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# Access to Administrative Records and Non-Existent Documents: The Burden of Proof

*Council of State (Consiglio di Stato), Judgment no. 4081 of 2026: the material non-existence of a record precludes judicial disclosure orders and governs the allocation of the burden of proof*

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**Current Legal Framework as of 11 November 2026:** Administrative case law consolidates the principle whereby actual possession and custody of a record constitute an essential constitutive fact of the right of documentary access under Articles 22 and 25 of Law no. 241/1990, placing upon the applicant the burden of overcoming, through qualified evidentiary presumptions, the public authority's formal attestation of non-existence.

**ABSTRACT**

The right of documentary access governed by Italy's general administrative procedure statute presupposes the concrete availability of the record within the public body's archives. In Judgment no. 4081/2026, the Council of State (*Consiglio di Stato*) establishes that an official attestation of **material non-existence** precludes any enforceable disclosure claim, giving rise to an instance of **impossible access** governed by the overarching legal maxim *ad impossibilia nemo tenetur*. The Court classifies physical or digital custody as a **constitutive fact** of the asserted right pursuant to Article 2697 of the Italian Civil Code, placing the corresponding **burden of proof** squarely upon the requesting party and excluding judicial disclosure orders grounded in mere hypothetical deductions or defensive purposes.

## Key Takeaways

- **Ontological prerequisite of access:** actual availability and material custody of the administrative record form a constitutive element of the right of inspection and a logical precondition of the judicial action.
- **Unenforceability of disclosure orders:** faced with a formal administrative declaration of non-existence, the general rule *ad impossibilia nemo tenetur* bars judicial rulings that would inevitably prove *inutiliter datae*.
- **Allocation of the evidentiary burden:** the requesting party bears the burden of alleging and proving actual custody of the document; serious, precise, and consistent presumptions are admissible, whereas mere conjectures are excluded.
- **Primacy of material reality over defensive interest:** the abstract instrumentality of requested documentation for prospective judicial proceedings cannot cure the absence of the physical or digital object sought.

**CASE DOSSIER**

JURISDICTION
**Italy (Civil Law)**

SUBJECT AREA
**Administrative Law & Administrative Procedure**

LEADING DECISION
Council of State ( Consiglio di Stato ), Judgment of 7 May 2026, no. 4081 — Inadmissibility of reiterated access requests and ont

## Legal Principle / Editorial Headnote

*In matters of documentary access pursuant to Articles 22 and 25 of Law no. 241 of 7 August 1990, the actual existence and material custody of the record by the respondent public administration constitute a constitutive element of the asserted right within the meaning of Article 2697, first paragraph, of the Italian Civil Code. Where the public body formally attests, assuming full institutional accountability, to the unavailability or non-existence of any further documents sought, an instance of impossible access arises under the general principle of inexigibility expressed in the maxim ad impossibilia nemo tenetur, thereby precluding the issuance of objectless disclosure orders. The burden of proving material possession of the record rests with the applicant, who may rely on circumstantial evidence and qualified presumptions, but not on conjectures, hypothetical deductions, or the mere assertion that the record is instrumental to judicial defence.*

## 01. FACTUAL AND PROCEDURAL BACKGROUND: RENEWED ACCESS REQUESTS AND ADMINISTRATIVE NEGATIVE ATTESTATION

A close reading of the reasoning whereby the Council of State (*Consiglio di Stato*) characterises the public authority's written reply as an implicit rejection of the application highlights how the relationship between **access to administrative records and non-existent documents** serves as the dividing line between a legitimate informational claim and an objectively unenforceable demand. The dispute originated from a road traffic offence detected by an electronic speed-measuring device, following which the recipient of the citation submitted an initial access request seeking to inspect and obtain copies of all records concerning type-approval, periodic calibration, and the installation of road signage. Following partial disclosure and a formal statement by the head of the municipal service certifying that no further records were held in the municipal archives, the applicant brought proceedings before the

Regional Administrative Court (*TAR*), alleging the formation of a tacit refusal (*silenzio-diniego*) and seeking an order for comprehensive production.

After the court of first instance dismissed that initial challenge, the private party lodged a second application for documentary disclosure. In this renewed request, the applicant sought public procurement contracts concluded with the supplier company, lease agreements for the measuring equipment, conventions governing postal delivery services, and itemized breakdowns relating to the calculation of service and notification fees, invoking an intention to bring an action for damages before the ordinary civil courts for alleged unlawful conduct by the ticketing officers. The municipal administration replied unequivocally that, beyond the records already promptly released in copy, no further documents existed in the authority's files. The subsequent judicial challenge against the alleged tacit refusal resulted in a declaration of inadmissibility owing to the absence of supervening elements and the substantive identity of the underlying legitimating position.

Seised of the appeal, the **Council of State (*Consiglio di Stato*)** upheld the finding of inadmissibility, observing that the formal administrative communication could neither be construed as an implicit grant nor treated as unlawful administrative inertia, but rather amounted to an insurmountable refusal grounded in the physical absence of the requested records[1]. Examination of the appellate decision demonstrates clearly that reiterating an application cannot circumvent the lack of its material prerequisite: where the public administration has exhaustively searched and transmitted all records in its custody, formally attesting that no other entries or data compilations exist, resubmitting the demand under the banner of different defensive purposes runs up against the objective exhaustion of the authority's power of disclosure.

## 02. THE CONCEPT OF IMPOSSIBLE ACCESS: AVAILABILITY OF THE RECORD AND THE PRINCIPLE *AD IMPOSSIBILIA NEMO TENETUR*

### 2.1 — Material Custody as an Ontological Prerequisite under Articles 22 and 25 of Law no. 241/1990

An analysis of Article 22, paragraph 1, point (d), of Law no. 241 of 1990—which defines an administrative document as “every graphic, photo-cinematographic, electromagnetic, or any other kind of representation of the content of acts, including internal acts or acts not pertaining to a specific proceeding, held by a public administration and concerning activities of public interest, regardless of whether their substantive legal regime is governed by public or private law”—immediately reveals how firmly the institution is anchored in a tangible empirical substrate. The legislature structured the right of disclosure not around an abstract informational claim over facts or events, but around the physical or digital existence of a specific ***res*** endowed with autonomous documentary consistency. Statutory law elevates incorporation onto a material or electronic medium into the essential linchpin without which no right of inspection or extraction of copies can come into being.

This definitional provision interlocks coherently with the rule laid down in Article 25, paragraph 2, of the same statute, pursuant to which “The request for access to documents must be reasoned. It must be addressed to the administration that formed the document or holds it on a stable basis.” Read together, the two provisions illuminate the logical foundation of the entire statutory framework: the public authority to which the claim is addressed must enjoy **stable availability** of the documentation. It follows that material custody does not merely represent an executive modality of compliance, but constitutes a genuine **factual and legal boundary** to the entitlement to inspect or duplicate a record.

Where the medium was never created or is not preserved within administrative repositories, the legal entitlement cannot crystallise for radical want of its object.

Within this conceptual perimeter lies the judicial doctrine of **impossible access**. Judicial protection cannot arise where an application targets purely hypothetical, supposed, or contingent acts. The Council of State (*Consiglio di Stato*) clarifies that administrative action cannot be diverted toward retrospective fact-finding inquiries or the *ex post* drafting of records in order to satisfy conjectural expectations. Concrete existence of the paper or electronic medium thus operates as an indispensable **ontological prerequisite**: where no physical record or stored digital file exists, the disclosure claim dissolves for lack of the substantive legal asset capable of forming the object of the right of access.

### 2.2 — Inexigibility of Disclosure Performance and the Prohibition on *Inutiliter Datae* Rulings

Once the physical or digital absence of the record is established, the general principle of inexigibility enshrined in the maxim ***ad impossibilia nemo tenetur*** comes directly into play. The Council of State (*Consiglio di Stato*) emphasised that the legal order cannot compel a public administration to perform an obligation rendered objectively impossible by the material non-existence of the documentation. Judgment no. 779 of 2026, delivered in the earlier litigation directly preceding the dispute under review, reiterates that where a record never came into existence or has been irretrievably lost without trace, the disclosure claim encounters a natural barrier that paralyses any duty of material cooperation on the part of the public body[2].

From a procedural standpoint, this substantive boundary directly shapes the remedial and injunctive powers vested in the administrative courts under the special expedited procedure governed by Article 116 of the Code of Administrative Judicial Procedure. A judicial order directing the production of records that neither exist nor can be located within the respondent authority would be radically unenforceable, amounting to a decision rendered ***inutiliter data***. Systemic coherence within administrative adjudication forbids issuing judicial commands devoid of a factual substrate capable of supporting enforcement proceedings, since judicial review cannot degenerate into purely platonic declarations or coercive injunctions destined for inevitable enforcement paralysis.

Administrative case law thus cements an impassable threshold: the intersection between **access to administrative records and non-existent documents** translates into the absolute inexigibility of production and the consequent supervening lack of interest or inadmissibility of the judicial action. Once the official responsible for the proceeding issues a formal negative reply and assumes institutional responsibility for that attestation, judicial proceedings cannot be turned into an instrument of coercion over a materially unperformable act, as preserving the effectiveness of adjudication requires avoiding rulings devoid of genuine remedial utility.

## 03. ACCESS TO ADMINISTRATIVE RECORDS AND NON-EXISTENT DOCUMENTS IN THE ALLOCATION OF THE BURDEN OF PROOF

### 3.1 — Documentary Existence as a Constitutive Fact under Article 2697 of the Italian Civil Code and Proximity to Evidence

The passage in which the appellate court brings the material existence of the document within the ambit of Article 2697, first paragraph, of the Italian Civil Code identifies the doctrinal foundation of the applicable evidentiary regime. This classification treats actual custody not as a mere affirmative defence to be raised by the public administration in order to defeat the claim, but rather as a true **constitutive fact** of the right of access. Consequently, a litigant seeking judicial protection cannot merely submit a generic demand or assert the abstract usefulness of the information, but bears the

affirmative burden of proving that the requested object actually exists and falls within the sphere of possession or stable custody of the respondent authority.

Such an allocation corresponds squarely to the principle of **proximity to the evidence**, calibrated specifically with respect to the proof of negative facts. Imposing upon a public administration the burden of proving a pure negative fact —such as the historical non-creation of a record or its physical absence from public archives—would prove manifestly disproportionate and anomalous. Administrative case law has made clear that judicial enforcement of disclosure rights reflects an inherent structural asymmetry: the requesting party, who alleges the infringement of a legally protected position, must establish the factual prerequisites generating that entitlement, since a claim resting on abstract assumptions would render litigation unmanageable and expose administrative offices to fishing expeditions devoid of any objective basis[3].

### 3.2 — Qualified Presumptions and the Prohibition on Conjectural Inferences: How Is the Burden Discharged?

In the practical operation of this evidentiary allocation, the applicant is by no means required to adduce direct documentary proof of custody, which would entail a logical paradox for a party suing precisely to obtain inspection of the record. The evidentiary regime fully admits reliance on **presumptive and circumstantial evidence** pursuant to Article 2729 of the Italian Civil Code. Yet, for inferential reasoning to overcome a contrary attestation issued by the public administration, the indicia adduced must display the statutory qualities of seriousness, precision, and consistency. The private claimant must point to unambiguous objective corroboration, linked registry protocol numbers, internal procedural cross-references, or formal statements from which the creation or filing of the sought record may logically be inferred.

Conversely, discharging the burden of proof through bare inferences, subjective conjectures, or abstract suppositions is categorically excluded. The Council of State (*Consiglio di Stato*) underscores that a citizen's conviction that certain documents ought necessarily to exist by virtue of the institutional competences vested in the authority amounts to nothing more than an **unsubstantiated assumption**. Absent specific factual coordinates, the applicant's assertion reduces to mere speculation incapable either of undermining the evidentiary weight of the negative historical fact attested by the authority or of justifying court-ordered investigative measures designed to remedy deficiencies in the claimant's pleadings.

### 3.3 — Evidentiary Value of the Administrative Attestation and Institutional Assumption of Responsibility

A systematic examination of settled administrative case law highlights the substantive weight accorded to the formal reply issued by the competent public official. Where the administrative body declares that, following thorough archival searches, the requested documentation neither exists nor can be traced within the institution, that declaration carries privileged evidentiary force underpinned by the declaring official's **assumption of responsibility**. The legal system accords credence to the truthfulness of an express administrative attestation, barring judicial disclosure orders whenever countervailing factual allegations capable of calling its reliability into question are lacking[4].

The probative weight of a negative attestation is further reinforced by the public body's prior **cooperative conduct**. Where the administration has already promptly released every document located within its files, postulating a selective and unreasoned concealment of remaining records defies rational plausibility. Rejection of an application cannot therefore be circumvented by repeatedly submitting requests of identical tenor: faced with a clear and accountable

statement of unavailability, the balance between **access to administrative records and non-existent documents** resolves decisively in favour of the finality of the administrative closure.

## 04. DEFENSIVE INSTRUMENTALITY, JUDICIAL DISTINGUISHING, AND PRACTICAL LITIGATION GUIDELINES

### 4.1 — Irrelevance of Defensive Interest in the Face of Material Non-Existence of the Record

The dismissal of the third ground of appeal yields an interpretive lesson of primary importance regarding the relationship between defensive access under Article 24, paragraph 7, of Law no. 241 of 1990 and the structural boundaries of administrative action. The appellant had argued that the requested documentation was indispensable in order to establish potential criminal and civil liability on the part of public officials pursuant to Article 185 of the Italian Criminal Code and Article 2043 of the Italian Civil Code. The Council of State (*Consiglio di Stato*) clarifies unequivocally that both the breadth of a claimant's defensive interest and the need to scrutinise the conduct of enforcement officers in court become wholly irrelevant whenever the object of the request is absent from the public body's archives.

The instrumentality of documentation to a litigation strategy—even where directed toward exercising the fundamental right of judicial defence guaranteed by Article 24 of the Italian Constitution—operates exclusively on the plane of **standing to request access** and procedural interest to sue. In no way can it compensate for the physical absence of the records. Even the most elaborate defensive pleading lacks any generative capacity to bring into existence acts never drafted or never retained by the public administration. An interest in acquiring knowledge cannot be converted into an entitlement to demand retrospective investigative inquiries or to compel the creation *ex novo* of non-existent records.

> *Treating actual custody as a constitutive fact of the disclosure claim prevents the need for judicial protection from turning into an instrument of coercion over a non-existent documentary reality, preserving systemic coherence between the court's remedial power and the ontological boundaries of the object sought.*

### 4.2 — Operational Distinguishing Criteria and Litigation Strategies for Counsel

Applying the principle of inexigibility requires drawing a precise judicial **distinction** with respect to cases in which the material non-existence of a record stems from a procedural irregularity attributable to the administration itself. The rule mandating dismissal **does not apply** where the requested documentation pertains to records that the public authority is under an express statutory or regulatory duty to draw up or preserve. Unlike ordinary situations in which the absence of a document reflects a normal factual occurrence, where an application concerns a typical and mandatory record inherent in institutional operations, failure to hold it constitutes an anomalous historical event. Under such circumstances, the burden of proof shifts onto the respondent administration, which must specifically allege and prove the concrete reasons for the loss, destruction, or failure to maintain the archival file.

At an operational level, these coordinates provide clear guidance for the **litigation strategy of counsel** acting within the special expedited procedure for access to administrative records governed by Article 116 of the Code of Administrative Judicial Procedure. Counsel for the applicant must not merely challenge the veracity of the public authority's

declarations in conclusory terms, but must formulate specific pleas supported by qualified evidentiary presumptions. In judicial proceedings, counsel must demonstrate the existence of preparatory acts, explicit references contained in subsequent resolutions, or statutory duties of documentary creation capable of rebutting the plea of non-existence. Only by adducing serious, precise, and consistent indicia can counsel overcome the authority's negative attestation and obtain a judicial order for preparatory inquiries or documentary production.

Ultimately, the balance between **access to administrative records and non-existent documents** rests on rigorous procedural rationality. The legal order safeguards administrative transparency and citizens' rights of defence within the confines of actual documentary reality, deterring vexatious litigation and shielding the operational efficiency of public offices from purely speculative demands.

## References & Authorities Cited

### Statutory Provisions

- Article 22 of Law no. 241 of 7 August 1990 — Definitions and general principles governing access to administrative documents.
- Article 25 of Law no. 241 of 7 August 1990 — Procedures for exercising the right of access and administrative and judicial remedies.

### Case Law Cited

1. **Council of State (*Consiglio di Stato*), Judgment of 7 May 2026, no. 4081** — Inadmissibility of reiterated access requests and ontological boundary of the material object sought. Outcome: appeal dismissed. Para.: paras. 58–76 of the reasoning.
2. **Council of State (*Consiglio di Stato*), Judgment of 29 January 2026, no. 779** — Configuration of impossible access and operation of the principle *ad impossibilia nemo tenetur*. Outcome: appeal dismissed. Para.: paras. 61–78 of the reasoning.
3. **Council of State (*Consiglio di Stato*), Judgment of 3 October 2025, no. 7719** — Material custody as a constitutive fact under Article 2697 of the Italian Civil Code and allocation of the burden of proof. Outcome: appeal upheld and contested judgment annulled. Para.: paras. 117–128 of the reasoning.
4. **Council of State (*Consiglio di Stato*), Judgment of 8 November 2023, no. 9622** — Preclusive effect of formal declarations of non-existence and prohibition on issuing *inutiliter datae* disclosure orders. Outcome: appeal dismissed. Para.: paras. 119–142 of the reasoning.

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