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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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FROM THE RIGHT TO TRANSPARENCY TO THE RIGHT TO OPEN GOVERNMENT IN A DIGITAL ERA. A FRENCH APPROACH

By **William GILLES**, Associate Professor (HDR) at the Sorbonne Law School, Director of the Chair of Americas of the University Paris 1 Panthéon-Sorbonne, President of IMODEV

The right to transparency in public administrations has ancient origins. Indeed, it was a one of the foundational principle of the French Revolution, and constituted a revolt against the practices of the old regime, by providing a high level of opacity, particularly in regard to the financing of public activities.¹ Under the old regime,² it was impossible to clearly distinguish the finances of the King from those of the State. The absence of a real budget under the Monarchy illustrates the financial mess that was prevalent at the time, and it also reveals the absence of transparency within the Kingdom of France. In the absence of a public budget, kings were not accountable. The only budgetary and accounting documents that existed within the nation at that time, and which could not be regarded as real budgets or accounts, were prepared solely for the king and his council's use rather than for the public. In France, the first budget was not made public until January 1781, and it was described afterwards as '*Compte rendu de Necker*' ('The Necker Report to the King'). This first step towards transparency marked a significant break from the previously existing legal framework. In fact, before that date, the government prohibited transparency regarding funding in order to better protect the corridors of power. Not only were the financial situation and expenditures of the King and the State hidden from the public, but also the government adopted a declaration in 1764 that prohibited anyone from printing, publishing or distributing "certain works or projects on financial reform or on their current, past or future administration."³

The Necker Report, delivered to the King, was regarded as a real draft budget despite shortcomings due to the concealment of certain expenses (including war spending) and the fictional character of certain revenues. However, the Report helped to introduce fiscal transparency which would be followed up in subsequent years by the yearly publication of a State budget. This effort to publish information regarding the financial state of the nation was an early form of transparency in public administration, and was designed to bolster the confidence of financiers regarding

¹ See William Gilles, *Les transformations du principe de l'unité budgétaire dans le système financier public contemporain* (Daloz, 2007).

² See Marcel Marion, *Histoire financière de la France depuis 1715* (A. Rousseau, 1914-1931).

³ Paul Boiteau, *Budget général de l'État*, in 1 LEON SAY (ed.), *DICTIONNAIRE DES FINANCES*, (Berger-Levrault, 1889) [In French, in the original version].

France's ability to manage its finances and debt. At the time, France was beset by the indecision that accompanied the 'Reign of Terror'⁴ and substantial expenditures during America's war for independence.

The final budget of the Old Regime, presented by Necker on May 5, 1789, is similar in nature, but attracted little interest from the French revolutionaries. Whereas Necker sought to preserve the financial system of the Old Regime, while modernizing and adapting it to new realities and requirements, the Constituent Assembly opted for a radical separation between past and future finances.⁵ The Assembly's objective was to create a transparent public financial system that did not resemble the one inherited from the Old Regime. Though the Revolution "brought a series of cleavages in public finances", as the revolutionaries sought to radically alter and renovate the system inherited from the Old Regime. After the revolution, officials sought to centralize information and public actions although the financial problems associated with the Convention (1792 - 1795), due primarily to the Assignat crisis,⁶ ended their efforts in this regard. Unfortunately, the French Revolution did not succeed in restoring order to France's public finances, and it was not until the French Restoration in the early nineteenth century that the desired modernization was achieved. Nevertheless, the French Revolution contributed to a very real change in the legal framework. France committed itself to transparency at the highest level therein, even including a transparency requirement in the Declaration of the Rights of Man and of the Citizen of August 26, 1789.

Transparency remains a major issue in France today, especially regarding public administrations. However, transparency is now

⁴ The term 'Reign of Terror' refers to two periods of the French Revolution (from August 10 to September 20, 1792, and from September 5, 1793, to July 28, 1794) characterized by a temporary suspension of the republican government which led to a concentration of power in the hands of the Revolutionaries and the execution of thousands of counterrevolutionaries which were qualified of Enemy of the Nation. See Larousse, *La Terreur*, ENCYCLOPÉDIE:

http://www.larousse.fr/encyclopedia/divers/la_Terreur/146370.

⁵ Paul Boiteau, *op. cit.*

⁶ WILLIAM GILLES, *LES TRANSFORMATIONS DU PRINCIPE DE L'UNITÉ BUDGÉTAIRE DANS LE SYSTÈME FINANCIER PUBLIC CONTEMPORAIN*, Dalloz, 2007. This paper currency – whose value was assigned on the sale of state property – was intended to provide resources to France, pending the replacement of the tax system of the Ancient Regime by a more modern tax system. Assignat became a great success: it was a simple method of funding as it sufficed to operate "the board of assignats" in order to issue paper currency. A declaration by Mirabeau illustrates this attraction to paper currency: "I only hear this: I only have so much; I therefore need so much more." See RENÉ STOURM, *LE BUDGET*, 44 (Guillaumin, 1896).

However, the amount issued exceeded the proportion of notes sanctioned by the State. The public having quickly become aware of the widening gap between the sales proceeds and the very high amount in issued notes, the value of assignats fell. Devaluations quickly proved necessary to reduce this gap.

The fall in the value of assignats, and the successive devaluations of paper currency rendered it difficult for any accurate budget estimate to be made. "Is it possible to prepare a budget when the value of the monetary sign, subject to continual fluctuations, has nothing stable [...], when it is clear, for example, that if you need, in a year of war, 320 million in March, would it be necessary to have 500 in September or 600 value of December? See 2 MARCEL MARION, *HISTOIRE FINANCIÈRE DE LA FRANCE DEPUIS 1715 (1789 – 1792)*, 336-337 (Arthur Rousseau Éditeur, 1919).

viewed in the wider context of open government, and is premised upon on three major components: transparency, participation and collaboration. For a long time, these three concepts were viewed in isolation rather than as connected and integrated.⁷ Once combined, they empowered public administration, including governmental officials involved in public decision making (e.g., elected representatives and senior administrative officials), the providers of public services (state workers), and the public, specifically the beneficiaries of governmental services. For this reason, transparency, participation and collaboration have evolved into a trendy triptych in the international context as markers of open governments.

§ 1 – TRANSPARENCY AND THE RIGHT OF ACCESS TO ADMINISTRATIVE DOCUMENTS, AS PREMISES OF THE OPEN GOVERNMENT

A) The Legal Framework of the Government Transparency, a Legacy of the French Revolution

As it is broadly defined today, the concept of open government⁸ is of recent origin, having been first articulated on January 21, 2009, in President Obama's first open government directive⁹. However, as noted, the underlying principles of transparent and responsible administration is of more ancient origin. Indeed, one could argue that French Revolutionaries started in the XIX century to build a legacy that would lead to open government two centuries later, even if the concept of open government did not exist at that time. There are several reasons for linking open government to the 1789 Revolution. First, French revolutionaries understood the importance of transparency, and thus, established it as a fundamental right by including it in Article 15 of the 1789 Declaration. Transparency and open government are distinct terms, the second term having a wider dimension than the first.¹⁰ Openness supposes to favor transparency, but also citizen participation and collaboration. Moreover, even though it is necessary to ensure the right to transparency, transparency by itself does not guarantee governmental openness because governments can provide the citizenry with lots of information without being "open". In such circumstances, transparency will exist, without

⁷ See Albert J. Meijer, Deirdre Curtin et Maarten Hillebrandt, *La gouvernance ouverte : relier visibilité et moyens d'expression*, 78 REVUE INTERNATIONALE DES SCIENCES ADMINISTRATIVES 13-32 (2012).

⁸ Regarding the term of open government, see, for instance, Irène Bouhadana, *Introduction. Transparency and Open Government: Which Possible Convergence?*, in IRÈNE BOUHADANA, WILLIAM GILLES, RUSSELL WEAVER (EDS), *TRANSPARENCY IN THE OPEN GOVERNMENT ERA 5* (Les éditions Imodev, 2015).

⁹ This Memorandum for the Heads of Executive Departments and Agencies was the very first political act of the president Obama: See Barack Obama, *Transparency and Open Government*, January 21, 2009.
http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

¹⁰ See Irène Bouhadana, *Introduction. Transparency and Open Government: Which Possible Convergence?*, op. cit.

being useful for the citizenry because of the information overload¹¹. Nevertheless, transparency is a prerequisite to open government in the sense that there can be no open government without transparency. For these reasons, transparency is an essential component of an effective democracy, and French revolutionaries perceived this crucial link.

French revolutionaries, perceiving this crucial link, articulated a commitment to transparency in the very first lines of the Declaration of 1789. The preamble to that declaration states that “ignorance, forgetfulness or contempt of the rights of man are the sole causes of public calamities and of corruption in governments.”¹² The document goes on to emphasize the need “to set forth in a solemn declaration the natural, inalienable and sacred rights of man”, and that the right to transparency is included among a number of these fundamental rights.¹³ The French revolutionaries also mentioned the right to transparency several times in the text of the 1789 Declaration. For example, the preamble emphasizes that acts of legislative and executive power must “be comparable, at any moment, with the aim of any political institution.”¹⁴

However, the imperative for transparency of public administrations comes from the very text and substance of the Declaration of 1789. According to Article 14 of the declaration, “citizens have the right to ascertain, by themselves or through their representatives, the necessity for the public contribution, to freely consent to it, to follow its employment, and determine its proportion, basis, collection and duration.” However, since this right cannot be implemented without transparency, there can be neither recognition nor consent if information is hidden from the people or their representatives. In other words, transparency is a *sine qua non* for the realization of the right of citizens (causality). Full realization of the right to ascertain or consent to tax is a consequence of the effective implementation of financial transparency Article 15 of the Declaration of 1789 reinforces this idea by stating that “the society has the right to demand the accountability of every public agent in its administration.” Therefore, in this respect, this article serves as a basis for requiring transparency of public administration as a way of forestalling any irregularity or poor governance.

Second, one could assert that the Declaration of 1789 pursues the same general objective as the open government process. As noted, the goal of open government is to promote transparency, participation and collaboration, in order to make governments more accountable. Yet, the Declaration of 1789 already sowed the

¹¹ Regarding the difficulty to manage the information overload, *see*, for instance, Guus Pijpers, *Information Overload – A System for Better Managing Everyday Data* (Wiley U.S., 2010); TORSEL KLINGBERG, *The Overflowing Brain: Information Overload and the Limits of Working Memory* (Oxford University Press, 2009).

¹² *See the Declaration of the Rights of Man and Citizen of August 26, 1789.*

¹³ *Ibidem.*

¹⁴ *Ibid.*

seeds of open government with its call for participation and accountability.

Not only does the 1789 Declaration of 1789 establish the legal foundation for transparency in France, it stresses the need to use transparency to promote citizen participation. In other words, the 1789 Declaration seeks to promote transparency, not as an end in and of itself, but as a way to encourage an active citizenry. Article 14, previously mentioned, not only recognizes that citizens or their representative must freely consent to taxation, it allows citizens and their representatives to monitor the expenditures. As a result, the Declaration created an expectation that French citizens should monitor how taxes are spent. Likewise, with Article 15 of the 1789 Declaration which recognizes that citizens possess “the right to demand the accountability of every public agent in its administration,” and thus encourages the citizenry to contribute to public life by requesting information in order to monitor not only the use of public monies, but also the effectiveness and efficiency of public services.

Adopted two centuries ago, the 1789 Declaration remains effective today, and has renewed vitality in an era of open information and open government. As part of the Constitutionality Block¹⁵, these articles provide for requirements that carry constitutional value.

But this right to ascertain and consent to taxation, or to hold public administrators accountable, although constitutionally enshrined, cannot be fully and effectively implemented while the system continues to rely on the traditional system which is based on ‘paper’. The advent of the digital society, and the technical possibilities it provides, particularly with regard to electronic data interchange and storage media, provide an entirely new lens for evaluating articles 14 and 15 of the Declaration of 1789. As the Internet has enabled Citizens to have direct access to budget information online, including those of the State and the Social Security (finance laws, laws on social security funding, parliamentary work and budget debates, audit report, etc.), transparency and open government take on an entirely new meaning.

¹⁵ In a decision of July 16, 1971, the French Constitutional council based, for the first time, its decision not only on the Constitution, but also with regard to its preamble. By “having regard to the Constitution and its preamble” (terms of the decision), the French Constitutional council recognized the constitutional value of the sources mentioned in the preamble of the 1958 Constitution. *See* French Constitutional council, decision No. 71-44 DC of JULY 16, 1971, Law completing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements:

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-71-44-dc-of-16-july-1971.135366.html>.

This term was coined by the Dean Louis Favoreu to qualify sources having a constitutional value in France after the decision No. 71-44 DC, namely the 1958 Constitution, the Declaration of the Right of Men and of the Citizen, the preamble to the 1946 Constitution and the fundamental principles recognized by the laws of the Republic. *See* Louis Favoreu, *Le principe de constitutionnalité, essai de définition d'après la jurisprudence du Conseil constitutionnel*, RECUEIL D'ÉTUDES EN HOMMAGE À CHARLES EISENMANN 33 (Cujas, 1975). Since 2005, the ‘Constitutionality block’ also includes the “the rights and duties as defined in the Charter for the Environment of 2004”, as this text was inserted to the preamble of the 1958 Constitution by the Constitutional Law No. 2005-205 of March 1, 2005.

B) The Right of Access to Administrative Documents, as a Way of Promoting Transparency

1) The Context of the French Adoption of the Right of Access to Administrative Documents

Although the French Revolution established the legal framework for transparency in public administration, its provisions were articulated only in general terms. As a result, effective implementation of the transparency requirement required legislative intervention to articulate more concretely methods for achieving the required transparency.

Act No. 78-753 of July 17, 1978, is often cited as a precursor text for transparency in French public administration. Certainly, this law has occupied and played a central role in the drive to achieve transparency in French public administration. However, it is equally important to note that the legislature did not wait until the Fifth Republic to become concerned about public transparency. The Act of April 5, 1884, was one of the first texts in France to mention a right to transparency and, above all, a right to re-use public data. That law provides that “any resident or taxpayer has the right to ask for a document without relocation, take a complete or partial copy of the minutes of the municipal council, budgets and accounts of the municipality, city ordinances. / Everyone can publish them under their own responsibility.”¹⁶ This law has limited impact since it pertains only to budgetary and accounting information of ‘communes’¹⁷.

It is not until the Act No. 78-753 of July 17, 1978¹⁸, that French legislation provides a general framework for transparency of information held by the French public administrations. This law provides greater substance to the concept of transparency. Prior to the enactment of this law, there was no general provision requiring transparency. The obligation to reveal administrative documents was provided for only in certain situations under specific laws as provided for in the Act of April 5, 1884. Although transparency was once regarded as nothing more than a moral obligation, it has gradually morphed into a legal requirement.¹⁹

The goal of the 1970s legislation was to “restore trust between citizens and public institutions.”²⁰ At this time, society was becoming aware of the risks that information technology poses to fundamental freedoms. This awareness was stimulated by the

¹⁶ Act of April 5, 1884, on municipal organization.

¹⁷ In France, the ‘communes’ are the first level of local organization, followed by the ‘départements’ and the ‘régions’. See Article 72 of the French Constitution.

¹⁸ Act No. 78-753 of July 17, 1978, containing several measures for the improvement of relationships between the public and the administration, as well as other administrative, social and fiscal provisions.

¹⁹ See Virginie Donier, *Les lois du service public : entre tradition et modernité*, 2006 RFDA 1219.

²⁰ See Geneviève Koubi, *Administration électronique et circulaires administratives*, 2006 AJDA 953.

revelations of the SAFARI²¹ case²² in 1974, which involve the creation of a central data base that link people's private information to information contained in State files in order to facilitate searches and interconnections. Following strong criticisms of the SAFARI project, the legislature adopted the Act of January 6, 1978, to provide legal protections against the use of personal data held in administrative files.²³

The Act of July 17, 1978, sought to redefine the relationship between the citizenry and administration in a context where information technology was facilitating access to administrative documents. This law has been amended several times to adapt the legal framework to contemporary needs, in particular. One of the principal amendments was contained in the Ordinance of June 6, 2005²⁴, whose was designed to incorporate the European Directive on Public Information Sector of 2003²⁵ into French law in order to provide a legal framework for the reuse of public data, including for commercial purposes.²⁶ This European directive, which was amended on June 26, 2013,²⁷ imposes no obligation on the Member States of the European Union regarding access to administrative documents, since it only deals with the reuse of public information. Thus, Member States may decide on their own to provide a legal framework for protecting the right of access to administrative documents. France did so with the first chapter of the first title of the Act of July 1978, which deals with liberty of access to administrative documents, whereas chapter 2 of title 1, which was introduced in 2005, is related to the reuse of public data. The French legislator has recently decided to codify these provisions in a new Code, called 'Code des relations entre le public et administration' (Code of relations between the public and the

²¹ SAFARI is the French acronym of 'Système Automatisé pour les Fichiers Administratifs et le Répertoire des Individus', that means 'automated system for administrative records and individual register' (author's translation).

²² See Philippe Boucher, *Safari ou la chasse aux français*, LE MONDE (March 21, 1974). For further explanation about the Safari Case, see also, Jean Harivel, *La difficile protection des données à caractère personnel dans une société numérique*, IRENE BOUHADANA, WILLIAM GILLES (EDS) DROIT ET GOUVERNANCE DES DONNEES PUBLIQUES ET PRIVEES A L'ERE DU NUMERIQUE, (Les éditions Imodev, 2015), William Gilles, *L'administration numérique en France : quel modèle juridique ?*, IRENE BOUHADANA, WILLIAM GILLES (EDS) DROIT ET GOUVERNANCE DES ADMINISTRATIONS PUBLIQUES A L'ERE DU NUMERIQUE, (Les éditions Imodev, 2014).

²³ Act n° 78-17 of January 6, 1978, concerning information technology, files and freedoms.

²⁴ Ordinance n° 2005-650 of June 6, 2005, on the freedom of access to administrative documents and reuse of public information.

²⁵ Directive 2003/98/EC of the European Parliament and of the Council of November 17, 2003, on the re-use of public sector information:

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0090:0096:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0090:0096:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0090:0096:EN:PDF).

²⁶ Another important amendment was adopted in 2009, through the Ordinance n° 2009-483 of April 29, 2009, taken in accordance with Article 35 of Act n° 2008-696 of July 15, 2008, on archives, whose Title 1 amends Act of July 17, 1978.

²⁷ See Directive 2013/37/EU of the European Parliament and of the Council of June 26, 2013, amending Directive 2003/98/EC on the re-use of public sector information:

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF).

administration),²⁸ that repeals and replaces several provisions of the Act of July 17, 1978.

2) The Content of the French Legal Framework Regarding Access to Administrative Documents

The Act of July 17, 1978, asserted existence of a “right to information for everyone” that is guaranteed by the provisions of its text. This right was stated in the first sentence of Article 1 of the text, illustrating the strong commitment of the legislature to the recognition of this right. This provision can now be found in Article L. 300-1 of the Code of relations between the public and the administration. It is necessary to analyze the content of the first title of volume III of this new code²⁹ in order to understand its significance.

First, the French legislator has provided *two ways to access administrative documents*.

The first provisions of the law provide for a general right of access to administrative documents if such documents are not excluded from the right of communication by Article L. 311-6³⁰ of the Code of relations between the public and the administration.³¹ Article L. 311-1 of this Code provides that, subject to this condition and in accordance with Articles L. 311-5 and L. 311-6 of this Code, the State, local authorities and other public law or private law entities entrusted with a public service mission³² must provide administrative documents to those who request them. The second provision is more restrictive because it is limited to administrative documents that can be used against the users or agents.³³ The legislature has recognized the right of every person to have access to information contained in an administrative document that might be used against them. This right is limited by the provisions of the Act of January 6, 1978, which concerns personal information stored in files. The law gives such people the right to provide their written observations regarding the conclusions set forth in the documents, and to have their observations attached to the document in question. The administration must accept the written

²⁸ This Code was created by the Ordinance n° 2015-1341 of October 23, 2015 (ordonnance n° 2015-1341 relative aux dispositions législatives du Code des relations entre le public et l'administration).

²⁹ The first title of the volume III (‘titre 1^{er} du livre 3’, in French) of the Code of relations between the public and the administration has replaced the former provisions of Act of July 17, 1978, that deals with the right of access to public information.

³⁰ Article L. 311-6 of the Code of relations between the public and the administration replaced the former Article 6 of the Act of July 17, 1978, repealed by the Ordinance n° 2015-1341 of October 23, 2015.

³¹ See Article L. 311-1 of the Code of relations between the public and the administration (Code des relations entre le public et administration). This Code was created by the Ordinance n° 2015-1341 of October 23, 2015 (ordonnance n° 2015-1341 relative aux dispositions législatives du Code des relations entre le public et l'administration), that repeal and replace several provisions of the Act of July 17, 1978.

³² This list refers to the authorities that are mentioned in Article L. 300-2 of the Code of relations between the public and the administration, and that are subject to the right to access to administrative document in accordance to Article L. 311-1 of this Code.

³³ See Article L. 311-6 of the Code of relations between the public and the administration.

observations. Moreover, the law prohibits that someone uses an administrative document that would violate this obligation.

Second, the legislature has imposed restrictions on the right to access administrative documents.

In this respect, it has specified the notion of administrative documents that are subject to the right to access. The right of access extends to all administrative documents within the meaning of titles I, III and IV of Volume III of the Code of relations between the public and the administration,³⁴ “regardless of their date, place of storage, their form and their medium, documents produced or received in the course of their public service mission, by the State, local authorities as well as other entities of public law or private law responsible for such a mission. Constitute such documents are files, reports, studies, minutes, proceedings, statistics, directives, instructions, circulars, notes and ministerial answers, correspondences, opinions, forecasts and decisions.”³⁵ It should, however, be noted that there is no obligation to provide access except to final administrative documents. Thus, the law makes a distinction between draft and finished documents as the right to access applies only to the last ones. The consequence is that the obligation to provide access does not extend to preparatory documents that precede the final administrative decision. Similarly, the administration may not refuse access when a document has already been issued publicly. Finally, the right of access continues to apply to documents even after they have been filed in the public archives.

Moreover, the legislature has reduced the scope of the right of access to administrative information, by excluding certain documents. The excluded documents are set forth in Article L. 311-5 of the Code of relations between the public and the administration, and include the following: “the opinion of the Council of State and administrative jurisdictions, documents of the Court of Auditors referred to in Article L. 141-10 of the Code of Financial Jurisdictions and documents of the regional audit chambers mentioned in Article L. 241-6 of the same Code, documents prepared or held by the competition Authority in exercising its powers of investigation, training and decision, documents prepared or held by the High Authority for the transparency of public life, within the tasks provided for by Article 20 of Act No. 2013-907 of October 11, 2013, concerning the transparency of public life, preliminary documents to the preparation of the report for the accreditation of health institutions provided for in Article L. 6113-6 of the public health code, preliminary documents to the accreditation of health personnel referred to in Article L. 1414-3-3 of the public health code, the audit reports by health facilities referred to in Article 40 of Act n° 2000-1257 of December 23, 2000, on social security funding for 2001 and documents produced pursuant to a contract

³⁴ See Article L. 300-1 of the Code of relations between the public and the administration.

³⁵ See Article L. 300-1 of the Code of relations between the public and the administration (author’s translation from the French original version).

for the provision of services on behalf of one or more specific persons.”³⁶

Also excluded are administrative documents when disclosure would prejudice: “a) the secrecy of Government and executive power authorities’ discussions; b) confidentiality of national defense; c) the conduct of the French foreign policy; d) the state security, public safety or the safety of persons; e) the currency and public credit; f) the conduct of proceedings before the courts or preliminary operations to such proceedings, unless authorized by the competent authority; g) the search, by the competent services, of tax and customs offenses; h) or, subject to Article L. 124-4 of the Environmental Code, other legally protected secrets.”³⁷

Eventually, the French legislator has adopted a specific legislation regarding the right of access to certain types of information. Likewise, documents produced or received by parliamentary assemblies are ruled under the Ordinance No. 58 1100 of November 17, 1958.³⁸

Between these two extremes, of providing both a general right to access and a prohibition on access to certain administrative documents, the legislature sought an intermediate approach for certain administrative documents which contain sensitive data. The legislature has provided that access may be limited regarding those administrative documents: “whose disclosure would undermine the protection of privacy, medical confidentiality and secrecy in commercial and industrial issues”; which carry “an appreciation or value judgments about an individual clearly named or easily identifiable”; or which expose “the behavior of a person, since the disclosure of such behavior might prejudice him/her.”³⁹ When information provided is of a medical nature, the affected individual may decide to have the information transmitted either directly to him or indirectly through his doctor.

When an administrative document contains statements that cannot be divulged, but which can be disassociated or hidden from the rest of the document, the administration may communicate the administrative document after obscuring or disjoining references that are not disclosable.⁴⁰ If it is not possible to hide or dissociate prejudicial elements, so that access needs not be provided, the

³⁶ See Article L. 311-5 of the Code of relations between the public and the administration (author’s translation from the French original version).

³⁷ Ibidem.

³⁸ For an example of litigation involving the distinction between the notions of ‘administrative documents’ and ‘parliamentary documents’, see French Council of State, July 3, 2006, No. 284296, *Min. Intérieur et Aménagement du territoire c/ Féd. chrétienne des témoins de Jéhovah de France*.

See also the response from the French Secretary of State for relations with the Parliament (published in JO SÉNAT, September 18, 2003, p. 2859) to the written question No. 08659 from M. Jean-Louis Masson (published in JO SÉNAT, July 24, 2003, p. 2346).

³⁹ See Article L. 311-6 of the Code of relations between the public and the administration (author’s translation from the French original version).

⁴⁰ See Article L. 311-7 of the Code of relations between the public and the administration.

administrative documents may be consulted once they are publicly archived,⁴¹ at the expiration of the statutory deadline.⁴²

Third, the legislature *specified the procedures for exercising the right of access*. On the one hand, it gave individuals three options for accessing administrative documents, depending on the technical possibilities of the situation.⁴³ First, individuals may freely consult these documents on the administration's premises unless they are excluded from access. Second, provided that the reproduction is not detrimental to preservation of the document, any person may request, at their own expense⁴⁴, a copy of the document in all medium identical to that in which it is being maintained. Third, when an electronic version is available, the document may be sent to the applicant by email at no cost. In other words, individuals can choose how to access administrative documents subject only to the technological capabilities of the administration in question.

The Legislature also sought to prevent abuse by providing that “the administration is not required to respond to abusive claims, especially, considering their number and their repetitive or systematic character”.⁴⁵ Likewise, a citizen cannot request an administrative document that has already been published.⁴⁶

The Legislature also addressed the situation in which the administrative authority that receives a request for access does not have the requested administrative document. If the document is held by another administrative entity, the administration receiving the request shall forward it to the entity that holds the document and shall inform the requesting person that it has been forwarded.⁴⁷

Transparency, from the perspective of access to administrative documents, allows citizens to become an integral part of the administrative process. However, access can be limited by the nature of the requested documents in that some documents cannot be transmitted or can be transmitted only under certain conditions. In addition, a citizen has any guarantee that no one will access to documents that are prejudicial to him/her (i.e., because they contain personal data).

Eventually, we can regret that the right of access is sometimes hampered by delays inherent in the nature of administration. Some of these delays could be significantly reduced by the use of new technologies that permit more systematic publication of public documents on the Internet, and that obviate the need for requests for information.

⁴¹ See Article L. 311-8 of the Code of relations between the public and the administration.

⁴² See Articles L. 213-1, L. 213-2 and L. 213-3 of the Heritage Code.

⁴³ See Article L. 311-9 of the Code of relations between the public and the administration.

⁴⁴ However, the cost to the person who makes the demand cannot exceed the cost of the reproduction.

⁴⁵ Article L. 311-2 of the Code of relations between the public and the administration.

⁴⁶ *Ibidem*.

⁴⁷ *Id.*

§ 2 – OPEN GOVERNMENT AS AN EXTENSION OF THE FRENCH ADMINISTRATIVE TRADITION

France's legal framework allows it to participate fully in the process of open government, through its administrative tradition of transparency and access to government documents. Nevertheless, it is important to examine the reasons why France lagged behind the open government partnership process for some time, as well as to note that the specific approach adopted by France resulted from its desire that the open government process be part of its policy of government reform.

A) The Need to Firmly Establish Open Government in the French Administrative Tradition

Transparency and access to government documents are key elements of the French administrative tradition; they are also essential conditions, but not the only conditions, for Open Government. With this in mind, we examine France's approach to the Open Government Partnership, which was created in September 2011 at the initiative of eight countries⁴⁸ that wished to bring this issue into the international arena.

Because France did not initially join this partnership, questions have been raised about where the country stands regarding the goal of incorporating open government into its administrative model. France's lack of participation in this movement could be construed as a lack of interest in these issues, but that was not the case. France was seeking its own path in this international movement. Even though France chose not to join this Partnership for a while, it did not remain inactive regarding open government.⁴⁹ Indeed, rather than joining the Open Government partnership, France decided, first, to work on open government issues with States that do not fall within the Anglo-Saxon sphere of influence. In fact, the aim of France was to bring together Francophone countries, especially African countries and other former French colonies, in an effort to raise their awareness of this issue.⁵⁰ More recently, France has sought to go beyond the Anglo-Saxon approach, which some considered as underlying the Partnership for Open Government, by making a decision to work towards a more pluralistic approach to the problem, i.e. one that takes into consideration other approaches besides the Anglo-Saxon approach. Indeed, France has played an active role in the adoption of the Charter by the G8⁵¹, in June 2013, on open data which "marks the collective ambition of

⁴⁸ Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom, the USA.

⁴⁹ See William Gilles, Open Government and Democracy. The French Case, Speech at the 4th International Conference on Democracy as Idea and Practice, January 10-11, 2013, University of Oslo.

⁵⁰ See, for instance, XIV^e Conférence des chefs d'État et de gouvernement des pays ayant le français en partage, *Horizon 2020 : Stratégie de la Francophonie numérique. Agir pour la diversité dans la société de l'information*, XIV^e sommet de la Francophonie, 14 octobre 2012.

⁵¹ *Open Data Charter*, adopted on June 17-18, 2013, at the Lough Erne Summit.

Member States to promote open economies, open societies and open governments”.⁵²

Although it may appear surprising, France’s decision not to join the Open Government Partnership might be explained by the long tradition that exists in this country regarding administrative transparency, dating back to the French Revolution. France has values that it wishes to export to other countries, and, transparency in public administrations is one of them. Retaining a francophone vision of transparency could be regarded as an imperative for the defense of this model, assuming that there are two approaches to the concept of open government, one Francophone and the other Anglophone.

However, by not joining the Open Government Partnership, France risked isolation on the international scene. As a result, the ultimate decision by the French government, in April 2014, to join the Partnership was welcomed. France announced its intent to join the Open Government Partnership in May 2014⁵³ and effective membership came in November 2014.⁵⁴ France has launched its first National action plan in July 2015.^{55,56}

Though the French legal framework includes a strong tradition on matters of administrative transparency, France has not neglected other aspects of open government such as the goals of ensuring participation and collaboration between citizens, consumers and public officials. France considers it a necessity to better involve all of these various actors in the processes of administrative decision-making. As a result, France has taken measures to strengthen civil collaboration, the other component of open government, in the search for greater transparency. When government bodies are transparent and civil society is allowed to participate in the governmental process, government action is more modern because it allows more citizens to participate in political decision-making. These factors foreshadow a process for modernizing public policy and they carry the seeds of State reform.

⁵² French Government Gateway, *Plan d'action G8 sur l'ouverture des données publiques* (published on November 7, 2013) :

<http://www.gouvernement.fr/gouvernement/plan-d-action-g8-sur-l-ouverture-des-donnees-publiques>.

See also the final release of the G8 Summit of June 17 and 18, 2013, which called for *Open Economies, Open Societies and Open Governments*.

⁵³ See France’s Letter of Intent to join OGP, May 2, 2014.

⁵⁴ J.-M. Meyer, « La France adhère au club international des gouvernements ouverts », ACTEURS PUBLICS (June 30, 2014) :

<http://www.acteurspublics.com/2014/06/30/la-france-adhere-au-club-international-des-gouvernements-ouverts>.

⁵⁵ See Government of the French Republic, For a Transparent and Collaborative Government: France National Action Plan 2015-2017, July 2015, available at: <http://www.opengovpartnership.org/country/france/action-plan>.

⁵⁶ In reality, France has adopted two National action plan, as the French National Assembly has issued its own one. See Assemblée nationale, *Toward a National Assembly of the XXI Century National Assembly’s Action Plan for the Open Government Partnership*, July 2015.

B) On the Need to See Open Government as Part of State Reform

Most concepts of modern democracies, such as transparency, participation, and accountability, are not new ideas. As noted, principles of transparency and accountability date back to 1789 in France where those ideas were decreed as society's "natural, unalienable and sacred rights".⁵⁷ The difference between today and ancient times is based on newly developed technologies that have led to the so-called "digital era".⁵⁸ Digital technologies have made it much easier for administrative entities to empower the citizenry by providing information, as well as by allowing the citizenry to participate and cooperate in government through the use of electronic voting devices, online training and consulting, and Internet opinion gathering. In other words, new technologies have helped foster greater interactivity between citizens and their elected representatives. Also referred to as democracy 2.0, new technologies have helped facilitate greater citizen participation and collaboration and helped make governments more accountable. As a consequence, the public has begun to demand something more than the right to simply access public information. In an era when the citizenry is becoming more and more adept at interacting on the Internet, the public expects to participate in an effective and efficient government that really addresses their needs.

Of course, the digital revolution requires government to consistently modernize its operations in order to ensure that its processes align the citizenry's needs and streamline and improve the allocation of public services. In a context of public resource scarcity, governmental reforms are often painful, and it is necessary to ensure citizen participation in the process. Yet, citizen participation and collaboration cannot be truly effective unless government provides a minimum of transparency and guarantees the citizenry access to information that will enable their participation. However, when transparency, participation and collaboration are all present, the result should be a more effective, efficient and accountable government.

Thus, it is not surprising that in the modern era, governmental reform has entered a new phase that focuses on using "transparency" to improve the functioning of public services. Instead of just trying to promote transparency in itself, the modern approach uses transparency as a vehicle for improving the functioning of governmental administration and for holding officials accountable for their decisions and actions.

The aim is not simply to create a right to transparency, and a right of access to public information, but to create a more effective and efficient Government by involving the citizenry, civil servants, and the civil society in the policy-making process.

⁵⁷ See Article XV of the French Declaration of the Rights of Man and of the Citizen, of August 26, 1789.

⁵⁸ See William Gilles, *Le modèle français de l'administration numérique : réalités et enjeux*, 4 REVUE DE L'INSTITUT DU MONDE ET DU DEVELOPPEMENT (RIMD) (2012).

France seems to be moving in the direction of making open government a focus of its State reform. By all indications, this process is extending the reforms undertaken by the adoption of the organic law relating to financial legislation of August 1, 2001⁵⁹. This law changed the management of public services by introducing a performance-based approach to the French State.⁶⁰ The general revision of public policies (RGPP) initiated in 2005 by the General Directorate of State Modernization (DGME) and its successor, the Modernization of Public Action (MAP), through the creation of the General Secretariat of the Modernization of the State (SGMAP) in 2012,⁶¹ coupled with the transition from a print-based government to e-government and now digital government, have helped establish a participatory approach to the search for more effective and efficient public services. As part of the move to streamline public spending and find effective public policies, France's government institutions, like those of other countries, are eager to consult with users as well as public officials, inviting them to express their needs and even suggest reforms.

As a result of this development, citizens now have not only a right to transparency and access to public information in the Internet age, but more broadly a right to open government that allows them to be at least a partial stakeholder in public decision-making.

⁵⁹ Regarding the consequence of this organique law, see for instance, Franck Mordacq, *La LOLF : un nouveau cadre budgétaire pour réformer l'État*, LGDJ, 2006 ; Charles Waline, Pascal Desrousseaux, Stanislas Godefroy, *Le budget de l'État : nouvelles règles, nouvelles pratiques* (La documentation Française, 2006) ; Xavier Inglebert, *Manager avec la LOLF : pratiques de la nouvelle gestion publique* (Groupe Revue Fiduciaire, 2009) ; Xavier Cabannes, *Libres propos sur la LOLF et l'évaluation permanente des politiques publiques*, in Michel Degoffe, Frédéric Rouvillois (eds), *La privatisation de l'État* (CNRS éditions, 2012) ; Michel Rodriguez, *Le service public et la loi organique relative aux lois de finances du 1^{er} août 2001 : contributions de la réforme des finances publiques à la modernisation de l'État* (Presses universitaires d'Aix-Marseille, 2013).

⁶⁰ See William Gilles, *Les réformes des finances publiques en France : évolutions et enjeux*, 54 REVUE CANADIENNE D'ADMINISTRATION PUBLIQUE 421-436 (2011).

⁶¹ See William Gilles, *Le modèle français de l'administration numérique : réalités et enjeux*, *op. cit.*

