Association of European Administrative Judges
"Independence and Efficiency" Working Group
Leipzig 15st and 16st June 2017

"Access to information held by public institutions in the Italian legal system"

Cons. ROSA PERNA
Administrative Judge in Rome
Member of AEAJ, AECLJ and AGATIF

1. Access and transparency: approaching the Italian system; 2. The "documentary access"; 3. The "civic access"; 4. The "generalized civic access": a third way towards transparency?; 5. Closing remarks.

1. Access and transparency: approaching the Italian system. I am really pleased to intervene as a speaker in the present debate on such relevant issues, which have a strong domestic significance and an authentically European dimension at the same time.

This Conference substantiates an opportunity for any of us to cast a bridge among the respective national jurisdictions in the matter of access to data and information held by the public administrations and, generally speaking, by courts, namely the administrative courts.

In this presentation I would like to focus on the first topic, with particular regard to the right to access, and steer your attention towards the Italian legal system, in order to examine its usefulness, its effectiveness for any individual.

Right to access has become such a benchmark for open democracies to be recognized as a fundamental human right, linked to the freedom of expression of any individual, regardless of his status of citizen. Accessing information and data on the activities of government and, more broadly, of public officers, is instrumental for citizens both to fully

participate in the public decision-making process and to hold governments responsible for their actions, as access induces transparency and transparency is directly conducive to the accountability of public officials.

This being said, we have to consider that the practical implementation of the right to access necessarily depends on the way each legislator intends to achieve the principle of transparency.

Transparency, as a general criteria for the administrative action, was introduced into the Italian legal system by the Administrative procedure Act (Law n° 241/1990), as amended by Law n° 15/2005. Nowadays, this principle has come to substantiate an "essential level" of benefits underpinning the activity of public administrations.

Transparency is more pregnant than the mere disclosure. Overcoming the former discipline based on a general duty of secrecy imposed on public servants, occasionally breached with the disclosure of information, transparency has been gaining an autonomous value in our system since it is - or should be - openness, an intrinsic quality of the administrative function and at the same time one of its objectives.

Symmetrically with regard to this twofold meaning of transparency, the present legal framework on access to information is made up of two legal disciplines: the one laid down by law n. 241/1990 concerning the access to administrative acts (the so called "documentary access"), which

remains the cornerstone, and the one provided for in Legislative Decree n° 33/2013 (as lately amended), presented as the "Italian Freedom of Information Act", introducing the so called "civic access", as we shall later on consider.

Due to the substantial differences between these two regulations, doctrine and jurisprudence have stated that different "Rights to access" coexist in Italy.

2. The "documentary access". In the double-track system that marks out the Italian legal order, the Administrative Procedure Act has been the first "container" of a right to access information held by the public authority. The "documentary access", as moulded by the 1990 Law and jurisprudence, has become a subjective, enhanced legal position with a reinforced protection but, at the same time, characterized by tight limits in terms of active legitimation.

As we first mentioned, on introducing the "documentary access" the Italian legislator abandoned the original setting in which secrecy was the rule and publicity the exception; this new discipline of access to documents has been expressive of a renewed way of considering the relationship between the citizen and the Authority: hence, accessibility to documents held by a public administration has become the rule, transparency is prodromal to foster participation, it is a condition for impartiality and an objective guarantee for the regularity of the administrative activity itself.

The discipline of the "documentary access" contemplates a wide object: it allows the individual to access to any "administrative document". The Law defines such documents as "*every representation of the content of instruments, […] that are held by a public authority and concern activities of public interest.*" This choice corresponds with the *ratio legis* of introducing the right to access as a general instrument aimed at guaranteeing impartiality and transparency in the administrative action (art. 22). At the same time, its object is also one of the main limits of the discipline: any information held by a public authority that is not in the form of an administrative document shall not be accessible.

Nonetheless, the potential of the "documentary access" has been largely limited in 2005 by the legislator, by introducing the following as requirements for the appraisal of the request to access, 1) the requesting party's interest to access and 2) the existence of a direct connection, a relation between the requested documents and a legally relevant situation of the requesting party.

In this context, a great job has been done on the part of the Administrative Courts, which filled the schematic provisions of the law with substantial content in order to achieve effective right to access for individuals.

In this regard, two concurrent guide-lines have been identified: 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.

More specifically, when the request to access involves conflicting interests, the administrative jurisprudence has come to identify and distinguish three different level of protection for the third-party data:

1) 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; 2) at a lower level (i.e. judicial and sensible data), a strict indispensability of the requested document is required; 3) at the lowest level, a mere necessity of accessing the document is considered enough.

In application of these guidelines, the courts have shown a strong awareness of the defensive needs of the requesting party.

As an example, 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, even though to the detriment of the industrial and commercial interest underlying the know-how of the undertaking, alleged by the respondents.

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 forms of the mere vision without the extraction of copies.

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 defence in civil litigation alleged by the requesting party.

Ultimately, even the documents covered by copyright have been deemed accessible, though underlying the claimant's liability for any possible use other than that instrumentally related to the protection of his/her legal position.

3. The "civic access". The influence of the European Law, promptly pointing out that transparency is a key principle in the activities of the institutions and associated bodies, certainly raised the awareness of the Italian legislator, who in 2013 eventually issued the act evocatively named Freedom of information Act (FOIA).

The right to information sculpted by the 2013 Italian FOIA, as later amended by Legislative Decree n° 97/2016, 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 them easily.

So, this relevant regulation – which has been introduced because of the evidence of a widespread presence of the phenomenon of corruption in our country - 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.

However, even though the discipline of the "civic access" addresses "anyone" and does not require any justification on the side of the citizen in order to get the requested information which hence become accessible to anyone, on the other hand it concerns the only information subject to mandatory publication that has not been accomplished.

As a consequence, the broader spectrum of the population that can exercise this kind of access is definitely its dominant character, but its object is limited.

There is a structural difference between the "civic access" and the "documentary access": while the first one represents an original and peculiar corrective "actio popularis" that allows to pursue, within the limits of mandatory publication laid down by law, the purpose of a widespread democratic control over public institution; this purpose is still expressly forbidden by the administrative procedure Act.

The "civic access" does not require any link between the information requested and a relevant interest; it doesn't require, on the side of the Administration, any balancing of opposing interests as well, because the legislator has already sifted the possible contrast of emerging interests and solved it in advance, by enlisting the documents which have to be published.

It is an effective right-to-know which is made possible through the openness of the public administrative function and, at the same time, functional to it.

Conclusively, to draw the line, the "civic access" has a wider breadth than the "documentary access", a greater usability by anyone, the only condition being that the mandatory publication of the requested document or information has not been observed. On the other hand, the "documentary access" still preserves its own systematic role for those documents which are not subject to mandatory publication on institutional web sites and pertain to a legal situation of the requesting party.

4. The "generalized civic access": a third way towards transparency? In 2016 a relevant amendment to the Freedom of Information Act has come to complete the compound legal framework of the rights to access in our system.

The Italian legislator has indeed introduced a further version of the civic access, defined as the "generalized civic access" by the doctrine. This latter declination of the right-to-know corresponds to the extended meaning assigned to the principle of transparency, which now concerns not only information on

the organization and the activity of the Public Administrations, but also any data and documents held by them, but for some legal exceptions.

Thanks to the new "generalized civic access", therefore, a new right to access is born, relating to "further" data and documents than those subject to mandatory publication, and potentially to any document or data held by the authorities.

This extension of the notion of transparency is in line with the purposes of the legislator, which 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 in the administrative activity, perceived as a popular participation in public affairs and not just in the administrative procedure.

5. Closing remarks. In the Italian legislative process towards the realization of the Administration as a "house of crystal", evocative image created by an influential jurist, Filippo Turati, this very recent amendment marks the transition "from need to right to know".

The "documentary access" is the way the legislator of the Administrative Procedure Act chose as a remedy for the lack of publicity; in terms of effectiveness, however, despite the significant openings of the jurisprudence, and just to speak in a figurative sense, it describes a line which ends to be

asymptotic to transparency, as it tends to transparency endlessly, without reaching it completely

Then, the “civic access”, due to a sensible change of perspective, had had the great merit of promoting the idea of transparency as an immanent value of the whole legal system, "a way of being” of the public power; but it encounters a limit in the documents not subject to mandatory publication.

Finally, the “generalized civic access” represents the new cornerstone of the renewed administrative transparency, adding a fundamental legal basis to a more complete, inward and outward awareness of the public administrative activities.