Right to access and the European principle of transparency: is Italy lagging behind? ([1])

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Summary: Preamble; 1. A new approach in Europe to transparency and freedom of information; 1.1. Moulding the European right to access: the primary law; 1.2. Regulation n. 1049 of 2001; 2. The right to access in Italy: Law n. 241 of 1990 and the "documentary access"; 3. A change of perspective: towards the right-to-know and the "civic access"; 4. The "generalized civic access": a difficult task to be accomplished?; 5. Closing remarks: the state of play.

Preamble.

It is commonly submitted that the constant interaction between the European Union law and the Member States legal systems has so far been a source of intense circulation of principles and legal models.

[1] **This paper develops and completes with notes and other references the ideas first exposed at the Conference for national judges on the topic "Access to information held by public institutions and handling of secret information in administrative courts", organised by AEAJ on 15-16 June 2017 in Leipsig.**
Rosa Perna wishes to thank Agnese Braghiroli for her invaluable help.
The author remains solely responsible for the content of this article.

One of the areas most affected by this flow of constructive inputs no doubt pertains to the achievement of transparency in public administrations and, consequently, the enhancement of the right of citizens to access data and information held by public authorities.

Originally developed in the Nordic European countries, the right to access progressively spread into the new democracies of the rest of Europe as well as into other continents. Nowadays, constitutions, national laws on freedom of information (FOI) and the jurisprudence of more than 90 countries provide people with instruments very apt for obtaining information from public administrations and public powers. Almost all national laws recognize the access to information as a fundamental civil right which has progressively become a benchmark for open democracies so as to be recognized as a fundamental human right *per se*, as linked to the freedom of expression of any individual, regardless of his/her status of citizen.

In the matter of access and transparency, the European Union has duly adopted a typically twofold approach, on the one hand addressing Member States with specific-sector provisions under the principle of conferral, on the other hand, directly regulating the European institutions according to Article 42 of the Fundamental Rights Charter and Article 15, paragraph 3, TFEU (former Article 255 TEC).

The driving force of the Union primary law has caused a marked "climate change" in the national approach towards the growing demand for transparency and Italy has not remained idle: in the last decades our national system has definitely undergone significant legislative interventions, up to the very recent adoption of European-oriented measures possibly aimed at fully achieving the openness of the public system.

The present paper will attempt to answer the question whether Italy has so far fulfilled the standards set by the European law in the matter of transparency and right of freedom of information and if so to what extent.

Our study will suitably be triggered by an assessment of the main salient features of the European legislation on the matter in question to move forward on, in a second step, inside our national borders.

1. A new approach in Europe to transparency and freedom of information.

Since the early 1990's, freedom of information legislation has been knowing a noticeable development in Europe and transparency has been considered with a new fervour, promoted as an aspect of good governance, stimulated as a legal norm, conceived as the segment of a wider evolution in the relationship between Authority and citizens that was affecting several EU member States and the European Union itself.

In the latter the phenomenon under consideration was characterized by a clear, simultaneous affirmation of the principle of transparency in a wide range of areas, from the obligation to provide the widest possible access to documents held by public bodies to the legislation on financial matters, to social law and the recruitment for careers in the European institutions.

Furthermore, in the European context, transparency and openness were beheld as a response to the perceived lack of legitimacy of the new-born Institutions and as a means to cope with the democratic deficit ([2]).

On the other hand, the concept of transparency was no novelty for the public and legal activities: in a major part of the European legislation it was already implicit and transparency obligations were inherent in other principles of law, such as the duty to give reasons and the rights of defence. Coherently, in developing the principle of transparency, unional

[2] In the White Paper on European governance, the Commission discerned a number of principles of good governance, including openness, in order to tackle problems which the Paper identified in being the EU *perceived* not to be effective enough.

institutions clearly indicated that they were taking as a basis established legal concepts ([3]), expanding them into the context of the Union.

Despite the divergences in the way the principle was applied in the different fields of law, in the notion of transparency a common core element could be recognized , which "*is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity"* according to the definition served by the Advocate General Ruiz-Jarabo Colomer ([4]) in order to describe the general contours of this loose notion.

The European transparency system, as we shall consider later, has its source in the EU Treaties and primary law, while it leaves the rulings on each body or institution to the secondary law.

1.1. Moulding the European right to access: the primary law.

A first, relevant step through the European route to transparency and freedom of access was made with the adoption of Declaration n. 17 alleged to the Treaty of Maastricht ([5]), where the Member States pointed out the dual character of the principle of openness, highlighting that "*transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration"* and resulted in the adoption of article 1 TEU ([6]), which stated that decisions are to be taken as openly as possible.

Hence, right to access to documents held by Union institutions was linked since the very beginning to their democratic nature and the extent of the openness required of the

[3] See Commission communication of 5 May 1993, 93/C 156/05

[4] Case C-110/03, Belgium v. Commission [2005] ECR I-2801, paragraph 44.

[5] Declaration n. 17 on Right to Access to Information, alleged to the Final Act of the Treaty on European Union, signed at Maastricht on 7th February 1992. Official Journal, C-191 of 29 July 1992.

[6] Treaty on European Union, signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. The consolidated version of Article 1 at present in force maintains the original reference to the openness in the decision-making process stated in the first version of the Treaty.

decision-making process merely reflected the importance of transparency for modern democracies.

Since the mentioned Declaration n. 17, where for the first time the principle of openness was established, a quality of transparency emerged: to a large extent, it was instrumental in enhancing the legal concepts and principles it referred to, such as trust in public institutions and participatory democracy, facilitating decision-making processes and increasing the accountability of public authorities.

In this context, right to access to information held by public powers was one of the tools which the European bodies expected to bring citizens closer to the institutions, stimulating a more intensive and conscious debate about European policies and improving the trust of the public in the Union ([7]).

The principle is applicable to all the activities of Institutions and EU bodies, under the assumption that citizens have to be fully informed to properly exercise their democratic rights ([8]); therefore, on the basis of Declaration n. 17, the Commission and the Council adopted a "Code of conduct concerning public access to Commission and Council documents" (1993), in which the two institutions codified that " *The public will have the widest possible access to documents held by the Commission and the Council*" ([9]).

Shortly after, the 1997 Amsterdam Treaty implemented the primary law basis of the right to access at the European level: former Article 255 TEC provided for the right to access to documents held by the European Parliament, Council and Commission to all natural and

[7] Commission Communications n. 93/C 166/04 and 93/C 156/05.

[8] General Court of the European Union, Case T-233/09, "Access Info Europe/Council".

[9] The code was implemented by Council, Commission and later also European Parliament decisions laying down detailed condition for access to information. Refer to: Council Decision 93/731/EC on public access to Council documents OJ L 340, 31 December 1993, p. 43; Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents OJ L 46, 18 February1994, p. 58; European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, OJ L 263, 25 September 1997, p. 27.

legal persons residing or having their registered office in one of the Member States and thus retaining the principle of the "widest possible access" ([10]).

In 2007, the Lisbon Treaty ([11]) further developped the right to access in Article 15 TFEU, which grants a right to access to documents held by all European institution, rather than just to those of Council, Commission and Parliament. In addition, right to access is also established by Article 42 of the Nice Charter of Fundamental Rights, included in the section dedicated to political rights of the European citizens.

Lastly, a systematic reading and interpretation of the provisions offered by the European primary law establishing the right to access, combined with other relevant legal principles, such as democracy and openness, leads to the conclusion that the right to access to information is conceived not only as a precondition for the application of the democracy principle at the union level but also for ensuring the transparency of the Union's action as a means to increase its democratic legitimation, since right to access remains intertwined with openness as an aspect of transparency ([12]).

1.2 Regulation n. 1049 of 2001

Pursuant to former Article 255 EC, the Council and the European Parliament adopted Regulation n. 1049/2001/EC ([13]) on public access to European Parliament, Council and Commission documents, also giving effect to Article 1 TEU which enshrined the principle

[10] M. Augustyn, C. Monda, *Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001*, European Institute of Public Administration, www.eipa.eu

[11] The Lisbon Treaty was signed on 13 December 2007 and entered into force on 1 December 2009. Official Journal C-306, 17.12.2007.

[12] V. Karageorgou, *Transparency principle as an evolving principle of EU law: Regulative contours and implications*, Lecturer in European Administrative Law, Panteion University.

[13] Regulation (EC) N 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

of openness and laid down the ideal of a decision-making process as open as possible throughout the Union ([14]).

The purpose of the Regulation is to define principles, conditions and limits governing the right to access to documents, so as to ensure the *widest possible access to documents*, establish rules granting the easiest possible exercise of this right and promote good administrative practice on access to documents.

Within the scope of the Regulation fall "*all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union*" (Article 2, paragraph 3) ; documents are broadly defined as "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*" (Article 3, lett. a))

Every natural or legal person resident or established in the EU enjoys the right to request access to documents held by an EU institution and no reasoning is required, according to the Regulation's philosophy where transparency *per se* serves the public interest, since "*openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen*". So, a person seeking access to a document will not need to state any reasons to justify the request (Article 6, paragraph 1) and will thus not need to demonstrate any particular interest in having access to documents beyond the public interest in transparency ([15]).

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[14] Although in line with the wording of former Article 255 TEC the Regulation only explicitly applies to access to documents of the Commission, Council and European Parliament. The Institutions adopted the Joint Declaration relating to Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 [2001] OJ L173/5 demanding that also agencies and similar bodies adopt analogous rules on access to documents.

[15] T. Heremans, "Public access to documents: jurisprudence between principle and practice", Egmont Papers, Royal Institute for International Relations, Brussels, September 2011.

This approach allows people to resort to the Regulation both for its original purpose, which is to increase the democracy and the accountability of the Institutions, and a number of personal reasons that fall outside the sphere of the original aims of the discipline. What is worth mentioning is that a document is released exclusively by reference to its importance for the democratic process, while the private interest of the applicant remains irrelevant.

Even though the preamble spells out a broad right to access, not every document is necessarily made public: Article 4 contains a list of exceptions which may justify restraining access to documents and puts the burden of proof on the Institution the request is addressed to. As the basic principle underlying the application of the Regulation n. 1049 of 2001 is the "*widest access possible*", it seems appropriate to assume that the exceptions provided for in the Regulation itself are to be interpreted as restrictively as possible, in line with the Court of Justice jurisprudence requiring that any request for access has to be subjected to a "*concrete and individual examination*"([16]).

Article 4, paragraph 1, foresees a number of absolute or mandatory exceptions, stating that European Institutions shall refuse access to documents if the disclosure undermines the protection of: "a) public interests, such as public security, defence, international relations and financial/monetary policy of the Union or a Member State; b) privacy and the integrity of the individual".

Article 4, paragraph 2, provides relative exceptions, stating that the disclosure of a document shall be refused to protect commercial interests, including intellectual property, court proceedings and legal advises and the purpose of inspections/investigation, unless there is an "*overriding public interest in disclosure*". The discretionary nature of these exceptions implies that the Institutions invoking them will need to balance the protected interest

[16] Case T-211/00, Kuijer/Council (Kuijer II) [2002] ECR II-485, cit., paragraph 36.

against a possible overriding public interest and will be asked to properly give reasons for the refusal.

Article 4, paragraph 3, aims at protecting the institution's decision-making process: while for defined procedures only documents containing opinions for internal use can be refused, for ongoing procedures all documents may be refused.

One of the main questions about the relative exceptions under paragraph 2 and those provided for in paragraph 3 concerns the kind of interest able to constitute the "overriding public interest in disclosure" and whether the interest in transparency itself could be alleged as overriding the exceptions laid down in the Regulation. The jurisprudence considers transparency, openness and democracy as public interests capable of overriding the Regulation's exceptions ([17]) and the European Court of Justice clarified that the interest underlying those principles (accountability of the institutions, participation in the European governance, trust in the Institution) could themselves constitute an overriding public interest ([18]).

European Court of Justice and Tribunal case-law contributed to define the applicable procedural regime: in order to comply with the principle of the widest access possible, the Court has been demanding of the Institutions, as a procedural requirement, to establish for each requested document whether there is a foreseeable and not merely hypothetical risk that the disclosure would harm one of the public or private interest protected by Article 4 ([19]). Moreover, the obligation to conduct an "*individual assessment*" requires the Institution to separately assess for each document the possibility to grant the requested access ([20]). Furthermore, the Institutions are under the obligation to state the reasons for their decision

[17] T. Heremans, "Public access to documents: jurisprudence between principle and practice", cit.
[18] Joined cases C-39/05 P and C-52/05 P, *Turco,* [2008] ECR I-4723.
[19] Case T-211/00, Kujer/Council, [2002] ECR II-485, paragraph 56.
[20] Case T-2/03, Verein fur Konsumenteninformation/ Commission [2005] ECR II-1121, paragraph 42.

in a manner that allows the applicant, as well as potentially the Court, to ascertain the concrete and individual nature of the assessment of their request.

The case-law referring to the mandatory exceptions shows that a wide discretion is left to the Institutions and the exercise of this discretion is deemed to be part of the "political responsibilities" conferred upon them by the Treaty's provisions, where they have to "undertake complex assessments" involving "the particularly sensitive and essential nature of the interests protected by Article 4(1)(a)" ([21]). Hence the Judge focuses his attention on a "*marginal judicial review*", ascertaining whether procedural rules have been complied with or if the duty to state reasons has been satisfied ([22]).

By contrast, when it comes to relative exceptions, the Court does not restrict itself to making a mere formal judgment but examines the merit of the case and follows an approach whereby access is granted as much as possible.

Additionally, a particular attention is paid to the extent of the judicial review, which cannot be bound by a confidentiality agreement that the applicant for confidentiality may have concluded with a person not party to the dispute, nor by the fact that certain documents and information were accorded confidential treatment by the Authority during the administrative procedure which has led to the adoption of the contested act ([23]). Furthermore, when the scrutiny leads him to conclude that some of the documents or information whose confidentiality is disputed are secret or confidential, the Judge is then to assess and weight up for each document or piece of information the competing interests ([24]).

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21 Case C-266/05 P, *Sison/Council,* [2007] ECR I-1233., paragraph 35.

22 Case C-266/05 P, Sison, [2007] ECR I-1270, paragraph 34; Case T-264/04, WWF European Policy Programme/Council, [2007] ECR I-911, paragraph 44; Case T-14/98, Hautala/Council, [1999] ECR II-2489, paragraph 71.

23 Case T-383/03, Hynix Semiconductor/Council, [2005] ECR II-0621, paragraph 39.

24 Case T-383/03, Hynix Semiconductor/Council, paragraph 44.

2. The right to access in Italy: Law n. 241 of 1990 and the "documentary access".

While the European right to access information of public institutions was already defined, Italy was still heading to fully overcome the national legal schemes deployed in accordance with the rule of secrecy, laying the groundwork for the very recent legislative interventions which will be shortly assessed later on.

On approaching the Italian system, it must however be made clear in advance that the legal framework of access to information is made up of two different and autonomous disciplines: Law n. 241 of 1990, the so called Administrative Procedure Act, introducing the "documentary access" - which remains a cornerstone – and Legislative Decree n. 33 of 2013, renamed "Transparency Decree" and introducing the so called "civic assess", lately amended by Legislative Decree n. 97 of 2016, presented as the "Italian Freedom of Information Act".

Due to the substantial diversities connoting the two institutes, doctrine and jurisprudence claim that different "rights to access" coexist in Italy at present.

In this double-track system, the 1990 Administrative Procedure Act was the first "container" of a right to access information held by the public authority since for the first time "transparency" was counted among the general criteria of the administrative action.

Already in the structure of Law 241 of 1990, access to documents represented an instrument transversal to the different phases and subjects affected by an administrative procedure, capable of giving rise to a subjective, enhanced legal position of the requesting party with a reinforced protection, nonetheless at the same time characterized by tight limits in terms of active legitimation.

On introducing the so called "documentary access", the Italian legislator abandoned the original setting where secrecy was the rule and publicity the exception and the new

discipline of access to administrative documents turned out to be expressive of a renewed way of considering the relationship between the citizen and the Authority: accessibility to documents held by a public administration became the rule and transparency prodromal for fostering participation as a necessary pre-condition to impartiality and an objective guarantee for the regularity of the administrative activity itself ([25]). Right to access implied the adoption of "organizational models usually participated and thus […] democratic", and as a result it allowed to overcome a relationship between the Administration and the individuals based on the strict supremacy of the former over the latter ([26]).

All these purposes are well condensed in the maxims of the Administrative Judge, in which the exercise of the right to access to documents held by public authority is declined as an instrument for fulfilling a broader right to information of European source, concerning the organization and the activities of the administration, not only in terms of mere disclosure and correctness of public authorities' action, but also as an effective means for prevention and social counter-action against abuses or other forms of illegality of the public apparatus ([27]).

According to the intention of introducing a legislative instrument of general application for ensuring impartiality and transparency in the administrative action, the "documentary access" regulation contemplates a wide object, allowing access to "any administrative document", defined as "*every graphic, film-based, electromagnetic or other kind whatsoever of representation of the content of instruments, including internal instruments and those not relating to a specific*

[25] Tesorone A., *I rapporti tra riservatezza e diritto di accesso*, www.giustamm.it, 2005.
[26] F. Cuocolo, *Articolo 22 (Commento all'),* in *Procedimento amministrativo e diritto di accesso ai documenti*, 1995; Lunardelli M., *The reform of legislative decree n. 33/2013 in Italy: a double track for transparency*, IJPL, 1/2017.
[27] Council of State, Ch.V, 23 September 2015, n. 4452; id., Ch.V, 17 March 2015, n. 1370; id., Plenary session, 18 April 2006, n. 6; id., Ch. V, 30 July 2014, n. 4028; id., Ch. VI, 20 November 2013, n. 5515.

procedure, that are held by a public authority and concern activities of public interest, independently of whether the substantive law governing them is public law or private law".

As pointed out, this positive feature turned out to be a major constraint of the documentary access since any information held by a public authority that was not in the form of an administrative document would not be accessible.

Besides, we must reckon with the fact that the effectiveness and usability of the institute was furtherly circumscribed by Law n. 15 of 2005, which reformed Law n. 241 of 1990 as a whole: one the one hand, it inserted the principle of transparency into the letter assigning it the status of a general principle governing the administrative activity, on the other hand it established the existence of a personal and concrete interest of the requesting party as a requirement for access, subject to the evaluation of the administration as well as the existence of a direct connection between the requested document and a legally relevant situation of the same party([28]). Additionally, in case of opposing interests, the request to access remained subject to the discretion of the recipient administration.

Despite the explicit affirmation of the principle of transparency into the body of the Law – which the doctrine deemed as a merely formal operation since transparency was already included among the guiding principles in the original version of the Administrative Procedure Act ([29]) - the choice of the 2005 Legislator to require a qualified interest of the applicant, to be declared in the request and whose appreciation was left to the discretion of the Authority, seems to follow an opposite orientation to the European approach, which since the Maastricht Treaty has declined the principle of the "widest access possible".

[28] Alù A., *Diritto di accesso civico: un concetto che cambierà la trasparenza della P.A.,* www.forumpa.it, 6 gennaio 2016.

[29] V. Cerulli Irelli, *Osservazioni generali sulla legge di modifica della L. n.241/90*, Giustamm.it 1-2/2005.

In this context, peculiar importance should be recognized to the effort made by the Administrative Courts, which in the last decades have been gradually filling the schematic provisions of the Administrative Procedure Act with substantial contents in order to effectively implement the right to access.

It is the case-law to clarify that for the requesting party it is sufficient to own a relevant legal position, even though merely potential ([30]).

Gradually, right to access has gained an autonomous relevance as a peculiar protected interest to information whose protection goes beyond the administrative procedure carried out by the interested administration. This has brought about two relevant consequences: on a purely administrative level, the requesting party can re-submit the application as long as the relevant legal position needs protection (31); on a procedural level, the requested document retains its own autonomy both from the outcome of the main judicial proceedings on the relevant legal position, and a possible groundlessness or inadmissibility of the action the applicant should eventually bring, after gaining cognizance of the requested documents (32).

In this way right to access progressively amounts to an autonomous and protected interest to information, a peculiar good of the citizen who relates to the public sphere, a right that does not vanish once the administrative procedure affected by the request to access is completed.

Besides, in the concrete interpretation of the limits expressly laid down by Article 24 of Law. n. 24 of 1990, and particularly those related to a third-party demand for confidentiality

[30] Tar Campania, Salerno, Ch. II, 6 April 2012, n. 666.

[31] Russo S., Oggetto e funzione dell'accesso agli atti dei pubblici poteri nella l. 15/2005, suoi limiti, sua reclamabilità", www.giustamm.it, 7/2005.

[32] Tar Sicilia – Palermo, Ch. I, 15 January 2016, n. 135; Tar Umbria – Perugia, Ch. I, 16 February 2015, n. 69; Council of State, Ch. V, 18 October 2011, n. 5571.

(paragraph 6, letter d)) with specific regard to epistolary, health-related, professional, financial, industrial and commercial interests, the delicate task of balancing opposing interests has highlighted its importance in guaranteeing effectiveness to the provision set out in the subsequent paragraph 7, that "*must nevertheless be guaranteed access to those administrative documents the knowledge of which is necessary for protecting or asserting their legal interests*".

In this regard, two concurrent guide-lines have been identified by the Administrative Courts: on the one hand, where in a case conflicting interests come into consideration, priority is given to the interest-to-know the requested document, especially if the request is aimed at guaranteeing the defense of a party's legal interest; on the other hand, the right-to-know is always subject to the proof, by the interested party, of a specific connection of his legal interest with the requested document. As a result, this distinction has brought to draw the boundary line between necessary knowledge of the requested document, which makes the access possible, and unnecessary knowledge, against which access can legitimately be denied ([33]).

More specifically, when the request to access involves conflicting interests, the administrative jurisprudence has come to identify and distinguish three different levels of protection for the third-party data: at the highest level (i.e. information disclosing health and sexual life of a third party), a situation of equal rank of interest is required of the requesting party; at a lower level (i.e. judicial and sensible data), a strict indispensability of the requested document is required; at the lowest level, a mere necessity of accessing the document is considered sufficient.

Applying these guidelines, Courts have shown a strong awareness of the defensive needs of the requesting party.

[33] T.A.R. Trentino-Alto Adige - Bolzano, 9 January 2017, n. 4; Council of State, Ch. VI, 28 July 2015, n. 3741; id., 25 March 2015, n. 1585; id., 15 March 2010, n. 1493.

As an example, a man who intended to bring an action for the annulment of his marriage, has been granted access to the medical records of his spouse, who had been affected by serious psychic disorders shortly after the wedding, as the purpose of the dissolution of marriage ties has been considered to be equal to interest of protection of sensitive health-related data (34).

Furthermore, it has been recognized the right to access documents relating to the "Costa Concordia" ship – which was the protagonist of the now-infamous shipwreck in the waters of the Tyrrhenian Sea - in order to safeguard the requesting party's defensive reasons in civil trials, though to the detriment of the industrial and commercial interest - alleged by the respondents - underlying the know-how of the undertaking (35)(36).

In a completely different context, where the protection of the economic interests and the family structure were at stake, access has been allowed to files and other information regarding the spouse, obtainable from the financial report archive of the tax administration, though in the form of the mere vision without the extraction of copies (37).

Moreover, it has been given access to documents held by Consob, the Italian National Commission for companies and the stock exchange, whose acts are secret by law, having considered worthy of protection the reasons of defense in civil litigation alleged by the requesting party (38).

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34 T.A.R.Sicilia, Sez. IV, 27 November 2015, n. 2785.
35 Tar Liguria, 6 March 2015, n. 259
36 "Approfondimenti - Accesso agli atti della Costa Concordia 26/03/2015. L'incomprimibile diritto di accesso", March 2015, Leggi d'Italia Legale.
37 Council of State, 14 May 2014, n. 2472; Tar Lazio, Ch. II-ter, 8 February 2017, n. 2161; Tar Puglia - Bari, Ch. III, 3 February 2017, n. 94; Tar Lazio, Ch. III, 17 April 2015, n. 5717; Tar Friuli-Venezia Giulia, Ch. I, 8 October 2012, n. 363; Tar Abruzzo, Ch.I, 29 September 2011, n. 46.
38 Council of State, Ch.VI, 6 July 2016, n. 3003.

Ultimately, even the documents covered by copyright have been deemed accessible, not without having pointed out the claimant's liability for any possible use of them not instrumentally related to the protection of his/her legal position (39).

In conclusion, right to access, as moulded by Law n. 241 of 1990, definitely is a relevant subjective position progressively provided with a reinforced protection but nevertheless of limited application in terms of accessibility and usability: over time, due to the legislative introduction of a general prohibition of requests aimed at a generalized control over the behaviour of the Administration, right to access has gradually lost its objective connotation as a legal instrument aimed at ensuring transparency in the administrative action.

Moreover, the essential feature of the "documentary access", namely the imperative request for a personal interest of a legal nature to justify the application, makes the whole legislative construction diametrically opposite to that of the European right to access to information.

3. A change of perspective: towards the right-to-know and the "civic access".

Over the years, the influence of the European Law, promptly pointing out that transparency is a key principle in the activities of the institutions and associated bodies, raised the awareness of the Italian legislator, who after a long gestation period in 2013 eventually issued the so called "Transparency Decree", lately implemented in 2016 to realize the evocatively named Freedom of Information Act (F.O.I.A.).

The right to access to information sculpted by the 2013 Transparency Decree contains interesting elements of proactive disclosure, generating the obligation of public bodies to provide, publish and disseminate information about their activities, budgets and policies in a way that allows the public to use and access them easily.

39 Note to the judgement "In primo piano - Diritto di difesa e limitazioni alla segretezza: accessibili gli atti della Consob", published on 26 July 2016, Leggi d'Italia Legale.

To fully understand what lies behind this change of perspective, it should be noted that over time, technological progress – namely, the development of ICT technologies – determined the emersion of new methods and instruments to make information knowable. Such methods and instruments use the Internet to disseminate information and documents, while they do not imply the exercise of the traditional right of access. Consequently, the Italian legislator was forced to deal with a new concept in this matter: the concept of availability of documents, data, and information, which refers to a form of publicity that targets an indiscriminate number of users. The online availability of information differs markedly from access to administrative documents, traditionally provided for in the Italian legal system as a right conferred only upon those who possessed a qualified interest and could thus claim its violation ([40]).

The relevant regulation provided for in Legislative Decree 14 March 2013, n. 33 is made up of two steps: first, it introduces strict duties on public bodies in terms of publication and diffusion of several information; then it states that the right of citizens to access data – significantly called "*civic access*"- freely corresponds to the abovementioned obligation and that, in case of violation, everyone can claim for access without any reasoning.

In order to place the institute into a clearer context and better understand its operating area and effects in terms of transparency, a focus on its main features is required.

Article 1 introduces a definition of the principle of transparency, expressed in terms of "*total accessibility to the information concerning organization and activities of public administrations*"; furthermore, it expressly establishes a unique purpose of transparency itself: to foster widespread forms of control by citizens over the public power in carrying out institutional functions and using public resources. It recognizes citizens – may they have an ongoing

[40] Carloni E., *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, Dir. pubbl., 2005.

relation with a given administration or not– an active role in overseeing public authorities' conduct.

This purpose remains at the heart of the concept of transparency: had the legislator not foreseen such an active role, the principle of transparency would have been characterized by a frail content.

Article 3 ("Publicity and Right to knowability") introduces significant disclosure obligations upon public administrations in terms of publicity, transparency and diffusion of documents, data and information on their activities and organization, subject to mandatory publication according to the existing legislation.

The duty to publish a number of relevant data on institutional sites corresponds to the right of anyone to know them and to use and re-use them freely (as stated by Legislative Decree n. 36 of 2006); the mandatory publication, the way it is enhanced by Article 3 of the Transparency Decree, guarantees in itself the public connotation of data and documents to which they are subjected. As an immediate consequence, the possibility to glean information on public activities directly, without having to submit a formal request, clearly take away rook for the application of documentary access provided for by Law n. 241 of 1990.

The peculiarity of the "civic access", as labelled in Article 5 of the Decree, lies in the way the disclosure obligations may be realized: it consists of the right to request public documents where an administration omitted to comply with the obligation to publish them (Article 5, paragraph 1) and is granted to any individual as it is not subject to restriction regarding both active legitimation and motivational burdens. Moreover, no necessary connection between the knowledge of the document and an underlying subjective legal position is required, nor the balancing of opposite interests, since the legislator itself has

preliminary solved potential conflicts enlisting information and documents which are object of a mandatory publication ([41]).

It represents a first step towards the fulfilment of the European standards in the matter, characterized by the "widest possible access" principle, without any subjective requirements.

The "civic access" represents an original and peculiar corrective "*actio popularis*" ([42]) that, within the limits of the mandatory publication laid down by law, allows to pursue the purpose of a widespread democratic control over public institutions ([43])([44]), where this purpose is still expressly forbidden by the Administrative Procedure Act. So it has a broader scope than the "documentary" one, greater usability by anyone, the only condition being that the exercise of the right is addressed towards data, documents or mere information under mandatory publication omitted by the administration. Nonetheless, this latter qualifying condition constitutes its main limit, significantly narrowing the objective contours of the institute. As a consequence, against the broader spectrum of the population which can exercise this kind of access, its object is limited.

Therefore, the 2013 legislative intervention is unable to cause a complete reversal of the Italian legal regime of access to information and even after the advent of the "civic access" the "documentary access" preserves its own systematic role in relation to all administrative documents exempted from mandatory publication (45).

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41 Cudia C., *Appunti sulla trasparenza amministrativa e diritto alla conoscibilità,* cit..

42 See the comments made by Alù A., *Diritto di accesso civico: un concetto che cambierà la trasparenza della P.A.,* cit.

43 Pajno A, *Il principio di trasparenza alla luce delle norme anticorruzione*, cit.

44 Circular n. 2/2013 of the Department of Public Function highlights that "civic access" allows anyone to monitor, through the institutional website, not only the formal fulfilment of the obligations of the public authority but, particularly, the way public resources are used, with special attention to the areas more susceptible to corruption.

45 Romano A., *Accesso ai documenti amministrativi*, quot.

As the jurisprudence noted, the two institutes present "*diversification of purposes and discipline … even in the common inspiration to the principle of transparency*" and "*the new provisions, governed by Legislative Decree 14.03.2013 n. 33 on publicity, transparency and dissemination of information by public administrations regulate situations not additional nor overlapping to those allowing access to administrative documents within the meaning of Articles 22 and following, Law 1.8.1990 n° 241, as subsequently amended and integrated"* (46).

Administrative Courts have confirmed that documentary and civic access are alternative remedies and ruled that once the request to access is expressly related to the 1990 Administrative Procedure Act regulation, the party will not be allowed to invoke the civic access regime in the following trial (47).

In case the party should vaguely and indistinctly refer to both remedies, the act introducing the proceedings would be deemed inadmissible because of the confusion of the respective causa petendi and petitum (48).

Finally case-law admits that the two options on access may cumulatively coexist, as long as the cumulative request is made expressly and not deemed to operate automatically (49).

4. The "generalized civic access": a difficult task to be accomplished?

In 2016 a conspicuous element of innovation has come to complete the composite national legal framework of the right to access and as a result the social control purpose – by then precluded under the "documentary access" regime - has even been exalted in the new Transparency Decree, as implemented by Legislative Decree n. 97 of 2016.

46 Council of State, Ch. VI, 20 November 2013, n. 5515; Tar Campania, Sez. VI, n. 188/2016; Tar Lombardia, Ch. IV, 30 October 2014, n. 2587.
47 Tar Campania, Ch. VI, 30 September 2016, n. 4508.
48 Tar Lazio, Ch. III quater, 8 marzo 2016, n. 3017.
49 Tar Campania, Ch. VI, 4 gennaio 2016, n. 188.

The result has been evocatively named "Italian Freedom of Information Act", reminiscing the homonym legislative measures already adopted in several other Member States.

As a matter of fact the 2016 Legislator has introduced a further version of the "civic access" that the doctrine has named "generalized civic access": this latter declination of the right-to-know corresponds to an extensive meaning of the principle of transparency, which concerns not only information on the organization and the activity of the Public Administrations, but also any data and documents held by public authorities by now.

This extension of the notion of transparency turns out to be in line with the European "widest possible access" criterion: in fact, the reform's purpose is not only, as in the past, to encourage widespread forms of control over the pursuit of the institutional functions and the correct use of public resources, but also to protect citizens' rights and promote the involvement of stakeholders into the administrative activity, to be perceived as a popular participation in public affairs and not just in the administrative procedure ([50]).
The F.O.I.A. reform favours the achievement of these purposes by providing for a generalized access to administrative records; such a discipline – where applicable - results in overcoming the barrier that Article 24, paragraph 3, of Law n. 241 of 1990 had erected by forbidding access requests aimed at exercising a widespread control.

Albeit the *ratio legis* underlying the 2016 amendments corresponds to the European concept of transparency and right of information, it has nevertheless to be ascertained whether the generalized civic access, in its practical implementation, meets the level of guarantees set by the European legal order.

When entered into force, Legislative Decree n. 97 of 2016 did not repeal the former "civic access" granted for documents subject to mandatory publication, so the "new" F.O.I.A.

[50] Monea A., *La nuova trasparenza amministrativa alla luce del d.lgs n. 97/2016,* cit.

"shattered" ([51]) the civic access into two different institutes, placing alongside the original 2013 "civic access" (surviving with no significant amendments) an additional form of access, provided for by Article 5, paragraph 2, potentially able to become a pillar of high transparency ([52]).

Therefore, a new right to access was born, relating to "further" data and documents than those subject to mandatory publication and, potentially, to any document or data held by the authorities.

Due to the generic formula used by the Legislator ("further data and documents"), the National Anti-Corruption Agency (A.N.A.C.) clarified in its "Guidelines to generalized access" ([53]) that the recipient administration may not be required to collect information that is not in its possession nor to re-elaborate documents it holds in order to respond to a generalized access request; processing operations are instead available where they consist in obscuring personal sensible data in the requested document and, more generally, in their anonymization, if this is functional to permit access.

This access is recognized in favor of "anyone", a term that in the present context gains a much richer meaning than in the past: it is, in fact, referred to an individual who not only wants to know about the organization and the activities carried out by the Public Administration and to monitor the pursuing of its institutional functions (as in the original version of the Decree) but whose intention is, as the reform itself foresees, to participate to the administrative activity and especially to protect his/her own rights.

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51 Cudia C., *Appunti sulla trasparenza amministrativa e diritto alla conoscibilità,* 2016, www.giustamm.it

52 Monea A., *La nuova trasparenza amministrativa alla luce del d.lgs n. 97/2016. L'accesso civico*, Leggi d'Italia Legale, 11/2016.

53 Annexed to the decision of ANAC 28 December 2016, n. 1309, published in the Official Journal on 10 January 2017, n.7 and entitled "*Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all'accesso civico di cui all'art. 5, comma 2, del decreto legislativo n. 33/2013*".

Hence, the "generalized civic access" is even capable of satisfying the needs of an "interested subject", within the meaning of Law n. 241 of 1990, who wishes to know not exclusively about what is - or should be - mandatorily published, but also "further" documents or data held by public administrations ([54]).

It is worth mentioning how this latest legislative intervention complemented the pre-existing "proactive" transparency, realized through the mandatory publication on institutional websites of data and information identified by law, with a "reactive" transparency, to better answer the demand for knowledge and knowability from individuals.

Consistently with the objectives pursued by the legislator, aligned with the European standards, the "generalized access" does not depend on the existence of a qualified interest motivating the requesting party, while its discipline expressly excludes the necessity of a motivation: moreover, it has a very wide object - potentially every information held by a public body - since it covers "*further data and document*", namely others than those subject to mandatory publication.

So far, the comparison between the European right to access and the Italian "generalised access" has achieved satisfactory results: from the objective point of view, the EU Regulation n. 1049 of 2001 grants access to "*all documents held by an institution*", defining documents as "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)"*, likewise the "generalized access" refers to both documents and data; from a subjective point of view, Italian F.O.I.A. satisfies the requirements of active legitimation, given that it does not require a qualified interest for the access requests.

[54] Again, Monea A., *La nuova trasparenza amministrativa alla luce del d.lgs n. 97/2016,* cit.

However, bearing in mind that openness is the rule and secrecy the exception, a full comparison between the legal instruments at hand calls for a consideration of the respective exceptions to the right of access.

Like the exceptions set out in Article 4 of the Regulation n. 1049 of 2001, the Italian Freedom of Information Act identifies certain public and private interests whose protection prevails on citizens' expectations of knowledge or knowability and justifies the refusal to access to related data and documents ([55]).

On the one hand, the nature of the interests protected by the two disciplines is comparable, both regarding public security and defence, international relationships and financial or monetary policy and private life of individuals, including commercial interest of natural or legal persons. On the other hand, unlike the European law, which distinguishes between mandatory and relative exceptions, left to the discretionary assessment of the recipient administration, Italian F.O.I.A. does not provide for the possibility that an "*overriding public interest to disclosure*" imposes to grant the request of access even in detriment of the protected public or private interest: Article 5-*bis* of the amended Decree n. 33 of 2013 does not mention diversified regimes of exclusions, merely establishing that if one of the interests identified by the rule can be prejudiced, access shall be denied.

However, Council of State ([56]) and Antitrust Authority have underlined that limits imposed on "generalized access" are significantly broader and more incisive than those provided for in Article 24, Law n. 241 of 1990: Article 5-*bis* of the renewed Transparency Decree uses

[55] It seems appropriate to refer these limits to the sole "generalized access", considering both the reference in Art. 5, paragraph. 2, and the fact that the balance of potential conflicting interest in the typical "civic access" has already been made by the Legislator at the root, when identifying the documents subject to mandatory publication. According to a different interpretation of the rules (Art. 5, paragraph 2 and Art. 5-bis), however, Art. 5, paragraph 1 amended, which merely grants access to documents to be published, should have been absorbed by the wider form of civic access provided for in paragraph 2 and, thus, deleted from the text of the Decree: Ponti B., *Nuova trasparenza amministrativa e libertà di accesso alle informazioni*, p. 160-161, 2016, Maggioli Editore.

[56] Council of State, Advisory Section, Opinion 24 February 2016, n. 515.

wider and generic expressions ([57]), some of the categories indicated by the rule are so generic (i.e. economic interests of a natural or legal person or the reference to State policy) that the evaluation - if not balancing- work assigned to the discretion of the Administration results to be broader than in the past; if it is so – as the doctrine observed in comparing the generalized access with the "documentary access" discipline - while the Administration benefits from a meaningful discretionary power, private applicants become subject to a tenuous, lesser and not homogenous legal position.

In this perspective, even the enlarged active legitimation recognized by the F.O.I.A. may result in detriment of the "interested subject" itself: to the extent that he/she is not required to demonstrate a relevant interest in support of the access request, no argument can be offered to prove the prevalence of the applicant interest, in a hypothetical balancing evaluation ([58]). Accordingly, when the "generalized access" is inhibited by one of the preclusive prescription of Article 5-*bis* of the Transparency Decree, the interested person, recurring the conditions required by Law, will claim for the traditional "documentary access", whilst taking care of accompanying the request with a particularly exhaustive motivational support ([59]) ([60]).

5. Closing remarks: the state of play.

In conclusion, the overall shape of transparency and access has gone through different phases during the Italian process aimed at the realization of the public Administration as a

57 Corrado A., Il silenzio dell'amministrazione sull'istanza di accesso civico generalizzato: quale possibile tutela processuale, Federalismi.it, 1st March 2017.

58 Cudia C., Appunti sulla trasparenza amministrativa e diritto alla conoscibilità, cit.

59 Algieri P., Il diritto di accesso civico alla luce del nuovo "Decreto Trasparenza", 2016, www.ildirittoamministrativo.it

60 Council of State, Ch. IV, 12 August 2016, n. 3631.

"house of crystal", so as to recall the evocative image created by Filippo Turati, an influential jurist ([61]).

Since its entry into force, the Administrative Procedure Act has appealed for transparency and participation in order to realize the transition from the administration-bureaucracy to a participated administration and the right to access has been traditionally deemed to contribute to increase the efficiency and effectiveness of the administrative activity, as well as the level of democracy of the whole legal system.

The "documentary access" is the remedy chosen by the legislator for the lack of publicity; in terms of effectiveness, however, despite the significant gaps filled by the jurisprudence, it describes a line which ends to be asymptotic to transparency, as it tends to transparency endlessly without reaching it completely.

In the same years, the European Union was being permeated with a renewed attention to the issues of transparency and openness, first functional to increasing the democratic legitimacy of the new-born Institutions. Since the Declaration n. 17 alleged to 1993 Maastricht Treaty, actualised in detail by Regulation n. 1049 of 2001, the European right to access has been shaped as a right accessible to anyone - without any subjective restrictions nor necessity of justifying the request by means of a qualified interest - which corresponds to a Nordic concept of public access to documents ([62]), fast and tendentially full and thorough ([63]); this initial setting has not changed over time and has progressively strengthened itself.

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61 Pajno A., Il principio di trasparenza alla luce delle norme anticorruzione, cit.

62 M. Augustyn, C. Monda, Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001, cit.

63 Traditionally this model has been considered contradictory with the central-Europe administrative model characterized by secretiveness, where access to administrative documents was possible only under certain conditions and requirements. Broadly, V. Karageorgou, Transparency principle as an evolving principle of EU law: Regulative contours and implications, cit.

Using the European discipline on access to information like a term of comparison, we find that the "documentary access" goes in the opposite direction: from a European perspective, the utilities linked to the wide object of the national right to access ("*any administrative document*") are almost totally frustrated by the strict conditions required in terms of active legitimation, emblematic of an idea of openness that has not yet completely overcome the rule of secrecy.

The European influence and the subsequent circulation of legal models has certainly raised public attention and induced the domestic legislator to deeply innovate the whole system. In the very last years, Italy has moved towards a deep change of perspective, allowing anyone to access documents and data of the public administrations without the necessity of reasoning the request, increasing the number of information subject to mandatory publication and contemplating the social control function on the institutional activities of public administration as one of the main purposes of the "civic access" legislation (still expressly precluded under the "documentary access" regime).

So, after a long gestation period, the Italian legal framework has been recently enriched with two further versions of the right to access.

Both these institutes have transposed the idea that the individual private interest underlying the request remains irrelevant, as openness has an intrinsic value that should be guaranteed *per se*.

However, the usefulness of the 2013 "civic access" is limited to those kind of information previously identified by law, subject to mandatory publication on institutional websites, and is subsequently unsuitable for covering the whole scope of application still retained by the "documentary access".

The assessment significantly changes apropos of the latest "generalized civic access": it is - or has the potentialities to be - a sort of Copernican revolution on the Italian stage, the driver for the transition from the need to know to a proper right to know.

The "generalized civic access" meets the European standards in terms of both subjective active legitimation and objective area of application of the rules; moreover, the exceptions provided for by the 2016 F.O.I.A. are not significantly more incisive than those set out in Regulation n. 1049 of 2001.

However, having in mind the critical aspects highlighted by the Council of State in the abovementioned Opinion about the loose contours of the protected interests against which the recipient Administration might deny access, and also considering the current lack of case-law on this latest version of access, it will be up to the substantial attitude of the Administrations to determine the future of this – potentially - highly useful tool and, eventually, let the "documentary access" fall into disuse.

What still precludes a full equivalence of the national regulation on access and transparency to the European model is likely the notably fragmented character of the Italian legislation: despite the national lawgiver seems to have taken the direction of the "*widest possible access*", the discipline laid out by Law n. 241 of 1990 - which is underpinned by a *ratio legis* just opposite to the "civic access" - is still in force and fractures the overall coherence of the legal framework; hence an upcoming regulatory intervention on the right to access should desirably be geared toward a unification and reorganization of the heterogeneous discipline concerned.