

Exploring patterns of implementation of the Freedom of Information Act (FOIA) in local government: the case of Italy

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Legislative decree no. 97 of 25 May 2016 introduced the right of citizens to view and acquire data, documents and information held by Italian public bodies. This right, which can be exercised by anyone and is not subject to a fee, has been called *generalised civic access*. Thus, the Freedom of Information Act (FOIA), that appeared in the 1960s in the United States and then spread throughout the world, was adopted in Italy, albeit with much delay.

The aim of the present article is to determine the level of implementation of generalised civic access provisions in the 307 Italian municipalities having a population over 30,000. The research first investigated the level of publication of the information necessary for citizens to exercise this right on municipal websites. Then an experiment was conducted which involved sending a request for access to the various municipalities. Overall, the empirical study showed that a substantial percentage of municipalities had not implemented FOIA dispositions. The lowest levels of implementation were found in smaller municipalities and in those situated in Southern Italy.

1. Introduction

In the course of the twenty-first century, the principle of transparency, understood as «availability of information about an actor that allows other actors to monitor the workings or performance of the first actor»¹, inspired administrative reforms in the context of the worldwide spread of the paradigm of open government². In combination with the digitalisation of government, the quest for openness led to a multiplication of the varieties of transparency

that include reactive forms, i.e., activated by citizen request, and proactive ones, i.e., providing direct civic access to information even in the absence of an explicit request.

The most widespread form of transparency on a global scale is that ensured by the Freedom of Information Act (FOIA) which grants citizens right of access to information held by public bodies in order to ensure their participation in the democratic process, foster trust in government and prevent corruption. The key features³ of FOIA are:

1. identification of exceptions and limits to access, e.g., regarding national security or protection of personal data;
- 64 2. specification of the powers and responsibilities of public bodies regarding oversight and monitoring of the effective implementation of the right to know;
3. publication of instructions on how to apply for access and how to appeal against denial, with an indication of costs, forms and deadlines for response;
4. listing the types of information that public bodies are obliged to provide on its websites as part of the civic right of access.

The last feature has particular importance in Italy, where FOIA is only one of three different forms of access to government information⁴.

The first form is *documentary access* which was recognised in the context of the law on general administrative procedure (law no. 241 of 7 August 1990). This form of access is granted only to subjects who can demonstrate a direct, concrete and current interest, which refers to a legally protected situation linked to the document requested.

The second form of transparency is based on public bodies' legal duty to publish an increasing variety of types of information on their websites in a section known as «Transparent administration» (legislative decree no. 33 of 14 March 2013). If this duty is not or is inexactly fulfilled, citizens can apply for *simple civic access* in order to obtain actual implementation of the right of all citizens to information.

These two forms of access were maintained after the introduction of FOIA, giving rise to a complicated system of government transparency. Indeed, legislative decree no. 97/2016 ensures *generalised civic access* to data and documents different from those that public bodies are obliged to publish on their websites. Like the provisions of FOIAs that spread from English-speaking countries to the rest of the world, application for generalised civic access does not require any motivation, and Italian

public bodies are obliged to reply within 30 days of application with an express and motivated provision.

Paradoxically, the multiplication of forms of transparency has not reduced the traditional opacity of Italian government⁵. Transparency reforms have been layered over each other, with the result that the three forms of access have different procedures, involving different bodies, for exercising the corresponding rights⁶. Recent public consultations conducted by the Italian government showed that this stratification of forms of access has made implementation of transparency onerous both for applicants and administrations⁷.

On the side of the applicants, many citizens are unable to distinguish one type of access to information from the others. This has often made it difficult to qualify their requests, causing uncertainty in the application of the transparency laws. The dispute caused by such uncertainty prompted the Supreme Administrative Court of Italy, in sentence no. 10/2020 of its Plenary Assembly, to express the principle under which public bodies have the power and duty to reply to requests formulated without any explicit reference to a specific form of access. The court ruled that it is up to public bodies to assess the premises for recognising one of the forms of access.

In practice, this orientation of the case law generated an onus for public officers to examine requests for access with reference to the different forms of transparency. This was accompanied by a dearth of indications on how FOIA was to be applied, due to the absence of an oversight body charged with deciding requests for re-examination of access applications. The only coordination between the different forms of transparency is ensured by the guidelines of the National Anticorruption Authority – ANAC (Deliberation no. 1309/2016) which give practical indications about the adoption of provisions, which may be in the form of an internal regulation, on how to apply the three forms of access in the specific context in which public bodies operate. ANAC also recommended concentrating the knowledge and skills needed for implementing transparency in a single specialised structure, in order to coordinate the handling of access requests by different offices of a given administration.

For the purposes of our investigation, it is worth underlining that ANAC, on the basis of its competence in the regulation of proactive transparency, also adopted guidelines on implementation of publication obligations (Deliberation no. 1310/2016). This instituted a subsection of the «Transparent administration» section of the website of Italian public bodies to explain what citizens have to do to exercise their right to generalised civic access⁸.

The first objective of the present research is to determine the level of effective publication of such information on the websites of Italian municipalities. We analysed the institutional websites of 307 Italian municipal councils over a certain size. The results are reported in the next section of the paper.

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The second objective is to determine the effective application of generalised civic access by municipalities. This was done by means of an experiment in which we sent each municipality a request for access, in order to verify the number and quality of the responses received. The results are reported in Section 3. In Section 4 we discuss the practical implications of the results of our research, which found patchy application of FOIA by Italian councils. In the concluding section we discuss the implications of our results for the international research agenda on FOIA.

2. Proactive transparency of FOIA in Italian municipalities

The Italian system of transparency leaves to individual administrations the definition of how requests for access to information have to be presented and managed. Unlike countries such as Mexico and the United States of America, Italy did not set up a single national portal for all requests and for providing citizens with data on the performance of FOIA in terms of positive and negative responses and waiting times. As a consequence, each administration in Italy enjoys complete autonomy in designating the offices to receive requests and in publishing how the three forms of access are applied and the results of implementation of the transparency laws.

To reduce the risk of confusion between the different forms of access, the already mentioned guidelines contained in Deliberation no. 1310/2016 of ANAC were adopted and followed by two circulars (nos. 2/2017 and 1/2019), in turn adopted by the Ministry for Public Administration. These documents contain operative recommendations about technological solutions for the presentation and handling of requests for access to information, with the aim of simplifying access for citizens and the work of handling them for administrations. These two circulars were adopted in the context of a broader disposition of the Ministry aimed at improving the capacity of local administrations to implement the generalised civic access law.

Overall, the recommendations of ANAC and the Ministry for Public Administration regulated publication of the following data and documents in the section of institutional websites dedicated to generalized civic access:

1. information on FOIA procedure;
2. contact information of the office to which to send requests for access;
3. the form for requesting access;
4. the form for requesting re-examination;
5. the «Access Register» with the processing times and outcomes of access requests.

To examine compliance of municipalities with the ANAC and Ministerial recommendations, in July 2019 we analysed the generalised civic access section of the institutional websites of 307 Italian municipalities with populations exceeding 30,000. Our aim was to determine the level of proactive publication of the data and documents indicated by the recommendations.

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Our attention fell on municipalities because comparative studies on the actuation of FOIA showed that a large proportion of access requests were lodged with councils, as the latter are closer to citizens⁹. We excluded smaller municipalities because they often do not have the staff or resources necessary to ensure publication of the data and documents on their websites¹⁰. Table 1 shows the distribution of the municipalities by size (population) and geographic macro-area (north, centre, south and islands).

Tab. 1 - Distribution of the municipalities studied by population and geographical area (absolute values)

<i>Population</i>	<i>North</i>	<i>Centre</i>	<i>South and islands</i>	<i>Total</i>
30,000-50,000	61	37	65	163
50,000-100,000	26	22	51	99
100,000-250,000	17	6	10	33
>250,000	6	2	4	12
Total	110	67	130	307

Table 2 shows the main results of analysis of the institutional websites. It lists the data and documents on management of generalised civic access that ANAC and the Ministry for Public Administration recommend be published on the websites. For each element, the table indicates the percentage of municipalities (distinguishing them by geographical macro-area) which effectively publish it. In other words, the table shows

the rate of compliance of municipalities to the ANAC and Ministerial recommendations regarding publication of data and information concerning FOIA.

The results suggest three main considerations. The first is that a significant percentage of councils do not publish the recommended data and documents. The second is that reluctance to publish is especially high for the *form for requesting re-examination* to be used by citizens who are not satisfied with the response received from the council. The third is that the rate of compliance generally varies by macro-area, being lowest in municipalities of Southern Italy.

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Tab. 2 - Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of data and documents concerning FOIA (percentages by macro-area)

	<i>North</i>	<i>Centre</i>	<i>South and islands</i>	<i>Total</i>
Information on FOIA	76	75	62	70
Office contact details	70	70	61	66
Request form	74	78	61	69
Re-examination form	27	33	20	25
Access Register	75	70	68	71

Table 3 shows the rates of compliance recalculated on the basis of municipal population. Larger councils emerge as complying with all recommendations except publication of the form for requesting re-examination, which was absent from the websites of 1/3 municipalities with populations over 250,000. Small councils emerged as having more difficulty in complying with the recommendations, presumably due to having fewer resources.

Tab. 3 - Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of data and documents concerning FOIA (percentages by population class)

	<i>30,000-50,000</i>	<i>50,000-100,000</i>	<i>100,000-200,000</i>	<i>>250,000</i>	<i>Total</i>
Information on FOIA	63	75	79	100	70
Office contact details	57	74	79	92	66
Request form	62	77	70	100	69
Re-examination form	16	31	39	67	25
Access Register	67	76	73	92	71

We also focused on the quality of publication of the Access Registers, which ought to ensure accountability of the implementation of FOIA by municipalities. Indeed, the Access Registers contain data, publication of which is crucial for citizens and control bodies, who can verify whether, how and how quickly the municipalities respond to requests for access, but also for scholars wishing to examine how FOIA is applied¹¹.

Table 4 shows the results of our analysis of the quality of publication of the Access Registers, based on three criteria:

1. the presence of a register on the council website that had been updated in the course of the year prior to the study;
2. a precise link in the register between requests and their outcomes;
3. qualification of the requests received by the council in relation to the three forms of access contemplated by the Italian system.

The table presents the data in such a way as to display the percentage of councils in the different macro-areas that meet the three criteria presented above. The data collected suggests that about half of the municipalities do not publish an up-to-date register and do not qualify the requests published. The link between requests and outcomes was indicated in 62% of municipalities under investigation. Also in this case the rate of compliance with national recommendations shows a patchy geography, with municipal councils of Southern Italy showing lower compliance than those in Central and especially Northern Italy.

Tab. 4 - Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of registers of requests under FOIA (percentages by macro-area)

	<i>North</i>	<i>Centre</i>	<i>South and islands</i>	<i>Total</i>
Updated Register	66	51	46	54
Link between requests and outcomes	66	61	58	62
Qualification of requests	57	52	41	49

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Table 5 shows a re-elaboration of the above data, distinguishing municipalities on the basis of their population. The best-performing municipalities for publication of Access Registers turned out to be larger ones, whereas smaller municipalities showed greater difficulty in complying with the quality standards recommended by ANAC and the Ministry for Public Administration.

Tab. 5 - Rate of compliance of municipalities with ANAC and Ministerial recommendations regarding publication of registers of requests under FOIA (percentages by population class)

	<i>30,000-50,000</i>	<i>50,000-100,000</i>	<i>100,000-200,000</i>	<i>>250,000</i>	<i>Total</i>
Up-dated register	50	55	61	92	54
Link between requests and outcomes	56	65	70	92	62
Qualification of requests	45	53	45	83	49

3. Experimental analysis of the efficacy of requests for access

Requests under FOIA are increasingly often used to conduct experiments to determine compliance of public bodies with transparency laws. Some recent experiments used FOIA requests to study how applicant identity influences response¹². Other experiments have shown that how the request is formulated influences the response¹³. Others have shown that the size of councils and their geographical macro-area influences the rate of response¹⁴.

Our study belongs to the latter line of research on the implementation of FOIA. To examine compliance of Italian local government with the transparency laws, our experiment was designed to determine, in the case of information requested by a citizen, whether the rate of response increases when the request is lodged with:

1. a municipality in south, central or northern Italy;
2. a large municipality.

In other words, our experiment aimed at investigating whether demographic and geographic factors that influence compliance with ANAC and Ministerial recommendations are also relevant for the rate of response to requests for generalised civic access. On October 23rd 2020, we sent certified emails to the 307 municipalities under investigation, requesting access to data on the number of electronic and hard-copy identity cards issued in 2018. The aim of the request was decided on the basis of its non-controversial nature, calculated not to fall foul of exceptions or limits regarding protection of major public and private interests. In other words, the request did not oblige the municipalities to interpret transparency laws, nor did it pose a challenge as might requests related to compliance with anticorruption or performance management laws. Requests such as ours do not threaten the reputations of local governments. The aim of our request for generalised civic access was therefore calculated to minimise the influence of typical government resistance to implementing transparency laws when the information provided can damage third parties or threaten the reputation of public officials¹⁵. This would enable the influence of the factors we were interested in, namely the size and macro-area of the municipalities, to be investigated.

Moreover, the object of our request was clear with regard to the office competent to decide whether or not to grant access. Indeed, in all municipalities, the civil registry office holds the information about the number of identity cards issued. For all municipalities, our request for civic access was sent not only to the email address of the civil registry office but also to those of the protocol office that receives and records correspondence, and to the public relations office, which as contemplated by legislative decree no. 97/2016, can forward such requests to all other offices indicated by the municipalities in the «Transparent administration» section of their institutional websites.

Once the requests had been sent, the responses received in the following 30 days were recorded. This is the term for response indicated by the law. In relation to their content, responses were coded in four categories:

complete response; partial response; negative response (including all interlocutory replies, requests for further details and denials); no response.

Table 6 shows the distribution of categories of response by geographic macro-area. The latter emerged as important for total absence of response (just over 16% in the north versus 36% in the south) and for complete response (72% in the north versus 60% centre and 52% south). The poor transparency of southern municipalities was made even more evident by the low percentage of partial responses (3.8%) and the high percentage of denials (7.7%).

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Tab. 6 - Outcomes of the experiment by geographic macro-area (percentages by geographic macro-area)

	<i>No response</i>	<i>Negative response</i>	<i>Partial response</i>	<i>Complete response</i>
North	16.4	5.5	6.4	71.8
Centre	28.4	4.5	7.5	59.7
South and islands	36.2	7.7	3.8	52.3
Total	27.4	6.2	5.5	60.9

As shown in Table 7, the distribution of responses also showed an association with population (Table 4). In the case of municipalities with populations over 250,000, no denials were recorded, and the percentage of complete and partial responses was the highest. In the case of other municipalities, the percentage of «no responses» was significantly higher than for municipalities with populations over 250,000. The percentage of complete responses decreased with decreasing population.

Tab. 7 - Outcomes of the experiment by size of municipality (percentages by population class)

	<i>No response</i>	<i>Negative response</i>	<i>Partial response</i>	<i>Complete response</i>
30,000-50,000	29.4	5.5	6.1	58.9
50,000-100,000	26.3	9.1	4.0	60.6
100,000-250,000	27.3	3.0	3.0	66.7
>250,000	8.3	0.0	16.7	75.0
Total	27.4	6.2	5.5	60.9

Analysis of the responses provided by the municipalities also made it possible to determine the compliance of reception of the requests for generalised civic access with ANAC and Ministerial recommendations. In particular, circular no. 2/2017 of the Ministry for Public Administration expressly provided that the office holding the data or documents requested has the competence to decide whether or not to receive a request for civic access. This implies that other offices competent to receive such requests, namely the public relations office and any other office indicated by the municipality at the «Transparent administration» section of its institutional website, are bound to transmit the requests without delay to the office that holds the data or documents. Since the information requested in our experiment concerned electronic identity cards, the office competent to meet our request was the civil registry office. As shown in Table 8, most of the responses received came from that office, with substantially similar percentages in the three macro-areas.

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However, the fact that we also received responses from other offices shows margins of uncertainty in the handling of the requests in a minority of municipalities scattered in all three macro-areas. In the first place, in some municipalities the public relations office not only receives the requests but also replies to citizens. In second place, in some municipalities the general affairs office replies to citizens. Since ANAC recommends that an office specialised in transparency be set up in each public administration, we suppose that this office has been located in the general affairs area. In third place, in the municipalities analysed, it seems evident that the indications of the law regarding the tasks entrusted to the officer in charge of transparency and of preventing corruption have been implemented. According to the law, this officer is excluded from examining requests for access to information, since he has the exclusive role of dealing with re-examination requests. Finally, a minority of municipalities show uncertainty in the handling of requests for access, allowing a number of offices to reply at the same time or not indicating a specific office. Such uncertainty can confuse the process of re-examination of requests by making it difficult to identify the office responsible for the municipality's decision in the first place.

Tab. 8 - Offices from which we received responses by geographical macro-area (percentages by macro-area)

	<i>North</i>	<i>Centre</i>	<i>South and islands</i>	<i>Total</i>
Public relations	3.23	6.25	3.57	4
Civil registry	80.65	79.17	79.76	80
Transparency and Corruption	0	0	1.19	0.44
General affairs	5.38	0	3.57	3.56
Other	1.08	2.08	1.19	1.33
More than one	2.15	2.08	0	1.33
Unspecified	7.53	10.42	10.71	9.33
Total	100	100	100	100

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As shown in Table 9, municipal population is a factor affecting the forwarding of requests for generalised civic access. Specifically, the critical threshold of administrative capacity is a population of 100,000. Indeed, below this threshold, a smaller percentage of responses come from the civil registry and we see a multiplication of offices offering responses to access requests.

Tab. 9 - Offices from which we received responses by municipal population class (percentages calculated on a population basis)

	<i>30,000-50,000</i>	<i>50,000-100,000</i>	<i>100,000-200,000</i>	<i>>250,000</i>	<i>Total</i>
Public relations	5.98	2.74	0	0	4
Civil registry	76.92	79.45	91.67	90.91	80
Transparency and Corruption	0	1.37	0	0	0.44
General affairs	3.42	4.11	4.17	0	3.56
Other	1.71	1.37	0	0	1.33
More than one	2.56	0	0	0	1.33
Not specified	9.4	10.96	4.17	9.09	9.33
Total	100	100	100	100	100

4. The practical implications for implementation of FOIA

The results of our research confirm a patchiness in the application of the transparency laws by Italian municipalities. This unevenness has already been pointed out in the international literature¹⁶, including studies on compliance with the obligations of online publication contemplated by the proactive transparency laws in Italy¹⁷. In first place, our research confirms the importance of the size of municipalities as a proxy for resource availability, which not only influences publication of data and documents on the procedure of generalised civic access, but also the rate of response to access requests. In second place, the results showed the importance of the geographical macro-area of the municipalities. In particular, the lowest actuation of FOIA was recorded in southern municipalities which historically have had lower institutional performance, due partly to their lower social capital¹⁸. This not only reflects on the capacity of administrations to offer data and information, but also on the capacity of civil society to request data and information through generalised civic access procedures, and in so doing, favouring widespread control on institutional functions and the use of public resources, as well as promoting participation in public debate.

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The results of our research have implications for practitioners interested in the reform of transparency in Italy. We confirmed that a large percentage of councils do not have the capacity to comply with the duties envisaged by the law and this capacity deficit is presumably even more pronounced in the many municipalities with populations under 30,000, especially where citizens are inclined to lodge access requests that would raise bureaucratic resistance.

The implementation of the Italian FOIA is based on a highly decentralised organisational model in which publication of the data on access procedure and the handling of access requests are left in the hands of single administrations. In this model, coordination is not ensured by an oversight body competent in deciding the merit of re-examination requests, nor does ANAC oversee compliance with the indications regarding publication of FOIA procedure data. Indeed, ANAC cannot check implementation of these indications by thousands of administrations, since it has to oversee compliance with a broader range of publication obligations, for example concerning public contracts and social benefits, as well as organisation of the public administration. The resources available for capacity-building initiatives, initiated by the Ministry for Public Administration and largely concerning central Italian administrations, are also limited.

In light of such macroscopic limits to the organisational model of implementation of FOIA, which make it easy for bureaucracy to passively resist the transparency laws, it is even comforting that a majority of large Italian municipalities have implemented generalised civic access in a context where oversight is weak and capacity-building initiatives are inadequate.

76 The results of our research also offer practical implications for making transparency measures effective. In first place, the dearth of capacity of local government requires that the burdens associated with implementation be lightened. In particular, our study contributes to the call for a reduction in the number of proactive disclosure obligations¹⁹. This number may have been justified before the introduction of generalised civic access, when among other things it had already been ascertained that a large proportion of the publication obligations concerned categories of data and documents for which citizens were unlikely to demand transparency²⁰. Evidence in the Access Registers of the tiny number of requests for *simple civic access* lodged with councils in recent years shows that the demand for proactive transparency continues to be low²¹. Faced with this low demand, and since introduction of FOIA in 2016, keeping the number of publication obligations unchanged amounts to leaving local government and the central bodies responsible for transparency policy – ANAC and the Ministry for Public Administration – exposed to a chronic deficit of administrative capacity that threatens implementation of the new institute of generalised civic access.

In second place, to ensure coordinated handling of access requests, there is a need for a web platform, managed by ANAC and/or the Ministry for Public Administration, along the lines of the portals introduced in Mexico and the United States (only at federal level in the latter case). This recommendation is also based on the results of studies that showed that access requests lodged via web platforms elicited higher response rates²². The platform, to which all local government and their institutional websites should be connected, should provide citizens with clear information on how to exercise their right of access and should also receive access requests. Once the requests are processed, individual councils should document the outcome on the central platform. Introduction of a web platform would reduce costs through uniform information on access procedure, avoiding the need for thousands of councils to set up special pages for generalised civic access on their websites. This reduction in costs for local government would also help reduce uncertainty regarding qualification of requests in terms of the different forms of ac-

cess. Introduction of a platform would moreover be a strong deterrent to non-response, since non-compliance would be readily visible to central control bodies, ensuring rapid up-dating of the access registers. Introduction of a platform would also imply that access registers are published in machine-readable formats, facilitating the dissemination and analysis of open data on the demand for transparency in Italy and on the capacity of administrations to meet it. This would produce evidence useful for monitoring and re-designing transparency policies.

Finally, a technological solution like that of a special FOIA portal should be accompanied by capacity-building initiatives in local government and civil society²³. With regard to local government, our analysis showed that Italy is not lacking in good practice in the implementation of FOIA. The experience of councils that have actuated FOIA should be the basis for programmes for building capacity based on transfer of know-how between peers. As far as civil society is concerned, the Italian government could adopt recommendations from the literature demonstrating the efficacy of initiatives to promote citizens' awareness of their access rights through public communication and transparency policy «infomediaries».

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5. Conclusions

An aim of this research was to determine the level of implementation of the 2016 reform introducing generalised civic access in large municipalities in Italy. The results contribute to two streams of the international literature on FOIA. The first regards the «transparency of transparency», namely the proactive disclosure of data and documents regarding right to access and how it is exercised²⁴. The second regards experimental study of the implementation of FOIA based on analysis of responses to a request sent to a series of municipalities. The results showed the influence of two factors – size and geographic position – on the publication of data and documents about FOIA and on the responsiveness of administrations to access requests.

Since our study concerned only one type of administration in a single country, it is an explorative study of the implementation of FOIA provisions. Future empirical studies on the institutional websites of administrations in other countries may consolidate the literature on «transparency of transparency» by more articulated examination of the determinants of proactive disclosure of data and documents concerning the FOIA procedure. Further

investigations may also delve into the mechanisms by which the geographical position of municipalities affects implementation of FOIA. For example, it would be possible to study the influence of exchange of know-how on the implementation of FOIA in given geographical areas. In fact, our analysis was unable to determine whether council compliance was influenced by reputational pressure from awareness that other administrations in the same geographical area had implemented the law²⁵. Finally, a more detailed analysis of how administrations handle access requests may clarify the organisational resources (IT systems, staff specialised in transparency, internal rules for handling requests, and so forth) that sustain implementation of FOIA.

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Note

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