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Transparency as a tool against corruption? The case of Italy

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Abstract

Under Italian legislation, transparency has been conceived as tool for different goals, not only as a tool against corruption. The result is the persistence of unresolved issues regarding different aspects that the interventions of the administrative court are unable to resolve completely. In particular, this study intends to illustrate that the shortcomings of the regulatory framework retain the gap with other FOIA models and weaken the effectiveness of transparency as tool against corruption.

Keywords: transparency, corruption, public administration, Freedom of Information Act (FOIA)

Riassunto. *Concorrenza come strumento anticorruzione? Il caso dell'Italia*

La trasparenza è stata concepita dalla legislazione italiana non solo come strumento contro la corruzione ma anche come strumento per il perseguimento di obiettivi diversi. Il risultato è la persistenza di questioni irrisolte su diversi aspetti che gli interventi del tribunale amministrativo non sono in grado di risolvere completamente. In particolare, questo studio intende illustrare come le carenze del quadro normativo mantengano il gap con altri modelli FOIA e indeboliscano l'efficacia della trasparenza come strumento contro la corruzione.

Parole chiave: trasparenza, corruzione, amministrazione pubblica, Freedom of Information Act (FOIA)

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1. Introduction

The importance of transparency as a tool for preventing and countering corruption has been recognised since the 1997 OECD Convention, in addition to the Criminal Law Convention on Corruption of the Council of Europe, signed on 27 January 1999 (Strasbourg Convention).

The same concepts are reiterated by the United Nations Convention against Corruption and by the Council of Europe Convention on Access to Official Documents, adopted on 27 November 2008, which obliges States Parties to adopt policies to prevent corruption based on principles of transparency and accountability as the main tools in the fight against corruption.

On the international level, as is generally known, the instrument chosen to guarantee transparency has been the right to generalised access based on the example of the United States Freedom of Information Act (FOIA), subsequently adopted in France in 1978 and in the United Kingdom in 2000.

In particular, administrative transparency was originally conceived in continental Europe and in the United Kingdom for the defence of the citizen involved in administrative proceedings. However, the last twenty years have seen the concept of transparency change, as witnessed by the approval of the United States Freedom of Information Act (FOIA) in nearly all European countries (Ackerman & Sandoval-Ballesteros, 2006; Kranenborg & Voermans, 2006; Mendel, 2008; Savino, 2010)[1].

It should be pointed out, however, that the right of access to the documents of the institutions is recognised in the European Union itself by Article 15 of the Treaty on European Union (TUE) and Article 42 of the Charter of Fundamental Rights of the European Union, as well as by the implementation of Regulation No. 1049/2001.

Later, in 2008, the Council of Europe approved the Convention on Access to Official Documents, which obliges States Parties to guarantee the «right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities». The Convention reinforces the idea that transparency «fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy».

Although the Convention was signed by only fourteen countries, it represents an important step towards establishing the idea that transparency, pursued through the right of access, is a fundamental tool for the life of democracies. In this regard, existing literature (Sandulli, 2007; Arena, 2006; Police, 2015; Fracchia, 2015) has illustrated that the right to know contributes to: a) ensuring citizen participation in public decisions; b) reinforcing the

[1] In particular, Savino (2010), pointed out that the "right to know" was established in France in 1978; subsequently other legal systems introduced laws based on the FOIA model. This happened, for example, in Holland in 1980 and subsequently in 2005, in Portugal in 1993, in Ireland in 1997, in the UK in 2000, in Switzerland in 2004, and in Germany in 2005.

legitimacy of public authorities; and c) monitoring government activities in order to prevent corruption (accountability).

Administrative transparency, that is, widespread availability of information and data in the possession of public bodies, is a valid tool both for evaluating the performance of government and in the fight against corruption (Manganaro, 2009; Merloni, 2013; Ponti, 2013).

This latter aspect has received much greater attention on the part of the Italian legislature, whose most recent interventions are based on the awareness that the fight against corruption must be based on preventive as well as repressive measures.

With a view to fighting corruption preventively, the tool of transparency takes on a crucial role as it eliminates any grey areas in which misconduct and corruption exist.

Under Italian legislation, transparency was initially pursued by imposing publication obligations on public authorities. This meant that there was a significant gap between the Italian model and the FOIA-based models and that the tool of transparency to prevent corruption was relatively underused.

More specifically, the transparency itself was conceived as tool for different goals, not only a tool against corruption. The result is, as will be illustrated, the persistence of unresolved issues regarding different aspects that the interventions of the administrative court is unable to resolve completely.

In particular, this study intends to demonstrate that the shortcomings of the regulatory framework retain the gap with other FOIA models and weaken the effectiveness of transparency as tool against corruption.

2. Administrative transparency as an array of different system. Critical aspects

Under Italian law, transparency has been applied both as a tool for protecting citizens against any government actions or conduct that may violate their rights and as a tool for guaranteeing the impartiality of public authorities. As explained in the following

paragraphs, it was only with Legislative Decree no. 150 of 2009 that transparency began to be seen as a tool in the fight against corruption. This perspective was validated by Legislative Decree n. 33/2013 and its modification by Legislative Decree n. 97/2016, introducing the so-called Freedom of Information Act.

Today in Italy, the right of access to information held by public administrations is modelled in three different ways: first, there is procedural access pursuant to law n. 241/1990; second, there is the generalised civic access pursuant to legislative decree n. 33/2013, modified by legislative Decree n. 97/2016; and finally, there is simple civic access, relative to the publication of the acts of the public administration.

In this regard, the administrative judge pointed out that these three different institutions «do not correspond to a single global subjective right of access, but rather constitute a set of guarantee systems for transparency, diversified between them, corresponding to as many subjective levels of claim to transparency from part of the public administration» (TAR Puglia, sent. No. 231/2018; Cons. State, sent. 2158/2018).

Therefore, a problem of a general nature derives from the fact that this «set of transparency systems», according to the current legislation, is aimed at pursuing different purposes such as, the promotion of the quality of services and the evaluation of the performance of managers, in addition to the fight against corruption (Gardini, 2018; Francario, 2019). The multiplicity of interests, configures different «methods of approach to knowledge and as many subjective levels of claim to the transparency of public authorities» (Savino, 2016; Moliterni, 2019).

We must take into consideration that in Italy, the recognition of the right of access to administrative documents came after multiple interventions by the legislature that have taken place since the 1980s. These different legislative interventions have produced a stratified system that has aroused many legal uncertainties that can also be detected by the relevant jurisprudence (Mattarella & Savino, 2018; Gardini, 2017).

In particular, Article 22 of Law no. 241 of 1990 guarantees the right of access without making a specific connection to guaranteeing administrative transparency. Yet it should be pointed out that the previous version of Law no. 241 of 1990 recognised the right of access

«in order to ensure the transparency of administrative activities and foster their impartial execution», «to whomsoever may be interested with regard to safeguarding legally significant situations». Subsequently, in 2005, the law was amended, and the reference to access as a tool of transparency was removed, with it becoming a right granted to «private individuals, including bearers of public or diffuse interests who have a direct, concrete and current interest corresponding to a situation covered by law and connected with the document to which access is requested».

In this regard, access under Law no. 241 of 1990 was designed to enable certain specific parties, according to their specific legal position, to participate in or oppose administrative decision-making procedures.

Alongside the provisions of Law n. 241/1990 which guarantee the right to procedural access in the presence of a direct, concrete and current interest, Legislative Decree n. 33/2013 develops two other forms of civic access: the simple civic access and general civic access.

With regard to the first right of access, Article 1 of Legislative Decree no. 33 of 2013 offers a concept of transparency that follows what is already set out in Article 11 of Legislative Decree no. 150 of 2009, according to which transparency is seen as total accessibility to information concerning the organisation and activity of public authorities, what changes is the scope of access to that information (Carloni, 2013; Simonati, 2013, 2018).

During the reform of 2009, the function of access was to ensure «broad monitoring» of public authorities «in compliance with the principles of impartiality and sound administration». According to Legislative Decree no. 33 of 2013, access must enable broad monitoring «of the pursuit of institutional functions and of the use of public resources».

Legislative Decree no. 33 of 2013 intervened by reorganising the publication obligations introduced by various legal instruments into four parts, dedicated to the organisation and activity of public authorities (Part II), the use of Public Resources (Part III), performance levels and services provided (Part IV) and special sectors (Part V) (Racca, 2013).

Specifically, in accordance with Legislative Decree no. 33 of 2013, public authorities must comply with transparency obligations through their own institutional websites in a specific section named «transparent administration», which every user can access in order to have information regarding the activities or organisation of the public authority without needing to be identified (Sciullo, 2013).

The enforcement tool of the legislative decree is based on the introduction of a person who is responsible for transparency, with a central role in monitoring the obligations placed on public authorities (Article 43, Legislative Decree no. 33 of 2013).

The individual responsible for transparency has the duty of updating the three-year programme for transparency and integrity and notifying the body's administrative and political leadership, the Organismo indipendente di valutazione (OIV), the National Anti-Corruption Authority (ANAC) and, in the most serious cases, the disciplinary office, of cases of late or non-compliance with publication obligations.

In cases of non-compliance with transparency obligations, penalties are enforceable not only on the person responsible for transparency but also on the executives and political bodies required to provide the data to enable it to be published.

Above all, the significant development introduced in 2013 was the so-called "civic access". Indeed, Article 5 of Legislative Decree no. 33 of 2013, stipulates that «The obligation provided for by current legislation incumbent upon public authorities to publish documents, information or data implies the right for anyone to request them, in cases in which their publication has been omitted.» Such access, in the version introduced by Legislative Decree no. 33 of 2013, is limited to documents, information and data which public authorities would have been obliged to publish, providing a strong incentive for them to comply with transparency obligations (Galetta, 2016).

The purpose of the provision is to acknowledge the right of access of any citizen, without any obligation to provide individual legitimation or justification, irrespective of involvement in the administrative procedure and of the reasons for which access is requested.

The right to obtain information is thus directly acknowledged for each citizen and for all administrative documents, including those from authorities and investees or subsidiary companies of public authorities.

Despite the reinforcement of the principle of transparency pursued through the introduction of civic access, the implementation of Legislative Decree n. 33 of 2013 has revealed several problems brought to light by ANAC (2012), all of which can be grouped under three categories: a) the difficulty of applying consistent regulations to different kinds of public bodies (government institutions, authorities, publicly held companies, etc.); b) the difficulty that some public authorities have in coming into line with the new regulations; and c) the opacity of the language of the legislation.

In short, the basic error of Legislative Decree n. 33 of 2013 lies in the conviction that the right to information about government activity could be guaranteed by making it compulsory to publish such information, an obligation which in certain cases has posed serious questions with regard to the protection of the right to privacy (TAR Lazio ord. n. 9828/2017). For these reasons, the legislature intervened once again with Legislative Decree n. 97 of 2016, which introduced the general civic access.

Specifically, the decree sets out to «redefine the scope of application of the obligations and measures concerning transparency, to clearly define publication obligations, and establish the parties responsible for inflicting penalties for the violation of transparency obligations» (Galetta, 2016).

Above all, the Legislative Decree no. 97/2016 introduced a new form of civic access to public data and documents, inspired by the FOIA.

Under this new form of access, anyone may access data and documents held by public authorities, regardless of the legitimacy to act in relevant legal situations.

Therefore, the system of access is broader than the one set out in Article 5 of the preceding Legislative Decree no. 33 of 2013, considering that it makes it possible to access not only data, information and documents for which specific publication obligations exist, but also data for which no publication obligations exist.

In other words, for civic access it is no longer necessary to have a direct, concrete, current interest corresponding to a situation covered by law and connected with the document to which access is requested.

The substantial change to the previous model laid down under Legislative Decree no. 33 of 2013 was already announced in Article 2 of Legislative Decree no. 97 of 2016 which clarified that the purpose of transparency is the protection of fundamental rights, as «it is a condition for guaranteeing individual and collective freedoms as well as civil, political and social rights, it complements the right to sound administration and contributes to achieving open government, serving the citizen» (paragraph 2, Article 1).

Therefore, in the new legislative decree, transparency is not pursued through the obligation to publish documents, but rather and above all, by extending civic access, the main tool for guaranteeing the right to know.

In this manner, a Copernican revolution is achieved by moving from the need to know to the right to know, in line with the FOIA models in English-speaking countries.

At the same time, however, the legislature has not resolved an underlying problem regarding the role of the right of access, which, on the one hand, constitutes a tool to counter corruption and extensively monitor the activity of public bodies and, on the other, a political right to participation in the democratic and institutional life of the country.

This ambivalent status of the right of access, which lies between the right to participation and a tool for extensive monitoring of government actions, has generated doubts and uncertainties in Italy regarding the application of the right on the part of the citizens, public administrations and courts.

It must be considered that the coexistence of different categories of the right to access forces to decide which discipline must be applied to each instance. This is a critical aspect because the individual citizens must clarify what kind of instance he is presenting: procedural access ex Law n. 241/90 or other earlier forms of general civic access and traditional access. Depending on the chosen form of access, the public administration will evaluate the instance of access under its specific law, without any possibility for the citizen to change his initial idea about the specific form of access.

The administrative court has at times remedied this rigidity, conceding that the same instance could have qualified both as procedural access ex Law n. 241/90 and general civic access (TAR Lazio, Roma, sent. no. 3453/2018).

However, in other cases, the judge has reaffirmed the need to indicate clearly in the instance to public administration which form of access has been chosen (TAR Lazio, Roma, sent. no. 7326/2018).

As has been pointed out, if this jurisprudential guideline were to prevail, it would be logical to expect that citizens submit the same instance of access with reference to the two laws: l. 241/90 and Legislative Decree n. 97/2016. In these cases, the public admnistration will be forced to evaluate the request under different limits and rules (Moliterni 2019).

There are also other problems which concern the relationship between the generalised right of access pursuant to Legislative Decree n. 97/2016 and the regulatory framework, with specific regard to public contracts.

Even in this case, it is possible to notice different approaches in the jurisprudential guidelines; sometimes the judge decided that the regulation about public contracts was an exception to the rule of FOIA model (TAR Emilia Romagna, Parma, sent. no. 197/2018) and in other cases, judges decided that public contracts may be subject to the general civic access (TAR Lombardia, Milano, sent. no. 45/2019)

3. Main unresolved issues about the object and subjects of right of access

Three years after the introduction of the FOIA, it is possible to record the persistence of elements of uncertainty that can be detected by the relevant jurisprudence, both on an objective and a subjective level.

On an objective level, the right of access extends to any document held by the administration, including data and information (Article 5, paragraph 3; ANAC, 2016), but in this regard the administrative jurisprudence has taken various orientations relating to the extent of the right of access.

On the one hand, part of the administrative jurisprudence has specified that the right of access can also abstractly concern the documents of third parties, subject to the requirements of confidentiality. Furthermore, since «the spirit of civic access is to allow the verification of the activity of a public administration, and not only of that which is realised with the adoption of final measures» it is not reasonable to exclude «the knowledge of internal acts» (TAR Lazio, Roma, sent. no. 6875/2018; TAR Sicily, Palermo, sent. no. 796/2018).

On the other hand, another part of the administrative jurisprudence has denied access to internal documentation instrumental to the exercise of activities of political orientation, since it would not have been ascribable to the administration management activity (TAR Lazio, Roma, sent. no. 3598/2018). In an even more restrictive sense, it was considered legitimate to deny the request for access to «news and information» that was not contained in «real documents» (TAR Campania, Napoli, sent. no. 2373/2017).

Similar contradictions are also recorded in the jurisprudence relating to the subjects of the right of access.

With reference to the subjects of the generalised right of access, the presence of a specific interest on the part of the citizen is not necessary; an element which according to part of the administrative jurisprudence, translates into the possibility of exercising the right of access by those who have only a «selfish interest» (TAR Lazio, Roma, sent. no. 6875/2018). Another part of the jurisprudence has actually specified that civic access should not be used for personal purposes but to allow control over the institutional purposes of the public administration (TAR Lazio, Roma, sent. no. 7326/2018). However, more recently the judge has clarified that «the aims of generalised civic access (to favour widespread forms of control over the pursuit of institutional functions and the use of public resources and to promote participation in the public debate) are not those that must support the interest of the citizen, but those based on which the citizen can have a potentially unlimited access to the administrative documents». Moreover, the very promotion of «participation in the public debate» implies broad access to «any administrative document» (TAR Emilia Romagna, Parma, sent. no. 325/2018).

The uncertainties relating to the subject and the subjects of the right of access are manifestations of a more general problem concerning the relationship between transparency and other public and private principles which may conflict with it (D'Alterio, 2019).

The resolution of any conflict requires a balancing which, according to the administrative judge, must take into account the differences between general access and procedural access, so as to assess the various interests at stake on a case-by-case basis (Cons. State, Section VI, sent. no. 651/2018).

The balance between opposing interests at stake takes on different balances in the case of procedural access ex l. n. 241 of 1990, in which access to documents follows more restrictive rules than general access whose ratio is that of a widespread control of the citizen on the activity of the public administration.

In particular, in the context of generalised access it is necessary to balance the general interest in the knowability of a given document and the actual injury that could result to other interests that are at stake, according to the model of the c.d. "public interest test" (Savino, 2016).

This balancing is entrusted to the public administration which for each case must indicate the concrete injury that other conflicting interests may suffer (Data Protection Authority, 2017a), with reference to the time period necessary for data protection beyond which a refusal to access the data requested by the citizen (TAR Lazio, Roma, sent. no. 3453/2018).

Furthermore, the denial by the public administration is not justified in cases where it is sufficient to carry out a mere deferment, or in the cases in which it is possible to proceed by obscuring only the parts or only the data affected by the aforementioned limits (art. 5-bis Legislative Decree no. 33/2013).

The balancing carried out by public administrations can never concern data and documents covered by State secrecy or a request for access to information that could reveal the health status of citizens. According to the Data Protection Autority, the latter is part of the «absolute exclusions», referred to in Article 5-bis, legislative Decree n. 33/2013 (Data Protection Authority, 2017a); data and information relating to the situation of poverty or economic and social hardship of private citizens are excluded (Data Protection Authority,

2017b), as well as information relating to the disciplinary procedure of a public employee because it is considered disproportionate, exceeding and irrelevant to the satisfaction of the cognitive need of the applicant (Data Protection Authority, 2017d).

Administrative jurisprudence has admitted the possibility of overcoming the risks related to the protection of privacy by partially obscuring sensitive data (Moliterni, 2019). This has happened with to data on the employment relationship of employees when the request related to «macro-organisational» actions (TAR Lombardia, Brescia, no. 303/2019; TAR Lazio, Roma, sent. no. 6875/2018); similarly, the documents relating to a public competition have been partially obscured for which no need to protect "super-sensitive" data was detected.

In relation to other private interests, the judge has often allowed a denial of access vaguely motivated by the public administration, to the advantage of a greater protection of economic and commercial interests (TAR Lazio, Roma, sent. no. 6875/2018).

Regarding the balance between transparency and public interests, it must be considered that the judge highlighted the need to apply exceptions to general civic access in relation to acts and documents relating to military and defence aspects (TAR Lazio, Roma, sent. no. 6542/2018), as it has deemed it necessary to obscure police documents that could have caused damage to investigations into possible crimes (TAR Lazio, Roma, sent. no. 9043/2017; Rubechini, 2018).

4. The difference between the traditional model of transparency in Italy and the system under the FOIA

The changes introduced by Legislative Decree no. 33 of 2013 are such as to beg the question as to what extent the Italian model of transparency – termed «civic access» – is comparable to the FOIA model adopted in the United States and in a number of European nations (Mendel, 2008).

It should be taken into account that the subject of civic access, as provided for under Legislative Decree no. 33 of 2013, does not regard the entirety of information in the possession of public authorities, which marks a significant difference from the FOIA model.

Under the latter, data and information held by government offices are deemed to be the property of the community and of individuals, who may enjoy the right to ownership of data held by public authorities through access. Access in this manner took the form of an instrument to guarantee a fundamental right of the citizen (Savino, 2010).

In contrast to Legislative Decree no. 33 of 2013, the right to know was restricted to «documents, information and data subject to compulsory publication in accordance with legislation in force»; for all other documents, data and information Legislative Decree no. 33 of 2013 established that government bodies may make provisions for their publication.

In other words, the Italian system granted government institutions the right to publish. However, this did not establish the right of open access for citizens (with the exception of parties bearing a «direct, concrete and current» interest as provided for by Law no. 241 of 1990).

Transparency was thus characterised by a distinction between the obligatory aspect, in which publication of documents and information as specified by legislation was compulsory, and the optional aspect, in which publication of all "other" documents and information not specified in the legislation was left to the discretion of the public authority concerned.

This distinction between the two aspects of transparency marked a clear difference from the FOIA model, in which limitations on the right of access are represented by the safeguarding of public interests (such as public security and law and order, economic and financial policy, and international relations, etc.) or by the protection of private interests (such as personal data, commercial and industrial interests, etc.).

The number of limitations in question is small compared with the larger number for which the right of access is provided in the case of Italy which in fact extended to all information not covered by the obligation of publication.

In practice, FOIA systems are based on the general principle of publication of documents, while the prevailing Italian system up until Legislative Decree no. 33 of 2013 was based on a general principle of secrecy compared with which the principle of public access was applied in a restricted manner[2].

In all cases in which a specific obligation of publication and the related right of access did not exist, the secrecy of the administrative information and documents prevailed.

This is the fundamental difference compared with the FOIA systems in which the right to know on the part of the individual regards all information in the possession of public authorities (Birkinshaw, 2006).

More specifically, it may be stated that in FOIA systems the right of access and publication work together to ensure transparency and citizens' right to know. Indeed, under some legal systems in which the FOIA system has been adopted, to documents to which access is requested, the obligation to publish is also extended[3].

In contrast, under the Italian system the right to access and the obligation imposed upon public authorities to publish data and information were not conceived to be complementary to and in synergy with one another, but rather as alternatives: the right of civic access applied to the same documents that were subject to obligatory publication.

In this way, the right of access was restricted to the same sphere as the obligation to publish, leaving out of the transparency equation the broad areas that were covered neither by obligation to publish nor (as a consequence) by the right of access.

In practice, in the Italian system the area of application of the right to know is established by the legislature, while in FOIA systems at the European and international level it is citizens who hold the fundamental right to know that choose what area and with what information to exercise their right. This right, in the FOIA systems, does not depend on the

2 Emblematic in this regard is the statement contained in US President Barack Obama's Memorandum on Transparency and Open Government: «All agencies should adopt a presumption in favour of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government» (President of United States, 2009).

3 See Freedom of Information Act (5 U.S.C. Sect. 552(2)), according to which «Each agency, in accordance with published rules, shall make available for public inspection and copying (...) copies of all records, regardless of form or format, which have been released to any person»; in Slovenia, the Access to Public Information Act (APIA) of 22 March 2003 (Article 10, paragraph 1, no. 6, APIA) makes provisions for the publication of «all public information requested by the applicants at least three times».

obligation to publish imposed by the legislature, but may extend in several directions, thus extending the effectiveness of transparency.

This difference between the Italian system and the FOIA systems has also had consequences for the effectiveness of transparency for anti-corruption, as in the Italian system the right to know administrative data, organisation and documents is neither free nor applicable to all areas of administrative activities and organisation[4].

5. Questions left unanswered as a result of the uncertain definition of right of access

While, on the one hand, it is undeniable that the Italian legal system has taken a step closer to the FOIA model proven by the express acknowledgment of the right to know contained in Article 2; on the other, it is necessary to consider the extent to which it has taken this step in order to understand to what extent this right to know is guaranteed in practice (Francario, 2019).

Similarities with FOIA systems are certainly evident in a number of aspects, such as: a) the absence of the obligation to justify any request for access to data or documents held by public authorities; b) the application of transparency legislation not only to public authorities but also to all companies and entities governed by private law which are controlled or partly owned by public authorities, as well as to economic public bodies; c) the responses of public authorities are rapid (within thirty days); and d) free access to digital documents, while for hard copies only the cost of reproducing the document is payable.

In fact, with regard to the last point, it should be pointed out that the legislative decree n. 97/2016 requires that the implementation of the new model based no longer on the obligation to publish but on right of access should occur without any additional costs to public finances. In this regard, comparative experience demonstrates that such a far-

[4] Regarding these observations, it should be taken into account that in the Italian system, unlike the FOIA systems, the adoption of the model of transparency was not accompanied by the provision of adequate time for its implementation, as occurred for example in the United Kingdom, in which the Freedom of Information Act adopted on 30 November 2000, was not implemented until 2005, providing a period of time that was necessary for public authorities to introduce adequate tools and procedures to implement the new legislation.

reaching reform necessarily entails implementation costs which the Italian public administration is unlikely to be able to bear and which have already induced previous legislators to fall back on a model of transparency based on publication[5]. With this in mind, it is clear that implementation of the new model constitutes a highly ambitious objective which requires an adequate organisational effort, careful monitoring and supervision, which is entrusted to the National anti-corruption Authority (Filice, 2013).

Problems arising from freedom of access, especially due to the excessive number of requests for information that could have altered the functioning of the public authority, were immediately noted by the Dipartimento della funzione pubblica (Department of Public Administration) and by ANAC, who issued specific memoranda and guidelines.

Specifically, the ANAC guidelines adopted by ANAC Deliberation no. 1309 of 28 December 2016, clarify in Section 4.2 that when a request for access to a «manifestly unreasonable number of documents is made, thus imposing such a large workload as to tangibly paralyse the proper functioning of the public authority, it may weigh up the interest of public access to the documents on the one hand and the workload that would arise from said request on the other, in order to safeguard, in these specific cases requiring strict interpretation, the interest in the proper functioning of the public authority». In line with this, see also the Department of Public Administration with its Circular no. 2 of 6 June 2017 concerning *Implementation of regulations on generalised civic access (so-called FOIA)*.

The administrative courts have prohibited the abuse of the right of access; in other words, a "distorted" use of the right of access which «may not be used in a dysfunctional manner that does not respect the purpose for which it has been introduced into law (namely, to foster widespread forms of monitoring and control of institutional functions and the use of public resources, and to promote participation in public debate) and transformed into a means of

[5] Section 12 of the UK Freedom of Information Act (2000), concerning «Exemption where cost of compliance exceeds appropriate limit», provides that public authorities adopt regulations concerning costs, including those relating to the hours of work required to process the request. Similarly, in the United States, each public body approves regulations regarding access for which costs are determined in compliance with the guidelines adopted by the Office of Management and Budget; these costs vary according to the well-defined interest underlying the request to access the documentation concerned (i.e., whether for commercial, scientific, educational or information purposes).

impeding the proper functioning of government» (TAR Lombardia, Milano, sent. no. 1951/2017).

At the same time, the public administration ignores «the deadline for completing the access procedure or ignoring the obligation to adopt an adequately motivated express provision» (Minister of Public Service, 2017). The non-qualification of the silence of the public administration, neither as silence-denial, nor as silent assent, represents a serious gap for the guarantee of the citizen's right of access, which according to the administrative judge's assertion, is forced to challenge the administration's inertia before against the silence of the public administration (art. 117 administrative process code) and later, in the event that the access request is denied, he is forced to appeal against the decision of the public administration according to the art.116 of the Process Code administrative (TAR Lazio, Roma, sent. no. 7326/2018; Corrado, 2017; Gardini, 2019).

The problem is aggravated by the fact that the law does not provide for a deadline by which, after the silence or after the refusal of the public administration, the citizen can request for a re-examination of the decision to the person responsible for the prevention

of corruption and transparency. The failure to indicate the *dies a quo* from which to calculate the term for the appeal against the denial of the public administration has two negative implications. On the one hand, it could allow the citizen to appeal beyond the term of thirty days expressly provided for recourse to the administrative judge and also for recourse to the ombudsman, both referred to in Article 5 of the Legislative Decree no. 33/2013. On the other hand, it deprives public administrations of a useful indication for better management of access requests.

In addition to this matter, we found other problematic issues in its implementation. These are, above all, the restrictions on access to data and documents: they are written in a vague way, leaving room for interpretation and therefore potential disputes.

Specifically, Article 6 of the new legislative decree introduces Article 5-bis to Legislative Decree no. 33 of 2013, setting out several cases in which access may be refused.

Firstly, it sets out cases in which access is typically denied for reasons relating to the need to avoid compromising public interests pertaining to public security, national security,

defence, military questions, international relations, policy, the financial and economic stability of the State, and the conduct of crime investigations and of inspection activities (paragraph 1, Article 5-bis of the current text of Legislative Decree no. 33 of 2013).

Secondly, it specifies that access is also denied in cases where «denial is necessary to protect one of the following private interests: a) personal data, in accordance with legislation on the matter; b) freedom and secrecy of correspondence; c) a natural or legal person's economic and commercial interests, including intellectual property, copyright and trade secrets» (paragraph 2, Article 5-bis).

Finally, it sets out cases in which access is denied in relation to state secrets and other cases in which access or dissemination is prohibited by law, «including cases in which access is subject to current legislation with regard to specific conditions, procedures or restrictions, including those mentioned in Article 24, paragraph 1, of Law no. 241 of 1990»[6].

As can be seen, the restrictions upon the right of access are necessary in order to safeguard the public interest. However, they are characterised by a significant breadth of scope and vagueness.

Of course, the breadth of scope of the restrictions is partly compensated by the possibility of denying access only to some parts of the document, so-called partial access, or the possibility of postponing access as opposed to denying it completely (Paragraphs 4 and 5, Article 5-bis).

In practice, the basic problem underlying the implementation of the Italian model of transparency lies in the uncertain definition of «civic access», which continues to occupy a grey area between an individual right and a tool for the control of corruption (Arena, 2008; Gardini, 2017).

[6] Reference is made to the following cases: documents covered by state secrecy laws; documents relating to tax procedures, to which the specific legislation governing them continues to apply; documents concerning the activities of public authorities relating to the publication of legislative, general administrative, planning and programming documents, to which the specific legislation governing their creation continues to apply; and documents relating to selection procedures containing information of a psychological and/or behavioural nature about private individuals.

The main disputes, in fact, have arisen in relation to requests for civic access for profit or individual motives and not for the purpose of monitoring the activity of public authorities.

It is worth recalling the legislation of the European Court of Human Rights. As a general principle, Article 10 of the European Convention on Human Rights (ECHR) does not grant individuals the right to access information in the possession of public authorities, nor does it oblige said authorities to provide them with such information. The right to access, like the corresponding obligation of public authorities to provide documentation, can be connected to the broader principle of freedom of expression guaranteed by the ECHR, only in particular situations and under specific conditions. In this regard, when the information subject to the request for right of access deals with questions of public interest, access may be considered instrumental to guaranteeing the freedom of the requesting party to receive said information and to make it available to the public. Therefore, denial of the right of access on the part of public authorities would constitute an infringement of this freedom of the citizen.

In this regard, the Data Protection Authority deems it legitimate to deny the right to civic access in all cases in which the purpose of the request is other than to monitor the activity of public authorities and which enter into conflict with the right to privacy of other parties (Data Protection Authority, 2017c).

In this sense, case law until now has ruled that public authorities are not obliged to provide a detailed justification for their denial of access when the request deals with documents relating to private economic and commercial interests (TAR Lazio, Roma, sent. no. 6875/2018).

According to this line of reasoning, civic access is deemed to be an individual right to be weighed against other rights, first and foremost the right to confidentiality.

Nevertheless, according to article 5, paragraph 2 of Legislative Decree no. 33 of 2013, amended by Legislative Decree no. 97 of 2016, the purpose of the right of access is to «foster widespread forms of monitoring and control of the pursuit of institutional functions and of the use of public resources and to promote participation in the public debate». The

ANAC guidelines also confirm that generalised civic access is "subservient" to the aforementioned generalised monitoring and control.

These two different orientations can be observed in the interpretation and implementation of the discipline, which bear witness to the existence of an unresolved difficulty constituted by the confusion between two distinct concepts: right of access and obligation to publish. The right of access, can be guaranteed by ensuring that the citizen making the request has a well-defined interest in accessing the documentation concerned. Without a well-defined interest in accessing documentation in the possession of the public authority in question, the authority may deny access in order to balance the right of access against the right to privacy. In contrast, the obligation to publish is certainly designed to ensure widespread monitoring and control of the operations of public authorities, even in the absence of a well-defined on the part of the citizen requesting access to the documentation in possession of the public authority.

By way of conclusion, the breadth and vagueness of the cases in which right of access is excluded create the risk that public authorities may abuse their powers of discretion in order to extend the sphere of non-access to data and information in their possession. This means that the effectiveness of the new model of transparency depends on the way in which public authorities choose to interpret cases which are ambiguous and not fully defined by legislation. Above all, the vagueness of the provision increases the risk of disputes between citizens and public authorities.

Reference List

Ackerman J.M., Sandoval-Ballesteros I. E. (2006). The Global Explosion of Freedom of Information Laws. *Administrative Law Review*, 58, 1: 85. Retrieved from: http://www.humanrightsinitiative.org/programs/ai/rti/articles/admin_law_review_explosion_of_foi_2006.pdf (26/06/2019).

ANAC (2013). *Rapporto sul primo anno di attuazione della legge n. 190/2012*. Retrieved from: https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Pubblicazioni/AnticorruzioneTrasparenza/Rapporto-attuazione-l.-n.-190_2012-ANAC.pdf (28/06/2019).

ANAC (2016). *Prime linee guida recanti indicazioni sull'attuazione degli obblighi di pubblicità, trasparenza e diffusione di informazioni contenute nel d.lgs. 33/2013 come modificato dal d.lgs. 97/2016. Delibera n. 430 del 13/04/2016*. Retrieved from: https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2016/430/Delibera430_2016.pdf (28/06/2019).

Arena G. (2006). Trasparenza amministrativa (voce). In Cassese S. (ed.), *Dizionario di diritto pubblico.* Milano: Giuffrè.

Arena G. (2008). Le diverse finalità della trasparenza amministrativa. In Merloni F. (ed.), *La trasparenza amministrativa.* Milano: Giuffrè

Birkinshaw P. (2006). Freedom of information and openness: fundamental human rights, *Administrative Law Review*, 58: 177

Bovens M. (2002), Information Rights: Citizenship in the Information Society. *The Journal of Political Philosophy*, 10, 3: 317. DOI: 10.1111/1467-9760.00155.

Canaparo P. (2014). La via italiana alla trasparenza pubblica: il diritto di informazione indifferenziato e il ruolo proattivo delle pubbliche amministrazioni. *Federalismi.it*, 4. Retrieved from: https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=24228&dpath=document&dfile=18022014233405.pdf (26/06/2019).

Carloni E. (2013). I principi del codice della trasparenza. In Ponti B. (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33.* Santarcangelo di Romagna: Maggioli Editore.

Colapietro C. (2016). *La "terza generazione" della trasparenza amministrativa. Dall'accesso documentale all'accesso generalizzato, passando per l'accesso civico.* Napoli: Editoriale Scientifica.

Corrado A. (2017). Il silenzio dell'amministrazione sull'istanza di accesso civico generalizzato: quale possibile tutela processuale. *Federalismi.it*, 5. Retrieved from:

https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=33640&dpath=document&dfile=28022017232555.pdf (21/06/2019).

D'Alterio E. (2019). Protezione dei dati personali e accesso amministrativo: alla ricerca dell' "ordine segreto". *Giornale di diritto amministrativo*, 25, 1: 9.

Data Protection Authority – Garante per la protezione dei dati personali (2017a). Judgement on a request for civic access – April 10th 2017. Measure no. 188/2017. Retrieved from: https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/6383249 (28/06/2019).

Data Protection Authority – Garante per la protezione dei dati personali (2017b). Judgement on a request for civic access – April 27th 2017. Measure no. 206/2017. Retrieved from: https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/6495493 (28/06/2019).

Data Protection Authority – Garante per la protezione dei dati personali (2017c). Judgement on a request for civic access – May 24th 2017. Measure no. 246/2017. Retrieved from: https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/6495600 (28/06/2019).

Data Protection Authority – Garante per la protezione dei dati personali (2017d). Judgement on a request for civic access – May 31th 2017. Measure no. 254/2017. Retrieved from: https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/6388689 (28/06/2019).

Filice M. (2018). *Regno Unito*. In Mattarella B.G., Savino M. (eds.), *L'accesso dei cittadini, Esperienze di informazione amministrativa a confronto.* Napoli: Editoriale Scientifica.

Fracchia F. (2015). L'impatto delle misure anticorruzione e della trasparenza sull'organizzazione amministrativa. *Il diritto dell'economia*, 3: 483.

Galetta D.U. (2016). Accesso civico e trasparenza della pubblica amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013. *Federalism.it*, 5. Retrieved from: https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=31502&dpath=document&dfile=02032016110532.pdf (21/06/2019).

Gardini G. (2017). Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici. *Federalismi.it,* 1. Retrieved from: https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=33162&dpath=document&dfile=10012017120341.pdf (21/06/2019).

Gardini G. (2018). La nuova trasparenza amministrativa: un bilancio a due anni dal "FOIA Italia". *Federalismi.it,* 19. Retrieved from: https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=37151&dpath=document&dfile=08102018234534.pdf (21/06/2019).

Kranenborg H., Voermans W. (2006). *Access to Information in the European Union. A Comparative Analysis of EC and Member State Legislation*. Groningen: Europa Law Publishing.

Manganaro F. (2009). L'evoluzione del principio di trasparenza amministrativa. *Astrid Rassegna*, 105, 22. Retrieved from: http://www.astrid-online.it/static/upload/protected/del-/del-principio-di-trasparenza-amministrativa_pross_pubb_nov09.pdf (21/06/2019)

Mattarella B. G., Pellissero M. (eds.) (2013). *La legge anticorruzione.* Torino: Giappichelli.

Mattarella B. G., Savino M. (eds.) (2018). *L'accesso dei cittadini. Esperienze di informazione amministrativa a confronto.* Napoli: Editoriale Scientifica.

Marzuoli C. (2008). La trasparenza come diritto civico alla pubblicità. In Merloni F. (ed.), *La trasparenza amministrativa.* Milano: Giuffrè.

Mendel T. (2008). *Freedom of Information: A Comparative Legal Survey*. Paris: Unesco. Retrieved from: https://unesdoc.unesco.org/ark:/48223/pf0000158450 (26/06/2019).

Merloni F. (ed.) (2008). *La trasparenza amministrativa.* Milano: Giuffrè.

Merloni F. (2013). La trasparenza come strumento di lotta alla corruzione tra legge n. 190 del 2012 e d.lgs. n. 33 del 2013. In Ponti B. (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33. Analisi della normativa, impatti organizzativi ed indicazioni operative.* Santarcangelo di Romagna: Maggioli Editore.

Minister of Public Service (2017). *Circolare n. 2/2017. Attuazione delle norme sull'accesso civico generalizzato (c.d. FOIA)*. Retrieved from: http://www.funzionepubblica.gov.it/articolo/dipartimento/01-06-2017/circolare-n-2-2017-attuazione-delle-norme-sull%E2%80%99accesso-civico (28/06/2019).

Moliterni A. (2014). La trasparenza amministrativa: recenti tendenze e prospettive future. *Rivista italiana di scienze giuridiche*, numero speciale, *I principi nell'esperienza giuridica*. Atti del Convegno della Facoltà di Giurisprudenza della Sapienza, Roma, 14-15 novembre 2014, 475. Retrieved from: https://www.rivistaitalianaperlescienze giuridiche.it/node/135 (26/06/2019).

Police A. (2015). New Instruments of Control over public Corruption: the Italian Reform to restore Transparency and Accountability. *Il diritto dell'economia*, 2: 189.

President of United States (2009). Freedom of Information Act. Memorandum for the Heads of Executive Departments and Agencies. *Federal Register*, 74, 15: 4683. Retrieved from: https://www.imls.gov/sites/default/files/presidentmemorandum620.pdf (26/06/2019).

Racca G.M. (2013). La prevenzione e il contrasto della corruzione nei contratti pubblici (art. 1, commi 14-25, 32 e 52-58). In Mattarella B.G., Pelissero M. (eds.), *La legge anticorruzione*. Torino: Giappichelli.

Romano Tassone A. (1995). A chi serve il diritto d'accesso? (Riflessioni su legittimazione e modalità d'esercizio del diritto d'accesso nella l. n. 241 del 1990). *Diritto Amministrativo*, 3, 3: 315.

Rubechini P. (2018). L'interpretazione delle norme: il ruolo dei giudici e delle autorità con poteri para-giurisdizionali. In Cassese S.; Di Mascio F., Natalini A., Rubechini P. (eds.). *P.A.: trasparenza amministrativa e accesso agli atti*. Speciali digitali del Giornale di diritto amministrativo. Milano: Wolters Kluwer Italia.

Sandulli A. (2007). La trasparenza amministrativa e l'informazione dei cittadini. In Napolitano G. (ed.), *Diritto amministrativo comparato*, Milano: Giuffrè.

Savino M. (2010). *The Right to Open Public Administrations in Europe: Emerging Legal Standards.* Sigma Paper no. 46. Paris: OECD. Retrieved from: http://www.epsa2011.eu/files/Themes_2011/OECD%20Administrative%20Transparency%201010.pdf (26/06/2019).

Sciullo G. (2013). L'organizzazione amministrativa della prevenzione della corruzione (art. 1, commi 1-4). In Mattarella B.G., Pelissero M. (eds.), *La legge anticorruzione*. Torino: Giappichelli.

Simonati A. (2013). La trasparenza amministrativa e il legislatore. Un caso di entropia normativa? *Diritto Amministrativo*, 21, 4: 749.