutions, regarding government information disclosure as their part time job. Even if the information sections are set up, where few people work hard and take heavy responsibility or suffer from high-stress, but most of them are "Temporary Team" or "Bare Team", whose staff turnover is high. This, inevitably, leads the subject of exercising real discretion to change frequently, the scale of the discretion to be "flip-flopped", and public bidding information also to bring a "fault" sometimes. As a result, the continuity of information disclosure is affected, and it is difficult to guarantee the normalization and standardization of the government information disclosure work.

The Decision and Classification of the Exemption Information are Vague, Making Excessive Discretion

For the "state secrets", "personal privacy", "commercial interests" and "third party interests", "degree of social harm", and other ill-defined, there is neither relevant economic criteria nor guide case to follow. Indeed, except for legal norms and regulations, when the government fulfills its mandate for reviewing application-based publicity, a subjective judgment occupies a large proportion, particularly and most typically in defining the degree of social harm. How to define the degree of social harm? Is the human loss or property destruction as a standard? How to measure the loss, the human loss or property destruction? All of these problem lack of specific quantitative standards. Even though citizens believe that the specific administrative acts of the government is not legitimate, but they don’t have relevant basis. When local governments obviously feel that the information administrative counterpart applied for may pose a threat to their own interests, they will exercise their "extra" discretion.
The open standards for procedural information are controversial. Whether procedural information should be exempted from the public or not, there exist three kinds of disputes, "cancellation theory", "strengthening theory" and "transformation theory".\(^5\) According to “Views On Efforts to Better Government Information Disclosure Application” (SCS No.2010 [5]), the State Council regulates that the process information in discussion, study, or review, generally, doesn’t belong to the disclosed government information that the OGI refers to. This can be said to be the final word, to solve the dispute. However, in terms of the types of information disclosure, whether extension of the meeting minutes, memo, sound recording, video recording, record, report, referral, reply, (discuss) opinion, letter, etc. shall be disclosed or not? Can it be exposed? How to distinguish between decision-making information and factual information in the decision-making process? Everybody has its own opinion. On the generation process of the procedural information, when the relevant administrative order or decision has been released, whether the information that was generated before the administrative organ making decision can be open or not? Can local governments refuse to disclose this information by claiming that it belongs to process information?

**The Construction of the Information Disclosure Platform is Lagging Behind and the Right to Release Information is Monopolized**

Government information disclosure platform is the government website, commonly known as the official website, affiliated with government agencies, and usually play the role of the General Office (room), whose staff are mostly civil servants. Therefore, government departments dominate the process of information disclosure and control the initiative. When open information, how open, open to who are completely decided by the government, and even worse, local government website is managed poorly and long-term not updated.

For example, in accordance with the "Regulations on Open Government Information", the announcement of government information should be released in March next year. However, according to Caixin network reporter, Shanxi Province and Shaanxi Province failed to publish the government information report within a specified time in 2016, and even the content link of annual reports of government information that Shanxi overdue release cannot be open.\(^6\)

In addition, content and form of information open lack of standardization. On one hand, the disclosure contents are not elaborated, and different districts put different information on the government website. Some agencies take the initiative to open the appointment and removal of personnel information; others consider it as internal information, not open for public. On the other hand, each department’s disclosure form is self-contained, leading the layout, quantity and quality of the information voluntarily disclosed by the local government authorities to vary greatly. The readability and consistency of information is difficult to guarantee.

**RESTRICTION ON THE RIGHT OF DISCRETION: RESPONSE FROM THE PERSPECTIVE OF STANDARDIZATION**

As the British Judge Kirk believes that "the discretion should not be arbitrary, ambiguous, uncertain, but it should be legal, set in their ways of power".\(^7\) The author argues that the establishment of government information disclosure of ISO quality management system of standardization, in theory, can effectively deal with the
generalization of discretion and even can discretion abuse, making it has its own rules, but not a movement and random behavior.

**Standardized the Agency of the Discretion, and Define the Subject.**

In order to create high-quality professional team, the main responsibility must be clear, and persons who work on information application, acceptance, examination should have qualification, professional accomplishment, entry and exit training. The government information website should supply "one-stop" Information Query Services, so that citizens can look up the information directly and comprehensively. The government should take initiative to open the name of the main officials, office phone, email, office time, address, and so on, to make people get help and consulting conveniently.

**The Boundaries of Exemptions Information Should Be Standardized, Which Helps Reduce the Elastic Space of the Right of Discretion**

As the pioneer of government information disclosure practice, Europe, the United States and Japan has provided practical experiences for the definition of exemptions information.

Firstly, the scope of the exemptions information must be clear. Taking Sweden for example, exemption information is listed by item and described in detail. Secondly, establish standardized exemption information review system, including the main Review body and the construction of review process. Europe, the United States and Japan have set up a special security information review agency with the information disclosure of government departments, such as Japan's Information Disclosure Review Committee, the UK's information commissioner's Committee. The review process should include “propose attribute of the Government information → verify the attributes of the government information → determine attribute of the Government information → index the directory of government information”. The author suggests that the third party can join the government in the process of reviewing information, which will regulate local government behavior of "acting as both athletes and referee”

**The Platform of the Government Information Disclosure Should Be Standardization, Which Can Break Up Monopoly of Government Information**

The Standardization platform of the government information disclosure should cover the following at least.

We should have successfully normalized contents and forms of the government information disclosure. In terms of contents, we should develop a detail public directory, sorting, grading, stratifying management of government information, especially for key areas of information, such as food safety, the protection of housing and education to maximize the clear the scope of the public. We might as well put some guidance materials in the government information, including guiding cases, and realizing accurate interpretation of the authority of the government. In the form of opening, as Osborn said in the Reform of the Government, "to implement the use of convenience, transparency and integrity and other features, the service is subject to customer demand." On the one hand, it is necessary to open the format. The contents of the government's Web site settings, file format, navigation settings, as well as auxiliary reading functions, etc. should be made a detailed, clear and convenient operation guide directory; on the other hand, according to the time limit of the public, we can put
different categories of information, such as real-time public, daily public, open, annual, quarterly, monthly public, 15 days public and the like.

To achieve standardization in the design of the application-based publicity system. The application-based publicity system has a large-scale personalized needs and services, which makes many local governments too tired to cope with it, but the masses are not satisfied. The solution is to build a custom pattern to meet the people's personalized information disclosure requirements. Meanwhile we can depend on process reengineering to realize the standardization of the process of government information disclosure. The process of government information disclosure should be placed in the most obvious location of the portal so that citizens can get access to it. From application, review to public the results, we should strictly implement the process management and constrain the information workers’ behavior from the procedure.

The application-based publicity inquiry system should be standardized. The applicant can dynamically know the submission of the letter, the delivery department of the material, the admissibility of time, and the network to declare the legal basis for the refusal or acceptance of such services. For example, Beijing adopts cloud technology to establish a "1+16 N" online government services platform, and achieves interoperability and sharing in four level of government system, opening approval guidelines, procedures, standards, results and other comprehensive online. Why not promote such a successful experience in the field of information disclosure?

FROM THE SOURCE TO RESPOND TO THE DISCRETION IN THE PERSPECTIVE OF STANDARDIZATION

The standardization of government information publicity is not only a technical problem, but also the thinking level’s problem, and the high of thinking level determines the technical accuracy.

Correctly Handle the Relationship between the Upper and Lower Law, Protecting the Discretion from the Source

At present, the exemption information is regulated by the Secrecy Laws and Archives Law in china. On the one hand, the OGI regulated that citizens are allowed to get access to government information; on the other hand, the OGI, as a lower law, must obey the laws of the host. In fact, it provides the legal justification for the administrative authorities to refuse, widen and narrow the exemptions information. In foreign countries, the law that adjusts the relationship between information publicity and the Secrecy Laws are generally in Congress or parliament legal form, it is in the second only to the constitution in the national legislative system, and the law that keeps the state secret are mostly in the form of administrative regulations. In our country, the Secrecy Laws and Archives Law still have a larger remodeling space. In practice, it is necessary to improve the legal hierarchy of the OGI and issue the Freedom of Information Act, to make it superior to the Secrecy Laws and Archives Law. This relationship can not only contain citizens’ right to know the information up to the legal status to be protected, but also provide a basis for the legalization of discretion from the source.
Smooth the Relationship Between Standardization and Personalization, to Make the Discretion Legalization, Compliance, Quantitative

Starting from the release of information discretion list, and the government should take initiative to open information disclosure projects, the application-based publicity procedures, the secret power list and the like, so that it can compress the list of information disclosure power. However, standardization is not stereotype, which means standardization and personalization cannot replace with each other, but complement each other. Except for the regulations of the lists of standardization, local governments can exercise their right of discretion to give information disclosure itself more personalized and interesting according to their own conditions. Jiangsu province, for instance, converts text to image, video under OGI in 2016. According to their own interests and hobbies people can choose the right way of viewing. It is helpful to improve the satisfaction of citizens and shape the friendly image of government. Therefore, the individual use of the reasonable and legal discretion is also a necessary complement to the standardization.

To Deal with the Relationship Between Mandatory and Autonomy Standards, and We Should Give More Legality Space to the Right of Discretion

The mandatory standards refer to the information that has to be open to safeguard citizen's basic right of knowing information, which must be implemented by the enforcement of the law. In order to further meeting the requirements of information standardization, the construction of information disclosure platform and the public of the project content are required to carry out mandatory norms. Mandatory standards are the fundamental conditions, but the autonomy standard is an option. When faced with different groups and socio-economic environment, the administrative law enforcement can make legal choice according to the autonomy standards, which will ensure the discretion always be used lawful, reasonable and sensible.

CONCLUSION

In summary, the purpose of the standardization of government information disclosure is to constrain the power of government agencies, and to solve structural contradictions between supplying and demanding parties in the process of the government information publicity, and to promote the disclosure of government information to become precise, transparent, and legal. Therefore, reforms should be based on need, problems, fairness and public-oriented gradually advance, and could not accomplish the whole task at one stroke. The order of information supply, supply mode, priority object and other institutional should be designed with the goal of improving satisfaction for the government information disclosure.

What’s more, we should adjust, supple, perfect and revise relevant laws and regulations, especially for the OGI, to enhance collaboration between the related laws and regulations from the system level, and eliminate the uncertainty of the specific operators in the process of the government information publicity. But confined to realistic problems like difficulties of formulating technical standards, standardization bodies and personnel professionalism, standardization needs a continuous evolution process, and the right of discretion also has a process of continuous compression and clarity. The Standardization of government information disclosure will not be "the past" or "future", but should always be "now".
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REFERENCES