Anna Simonati*

Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation

I Transparency and the Italian Legislator: An Evolution Toward Polysemy

Recently, the Italian legislator has introduced new rules on the transparency of administrative action (Law No. 190/2012 and Legislative Decree No. 33/2013, reformed by Legislative Decree No. 97/2016). The main purpose of the statutes is to prevent and combat corruption. In this perspective, the duty of administration to publish documents and data has been greatly enlarged. The relationship between authorities and private people is changing, not only in practice but also in the perception of the legislator, and the fair management of information used in the public interest has become a basic value. This idea of transparency has been progressively accepted by scholars, by the administrative courts and by the rule-makers.

In the general statute on administrative procedures (Law 241/1990), transparency is clearly indicated among the basic principles of administrative action but a definition of this concept is not given; therefore, it is reasonable to think that the traditional one has been tacitly accepted. According to the traditional idea,[1] transparency compels authorities to allow private individuals to be aware of the former's activities during the procedure and to check the results when the final decision has been emitted.[2] In this vision, transparency is strictly connected to good administration and efficiency; its purpose is to ensure the correct comprehension of activities performed in the public interest.[3] It does not necessarily compel authorities to disclose all acts and documents. On the contrary, transparency could even require some 'dark zones' (in order to protect public law secrets and the private right of privacy) to be

* Anna Simonati is Professor at the University of Trento.

1 See: Filippo Turati, Atti del Parlamento Italiano. Camera dei Deputati, sess. 1904–1908: 22962. (17.6.1908); Henri Chardon, *L'administration de la France. Les fonctionnaires, du gouvernement, le ministère de la Justice.* (Perrin 1908, Paris).

2 See: Giuseppe Abbamonte, La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema (Giuffre 1989, Milano) Quad. reg.: 977–994; Gregorio Arena, 'Trasparenza amministrativa' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2006, Milan) 5945–5955.

3 See: Gregorio Arena (ed), *La funzione di comunicazione nelle pubbliche amministrazioni* (Maggioli 2001, Rimini); Annamaria Bonomo, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni* (Carocci 2012, Bari).

maintained.[4] a totally glass house may perhaps be too fragile and too expensive. As such, public knowledge of administrative documents must be the normal rule and secrets must be an exception, in order to grant real democracy and transparency: however, transparency and publicity (or total openness) are not synonyms.[5]

Nevertheless, in the latest reforms, a new legal concept of transparency was born, and it is quite different from the one previously accepted by scholars, the administrative courts and – even if implicitly – by the legislator.[6] Actually, the recent rules expressly make reference to Law 241/1990; therefore, it is reasonable to think that the traditional idea of transparency has been maintained, which is confirmed by the fact that Legislative Decree No. 33 also refers to the right of access to administrative documents as an instrument for transparency.

However, the 2013 decree offers a general notion of transparency as well, even if the specific purpose of such rules is to prevent and fight corruption in the administration and this is clearly a narrow perspective.

According to the original formulation of art. 1 (which was reformed in 2016), transparency was intended as total accessibility of information on the organisation and activities of public authorities (and of private subjects involved in the fulfilment of public interest), in order to encourage widespread checks on the pursuit of institutional duties and on the use of public resources.[7] In practice, the duty to publish documents and data was not as wide as it may seem. This 'new' principle of transparency, in fact, essentially worked only through the publication of specific groups of documents, information and data on the institutional websites.[8] Everyone had (and still has) a right to direct and immediate access to the websites, without any authentication and identification. If the duty of compulsory publication is not respected by the administration without delay, anyone may ask for it to comply with the obligation and obtain so-called civic access to elements that it is legally obliged to publish.[9]

Originally, each authority also had a discretionary power to publish on-line other documents or information not containing personal data, but this power was in practice never

---

[4] See Marcello Clarich, 'Trasparenza e protezione dei dati personali nell'azione amministrativa' (2004) 3 (12) Foro amministrativo T.A.R. 3885–3897.

[5] See Massimo Occhiena, 'I principi di pubblicità e trasparenza' in Mauro Renna, Fabio Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2011, Milan) 141–148.

[6] See: Enrico Carloni, 'La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa' (2009) 3 Diritto pubblico 779–812; Benedetto Ponti et al., *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (Maggioli 2016, Santarcangelo di Romagna); Mario Savino, 'La nuova disciplina della trasparenza amministrativa' (2013) 33 Giornale di diritto amministrativo 795–805.

[7] See Marco Bombardelli, 'Fra sospetto e partecipazione: la duplice declinazione del principio di trasparenza' (2013) 3–4 Istituzioni del Federalismo 657–685.

[8] See: Antonio Contieri, 'Trasparenza e accesso civico' (2014) 9–10 May, Nuove autonomie 563–576; Esposito Vincenza et al., 'Il diritto sociale alla trasparenza tra il diritto di accesso ed il diritto civico' <http://www.filodiritto.com/articoli/2013/07/il-diritto-sociale-alla-trasparenza-tra-il-diritto-di-accesso-e-l-accesso-civico/> accessed May 2017; Diana Urania Galetta, 'Transparency and Access to Public Sector Information in Italy: a Proper Revolution?' (2014) 2 Italian Journal of Public Law 212–240; Gianluca Gardini, 'Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?' (2014) 8–9 Giornale di diritto amministrativo 875–891.

[9] See art. 5, Legislative Decree No. 33/2013.

used, because of the constant expense clause in the Decree.[10] Finally, it was erased in 2016, when the legislator introduced a new kind of civic access (so called 'generalised' civic access), which allows private parties to obtain disclosure beyond the borders of compulsory publication.

An interesting element of the 2013 Legislative Decree concerns the indication of promoting higher levels of transparency as a strategic area for the definition of general and specific goals. First, it is clear that publicity/publication is just one possible tool for achieving substantial transparency (as such, the two principles are not the same). Second, in this context, transparency is not only manifested in its relationship with the publication of acts and documents, but also, for instance, with simplifying the language used by the authorities in their communications with citizens.

In fact, a definition of publication has been given in Legislative Decree No. 33, since its adoption in 2013, besides the definition of transparency. Publication is intended as publication in the authorities' websites of information, documents and data regarding their organisation and activities. However, according to the decree, online publication is compulsory only for those groups of acts/documents/data which are indicated by the legislator. The result is a sort of tautological effect: only the information that is public according to the statutes must be published online on the authority's website and be accessible to anyone (not only to the stakeholders who are the authors of a request). This is interesting from the point of view of the nature of the legal position of the person who aims at obtaining the document or the information: in this case, in fact, that position is certainly strong (a full right) and there is no discretionary administrative power. However, at the same time, the rule according to which total publication is alternative to the 'traditional' right of access to documents (and when the document is public, which means that it has been published, the right is assumed to have been granted automatically) stays alive in law 241/1990.

As already pointed out, Legislative Decree No. 33/2013 was reformed by Legislative Decree No. 97/2016. An important change has to do with the legal notion of transparency.[11] At present, it not only requires public action to be made available to citizens according to the rules in force, but is also explicitly connected with the protection of the rights of individuals and with promoting participation by private parties in the administrative procedures.[12] Today more than ever, transparency is becoming a polysemic notion in Italy.[13] There are at least two notions of administrative transparency, which are different from the point of view of their

[10] In fact, the Decree compelled – and still compels – the administration to implement it without incurring new expenses; this rule was materially incompatible with actions requiring complicated evaluations of the need for partial anonymisation of personal data, which of course requires time and money to be spent in order to obtain the desired result. See Savino (n 6) 795–805.

[11] See Mario R. Spasiano, Riflessioni in tema di trasparenza anche alla luce del diritto di accesso civico' (2015) 1 Nuove Autonomie 63–80.

[12] See art. 1, Legislative Decree No. 33/2013, as emended in 2016.

[13] See Anna Simonati, La trasparenza amministrativa e il legislatore: un caso di entropia normativa? (2013) 21 (4) Diritto amministrativo 749–788.

content and from the point of view of their purpose. The 'new' concept is defined after the 2013 and the 2016 reforms in general terms, but the legislator expressly keeps the 'traditional' concept alive.

II The Right(s) of Administrative Access

1 Preliminary Remarks

The 'traditional' right of access to administrative documents ruled in Law No. 241/1990 allows private parties to read or take a copy of administrative documents, in order to defend their own legal position; as a consequence of the aim of self-protection, the request must give reasons and, when the documents contains secret information or confidential/sensitive data on third subjects, the reason given in the application is the basis for the competent authority to make a comparison between the counter-interests.

After the 2013 and the 2016 reforms, such a right of access survived. Now, it works together with the two kinds of civic access.[14] The first, introduced by Legislative Decree No. 33/2013 in its original formulation, allows everyone to know directly, without being compelled to give reasons for the request, documents, data and information that must be published in the websites of authorities.[15] According to the second, besides the *ex lege* publication of documents, data and information, anyone has a right to know the content of administrative documents and data (without being compelled to give reasons for the request), with the exception of those containing secrets to be kept in the public interest or to defend private and highly confidential data.

Even if the case law in principle does not put in doubt that the three rights of access have different characteristics,[16] the distinction between them is not simple[17] and the boundaries have to be indicated very carefully.

---

[14] See art. 5 and art. 5 bis, Legislative Decree No. 33/2013, as emended in 2016.

[15] See: Marina Binda, 'Accesso civico e accesso disciplinato dalla legge n. 241 del 1990. Commento a d.lg. 14 marzo 2013, n. 33; l. 7 agosto 1990, n. 241' (2014) 4 Temi romana 47–56; Valerio Torano, 'Il diritto di accesso civico come azione popolare' (2013) Vol. (4) Diritto ammministrativo 789–840; Stefano Toschei, 'Accesso civico e accesso ai documenti amministrativi: due volti del nuovo sistema amministrativo' (2013) 3 Comuni d'Italia 9–23.

[16] See for example: Cons. St., VI, 20.11.2013, No. 5515, TAR Lombardia, Milan, IV, 30.10.2014, No. 2587; TAR Lombardia, Milan, IV, 11.12.2014, No. 3027; TAR Campania, Naples, VI, 3.3.2016, No. 1165; TAR Abruzzo, L'Aquila, I, 30.7.2015, No. 597. See also Toschei (n 15) 9. However, sometimes the courts held that the statutory introduction of the 2013 right of civic access has materially strengthened the traditional access to documents: see, for instance, TAR Piedmont, Turin, I, 8.1.2014, No. 9. See also TAR Umbria, I, 16.2.2015, No. 69 and TAR Abruzzo, I, 16.4.2015, No. 288; TAR Lombardia, Brescia, I, 4.3.2015, No. 360, and TAR Abruzzo, I, 16.4.2015, No. 288. The text of all the case-law mentioned in the paper is available (unfortunately, in Italian), in https://www.giustizia-amministrativa.it.

[17] In fact, the applicant for access sometimes prefers not to make clear which kind of access he/she aims at obtaining, by expressing the request in a very broad way. However, according to the most correct line, an application that does not make clear what kind of access it refers to should be considered (both by the administration and, later, by the courts) as inadmissible. See so, for instance: TAR Lazio, Latina, I, 9.12.2014, No. 1046; Cons. St., V, 12.5.2016,

The comparison is further complicated in light of the peculiar role given in this field to administrative courts. In fact, according to the Code of Administrative Judicial Review (Legislative Decree 2.7.2010, No. 104), the same judicial remedy works with reference to the breach of the duties of on-line publication and to overcome an administrative denial of 'traditional' access to documents.[18] The judicial procedure is special and it is based on short deadlines for the private parties to act during the procedure and for the court to issue its decision and on the wide powers of the administrative court. In fact, the courts may order documents to be presented to the applicant (for the 'traditional' access) or to be published (in the case of civic access), also indicating how specifically to do that (art. 116.4, Legislative Decree No. 104/2010). This legislative choice does not take into account the numerous differences between the three kinds of right of access; besides, it gives the administrative courts an efficient tool for the protection of the applicant's interest, while the position of the parties with opposing interests is, in the perspective of judicial review, much weaker (which is partially compensated by the provision for the possibility, open to them too, to apply to an ADR authority).

2 The Recipients and the Authors of the Request

The first basis of comparison between the various kinds of access concerns the subjects involved.

From the point of view of indicating the recipients of the request, the situation is quite similar in the three cases, because in all of them not only public authorities, in strict sense, but also private subjects acting in the fulfilment of public interest may be the interlocutors of the applicant. However, this is the result of a normative evolution.

In fact, in the case of the right of access to documents, the legislator has progressively adapted the rules in force[19] in light of the case law, which had clearly gone in an extensive direction from a substantive point of view. According to such a perspective, the request for access may be directed to formally private subjects whose mission is (at least partially) to

No. 1876; Cons. St., V, 12.5.2016, No. 1877; Cons. St., V, 12.5.2016, No. 1878; Cons. St., V, 12.5.2016, No. 1881; Cons. St., V, 12.5.2016, No. 1891. It also true that, sometimes, a sort of osmotic relationship between 'traditional' and civic access was indicated. In such cases, when there was a pertinent rule in Decree No. 33/2013, the courts ordered the administration to publish the document on-line on the website, even if the applicant had asked for 'traditional' access to it: see so, for instance, Cons. St., VI, 24.02.2014, No. 865 and Idem, V, 11.2.2014, No. 64. This is quite dangerous, because the result obtained by the applicant is different from the one that he/she aimed at and there could be no correspondence between what was asked for and the answer given by the court in the decision; besides, when the compulsory on-line publication of data is not complete, such a decision may not be totally satisfactory for the applicant, who aimed at knowing (through the 'traditional' access) the full content of the document.

18 See art. 5.5, Legislative Decree No. 33/2013 in its original formulation; after the reform in 2016, the same rule is contained in art. 5.7. of the Decree.

19 Which was done by Law No. 265/1999 and by Law No. 15/2005.

pursue a public interest.[20] A similar change happened with reference to the rights of civic access: after having assumed a restrictive formulation in the original text of Legislative Decree No. 33, art. 2 bis (reformed in 2016) it now comprises all public authorities,[21] the great majority of public companies and (formally) private bodies with an economic dimension larger than a minimum size, the activities of which are financed or controlled by public authorities or are connected with the pursuit of public (national or E.U.) interests.

Authors of the request for access are always private parties, even if the conditions required are different: the protection of an individual interest in light of Law No. 241/1990; a breach by administration of its duty to publish on line in the case of civic access; and just the exercise of the right to know in the case of 'generalised' access.

Public authorities, in their mutual relationship, are presumed to act in compliance with the principle of loyal cooperation, which means that they are supposed to exchange the data and information they possess in a fair manner. However, sometimes this principle does not actually work and an authority simply refuses to send the requested data or information to the other authority. Consequently, a narrow but interesting case law[22] has developed an opinion, according to which public subjects may also ask for access to documents following the ordinary rules contained in Law No. 241/1990. This is an evident effort to allow public subjects to use the judicial protection tools which are at the disposal of private parties as well whenever the principle of fairness in mutual relationships between authorities has been concretely breached.

3 Object and Purpose of the Right(s) of Access

The differences between the three kinds of access are evident with reference to the object of the right.

The object of the 'traditional' right of access is existing documents,[23] and not directly data or information. Consequently, the recipient of the request must not produce *ad hoc* documents in answer to the applicant. This is of course an effect of the principle of efficiency of administrative action, the corollary of which is economy.

---

[20] In the recent case law, see for instance *ex multis:* Cons. St., AP, 28.6.2016, No. 13; Cons. Stato, IV, 28.1.2016, No. 326; Cons. Stato, V, 26.6.2015, No. 3226; Cons. Stato, IV, 11.4.2014, No. 1768; Cons. St., V, 15.7.2013, No. 3852; Cons. St., III, 27.5.2013, No. 2894, Cons. St., VI, 10.52013, No. 2566; Cons. Stato, VI, 2.5.2012, No. 2516; Cons. Stato, VI, 12.3.2012, No. 1403; Cons. St., VI, 17.1.2011, No. 235; Cons. Stato, IV, 27.1.2011, No. 619; Cons. Stato, VI, 9.8.2011, No. 4741; Cons. St., IV, 12.3.2010, No. 1470; Cons. Stato, VI, 19.1.2010, No. 189.

[21] In the perspective of practical implementation, it is interesting to note that, in the 2016 reform, the importance of the specific characteristics of the different kinds of public subjects was carefully taken into account. The consequence of such sensitivity is particularly evident for local entities (primarily the numerous small Italian municipalities), which often have weak financial and structural resources. Hence, on line disclosure works for them in a simplified way (art. 3.1 *ter,* Legislative Decree No. 33/2013) and such obligation became legally binding not immediately but after one year since the entry into force of Decree No. 97/2016 (art. 42.2).

[22] See especially Cons. Stato, V, 27.5.2011, No. 3190, Cons. Stato, VI, 9.3.2011, No. 1492 and Cons. Stato, VI, 15.3.2007, No. 1257.

[23] See art. 22.4, Law No. 241/1990.

Civic access was introduced in 2013 with a much wider scope, documents, data and information. The acceptance of broad openness was not seen as an excessive complication because the field of implementing this kind of access is rather narrow, comprising only compulsory public elements (which tend to exclude discretional evaluations by the competent authority).[24]

Things have become less simple with the entrance into force of the 2016 reform. According to the current formulation of art. 5.2 of Legislative Decree No. 33/2013, the 'new' civic access seems to concern only documents and data, apart from those that are legally to be published in the institutional websites. Consequently, information (that is 'elaborated' data) seems not to be part of the implementation area of the new civic access. However, the same art. 5 continues by explaining that all the kinds of civic access may be requested with reference to documents, data or information. In my opinion, this rule makes the narrower formulation of the definition indicated immediately before to be not legally binding; therefore, in practice information could also be the object of a request for 'generalised' civic access.

Another important difference relates to the purpose of the various kinds of access.

The 'traditional' right of access to documents is a tool for the protection of individual interests; hence, applications made with the aim of generally monitoring administrative behaviour are not admissible.[25] The common aim of both forms of civic access, instead, is facilitating a general check by citizens on administrative action.[26] The applicant for access to documents must give reasons and indicate the specific legal interest that, through such access, he/she wants to defend,[27] while the request for civic access must never give reasons.[28]

4 Limitations to the Right(s) of Access

Things are particularly intricate with reference to limitations to access.

In this field, there is no substantive problem with the right of civic access introduced in 2013. In fact, such right of access concerns a 'closed' list of administrative acts, the total or partial disclosure of which – by publication in the institutional website – is directly imposed by a rule in force. It is actually implementation that makes things more complicated, especially when personal data is involved in the compulsorily public document or information, which

[24] Traditionally, the case law follows a restrictive interpretation of the rules providing for cases of compulsory publication (TAR Emilia Romagna, Parma, I, 23.102014, No. 377, and TAR Puglia, Bari, III, 16.9.2016, No. 1253) and they may not be extensively interpreted and implemented (TAR Emilia Romagna, Parma, I, 23.10.2014, No. 377), even if it makes clear that they are expression of a general principle of transparency of administrative action (TAR Lombardia, Brescia, I, 4.3.2015, No. 360). In the doctrine, see Francesco Manganaro, 'Trasparenza e obblighi di pubblicazione' (2014) 3 Nuove Autonomie 553–562; Paola Marsocci, 'Gli obblighi di diffusione delle informazioni e il d. lgs. 33/2013 nell'interpretazione del modello costituzionale di amministrazione' (2013) 2–3 Istituzioni del Federalismo 687–724.

[25] See art. 24.3, Law No. 241/1990.

[26] See art. 5.2, Legislative Decree No. 33/2013.

[27] See art. 25.2, Law No. 241/1990.

[28] See art. 5.3, Legislative Decree No. 33/2013.

requires a careful evaluation by the competent subject. Of course, in light of the statutes in force, disclosure of sensitive data is always forbidden and, according to the principle of necessity of data processing, administration should never publish confidential personal data when it is not strictly needed. Therefore, case-by-case decisions must be made often.

Exceptions are instead expressly listed for both access to documents and generalised access. At first sight, they are quite similar: some of them are in the public interest, other aim at defending the right of privacy of third parties. Limitations in the public national interest substantially coincide: security, combating crime, international relationships, economic and financial stability. These interests are often protected by legal secrecy; hence, administrative power in this field is not strong.

The rules are significantly different however when the purpose is the protection of private rights.

According to Law No. 241/1990,[29] the right of privacy of third private parties has to be compared with the personal position to be defended through access, and access prevails when it is strictly necessary in order to defend the applicant's individual position. According to Legislative Decree No. 33, civic access may be denied when it is justified to comply with the statute on personal data processing, or else to grant freedom and secrecy of correspondence and economic private interests; hence, civic access is not allowed if disclosure is concretely harmful.[30]

The different perspective is evident and so is the inversion of the point of view. In the case of access to documents, when sensitive or highly confidential information of third parties is involved, the applicant must give reasons for the request, in order to show that his/her interest may be satisfied only through the knowledge of the requested documents. In the case of generalised access, access is instead presumed to be allowed, but it must be excluded when disclosure is probably materially harmful for the owner of the information. Decision-making in this field is particularly difficult, especially because (as already noted) the request for generalised access itself must not give reasons and consequently making a comparison between the private interests is almost impossible for the administration. As such, the circulation of joint guidelines by the National Anti-Corruption Authority and the National Data Protection Authority is going to be extremely useful.

Anyway, on the basis of method (so to say) the same solution may also help in managing both the 'traditional' and generalised rights of access properly: it is partial disclosure, which allows the applicant to know just some data, without disclosure of the information, the communication or publication of which would be harmful to a protected interest.

[29] See art. 24.6.d), Law No. 241/1990.

[30] See art. 5 bis, Legislative Decree No. 33/2013.

5 The Procedural Rules: Some Relevant Elements

From the point of view of procedure, management of the 'ordinary' civic access is quite simple. In fact, it is nothing more than the consequence of the breach of rules compelling the total or partial on-line publication of documents, information or data.

Once more, similarities are especially evident in the rules on the right of access to documents and the generalised access.

The first common element is the administrative duty to give reasons for the decision on the request, especially when it is negative. However, this rule works a little differently in the two cases. In fact, Law No. 241/1990[31] provides for a hypothesis of tacit denial, which of course reduces the strength of the motivational duty. No similar exceptions to the duty are admitted in the Legislative Decree No. 33/2013, which, on the contrary, requires administrative decisions on civic access to be expressed in every case.[32]

The second common element is the compulsory involvement in the procedure of the owners of confidential data, who must be put in the position of expressing their view on disclosure. The intensity of their role is however different in the two cases. In the system of the right of access to administrative documents, they can produce a written contribution, which the administration must consider before taking its decision.[33] According to Decree No. 33, their legal position is stronger because, if faced with their opposition, access by the third party is postposed, in order to allow them to activate an administrative appeal or an application for judicial review without delay.[34] The deeper attention to parties with opposing interests is clear also in light of the rules on ADR tools: while in the system of the right of access to administrative documents such instruments may be activated only by the applicant who has been denied, they are available to all parties involved in the controversies on generalised access.[35]

III The Right(s) of Access and the 'Digital First' Principle: Open Issues

An element of administrative action that directly impacts the management of the rights of access has to do with digitalisation. The use of informatic tools should be a source of simplification and so it is generally considered in the national and the supra-national systems. Hence,

31 See art. 25.3, Law No. 241/1990.

32 See art. 5.6, Legislative Decree No. 33/2013. However, see also *infra*, 4., where it is pointed out that, in its, 2016 guidelines, the Anti-Corruption Authority hold that the duty to give reasons for denial of generalised access does not work when secrecy relates even to the existence of the required information.

33 This rule is contained not directly in Law No. 241/1990, but in the executive regulation: see art. 3, Decree of the President of the Republic No. 184/2006.

34 See art. 5.5, Legislative Decree No. 33/2013.

35 See art. 5.5-9, Legislative Decree No. 33/2013.

in Italy the strong attention to the contribution of technology to grant more effective administrative transparency[36] has been recently expressed in Law 7.8.2015, No. 124. This statute refers to a general principle – *digital first* – to be implemented by specific legislation as a key rule for administrative action.[37] According to this principle, in order to assure transparency in the public interest, the administrative action should primarily take place through digital procedures. Digitalisation is presumed to improve the quality of governance and to make participation by private parties easier. The same idea is clearly shared in the 2013 and 2016 reforms on civic access, which is intended as a strong communication tool between administration and the citizens through institutional websites and the electronic disclosure of documents, information and data.

Nonetheless, such an approach opens new questions, especially about the link between transparency, efficiency and public ethics. It is necessary to keep in mind, in fact, that in Italy there is a low level of digital literacy. At present, it would be anachronistic to require that the whole population owns the technical tools and is able to use them properly in order to participate in the administrative procedures.[38]

As was already pointed out, in its traditional physiognomy, transparency is a fundamental element of public performance and it goes beyond publicity; moreover, it must be granted with the same intensity to all citizens, intended in its widest sense. In light of all these elements, one could infer that, to really implement transparency through access, the administrative authorities should not only create an accessible institutional website, but also put free internet terminals (with a printer) at the disposal of their citizens. Besides, public servants, to assist and provide technical guidance to them, should continuously attend the terminals. Such a duty seems to be the direct consequence of the introduction of the *digital first* rule as a basic principle for administrative action and it corresponds to public ethics taken seriously. Nonetheless, as economy of administrative action must also be taken seriously, this proposal is of course just rhetorical.

Anyway, the implementation problems connected with the *digital first* principle may perhaps be reduced by proposing that the rules in force be interpreted in a way that partially contrasts with their current text but is at the same time compatible with the 'spirit' of the principle of good and fair administration. The issue relates to the possible right of citizens to

---

[36] See: Fiammetta Borgia, 'Riflessioni sull'accesso ad Internet come diritto umano' (2010) 65 (3) La comunità internazionale 395–414; Pasquale Costanzo, 'Miti e realtà dell'accesso ad internet (una prospettiva costituzionalistica)' (2012) 8 November, Consulta online 14; Lorenzo Cuocolo, 'La qualificazione giuridica dell'accesso a Internet, tra retoriche globali e dimensione sociale' (2012) 2–3 Politica del diritto 263–287; Tommaso E. Frosini, 'The internet access as a fundamental right' (2013) 25 Federalismi.it 7; P. Passaglia, 'Diritto di accesso ad internet e giustizia costituzionale. Una (preliminare) indagine comparata' (2011) Consulta online 37.

[37] See: Enrico Carloni, 'Tendenze recenti e nuovi principi della digitalizzazione pubblica' (2015) 2 Giornale di diritto amministrativo 148–157; Carmela Leone, 'Il principio 'digital first': obblighi e diritti in capo all'amministrazione e a tutela del cittadino. Note a margine dell'art. 1 della legge 124 del 2015' (2016) 6 GiustAmm.it 8.

[38] Of course, the scientific debate about the nature of the right to the internet as a personal fundamental right has also a basic role in a legal discourse on this issue: see Borgia (n 36) 395–414 and Frosini (n 36) 7.

request, at the same time and with reference to the same documents, 'traditional' and civic access. The rules in force suggest a negative answer, at least when the compulsory on-line publication concerns the whole content of the act. In fact, according to art. 26.3 of Law No. 241/1990, if a document has been completely published, the right of access by citizens is fully satisfied and it cannot be asked for again.[39] The case law is now instead oriented to a positive answer, whenever the applicant has a relevant legal interest in light of both the 1990 Law and the 2013 Decree.[40] This solution may help at the moment, as a sort of interim 'positive action' measure, in overcoming the problems connected with the implementation of the *digital first* principle, which may have counterproductive results in systems such as the Italian one, where the general level of digital literacy is still low.[41]

Moreover, a possible danger connected with a widespread implementation of the *digital first* principle has to do with openness of administrative action. In fact, if administrative procedures are primarily conducted on-line, the low level of digital literacy will probably discourage participation by an important segment of the stakeholders. This may cause a lack of possibly useful inputs for the competent authority, with consequent serious damage to the public interest.

Another link between the *digital first* principle and public ethics concerns the relationship with open data. According to Legislative Decree No. 33/2013, on-line publication of documents and information in the websites of the authorities is compatible with the possibility of free use of data, with the only duty to indicate the official source. Notwithstanding this, the Italian Data Protection Authority has held that personal data may be 'open' only if it is not confidential (or even sensitive, of course) and its use does not cause damage to the right of privacy of the person to whom it refers. Therefore, an *ex ante* careful choice among the various kinds of documents and data to be published in the institutional website is necessary.

IV The Right(s) of Access and the Guidelines of the National Data Protection Authority and Anti-Corruption Authority

The Italian legal system may be integrated with guidelines issued by independent authorities, which are an answer to the need for quick and flexible rules. The various kinds of guidelines are quite different from one another and discussion is open regarding their definition, either as a new sort of normative act (globally indicated as secondary level sources of law) or as administrative acts with general content, addressed to the group of stakeholders in the specific

[39] In the administrative case law, this rule is constantly implemented. See, for instance: Cons. St., IV, 10.1.2012, No. 25; Idem, VI, 16.12.1998, No. 1683; TAR Puglia, Lecce, II, 17.09.2009, No. 2121; TAR Basilicata, Potenza, I, 25.6.2008, No. 315; TAR Liguria, Genova, I, 14.12.2007, No. 2063; TAR Lazio, Rome, I, 08.2.1996, No. 177.

[40] See, for instance, TAR Campania, Naples, VI, 5.11.2014, No. 5671.

[41] From this point of view, the case law, according to which it is a duty of the private party to prove that the digital link indicated by the authority to reach the desired information did not work at that moment (which is often very hard), is certainly not 'citizen-friendly'. See, for instance, TAR Sardinia, II, 23,4.2015, No. 719.

field. In both cases, they may be considered as the most advanced paradigm of administrative lawfulness, which in Italy has become much more flexible in recent years than it used to be. At the same time, they must be very carefully considered, because they allow public authorities – which are not democratically legitimated and are often linked to groups of private subjects, who have economically and socially strong interests – to create generally binding rules. This could be in contrast with the basic corollaries of the principle of good administration, such as impartiality.

In the field of the right(s) of access, the Data Protection Authority and the National Anti-Corruption Authority are requested to indicate, after a participatory procedure, the groups of information that must be just partially published, in compliance with the principles of proportionality and simplification.[42] The same authorities issue guidelines, to make clear the borders of the limitations to civic access.[43] The Anti-Corruption Authority, with the strong cooperation of the Data Protection Authority, therefore, produced Act No. 1309 of 28.12.2016.[44] This is, in the field of transparency and administrative access, the latest (and probably the most important) example of guidelines.

However, other guidelines on similar subjects had been produced before.

In 2011, the Data Protection Authority[45] produced its guidelines for the Processing of Personal Data Contained in Documents and Records by Public Bodies in Connection with Web-Based Communication and Dissemination.[46] In the 2011 guidelines, definitions of *transparency*, *publicity* and *access* are proposed. In particular, according to the guidelines, *transparency* means the availability of administrative records and documents containing personal data on institutional websites, in order to ensure widespread knowledge so as to enable the public supervision of administrative action; *publicity* means online availability, intended to inform about administrative actions as related to fairness and legitimacy principles, as well as to ensure that administrative decisions are legally enforced where necessary; *access* means availability of administrative records and documents on institutional websites for specific entities, so as to facilitate participation in administrative action. Such definitions are expressly proposed 'without prejudice to specific definitions set out in special rules' and only in the perspective of 'the appropriate implementation' of the guidelines themselves. This shows

---

42 See art. 3, Legislative Decree No. 33/2013, as reformed in 2016.

43 See art. 5 bis.6, Legislative Decree No. 33/2013, as reformed in 2016.

44 The guidelines are published (unfortunately, in Italian), in <http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2016/1309/del.1309.2016.det.LNfoia.pdf> accessed 5th April 2019 – Among the scholars, see: E. Furiosi, 'L'accesso civico „generalizzato", alla luce delle Linee Guida ANAC' (2017) 4 GiustAmm.it 21; M. Lucca, 'Il diritto di accesso civico, generalizzato e documentale alla luce delle Linee guida ANAC n. 1309/2016' (2016) 1–3 Comuni d'Italia 26–40.

45 See G. Di Cosimo, Sul ricorso alle linee guida da parte del Garante per la privacy (About the use of Guidelines by the Italian data Protection Authority)' (2016) 31 Giornale di storia costituzionale 169–172.

46 The guidelines (Act. No. 88, 2.3.2011) are published in Italian in <http://www.garanteprivacy.it/web/guest/ home/docweb/-/docweb-display/docweb/1793203>; the highlights in English are available in <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1803707> accessed 5th April 2019.

a strong awareness, first, of the polysemy of the legal terms[47] and, second, of the difficult relationship between the guidelines and the (other) legal sources. In the same guidelines, then, great attention is paid also to addressing the exercise of discretionary power. When, in the rules in force, there is no indication of the specific elements of publication (such as, for instance, the length of the mandatory disclosure period), each authority decides in light of the principles of proportionality and indispensability of data processing.

Another interesting interpretative contribution was given by the guidelines issued by the Data Protection Authority in 2014 (Act No. 243, 15.5.2014), about on-line processing by public subjects for publicity and transparency purposes.[48] The Authority states that a deep discretionary evaluation is requested, in order to decide whether non-aggregated data is to be published on each website. Such on-line publication is allowed only if strictly necessary (according to the general rules)[49] and excluding personal data regarding sex and health. A relevant specification contained in the guidelines has to do with the aim of the rules requiring the data publication. The specific rules contained in Legislative Decree No. 33 (for instance, with reference to the term of the obligation to on line publication), in this view, can only be applied if the purpose of legislative publication is the protection of administrative transparency, not if the legal purpose is anything else.[50] This is very interesting, because such a distinction is not mentioned at all in the primary sources of law. The 2014 guidelines therefore show an effort to interpret the rules beyond their original scope as well. Of course, such a tendency opens the problem of the possible binding force of the guidelines themselves. In my opinion, the guidelines work as an interpretative contribution and they can 'fill in the blanks' of the statute with which they are connected, only if the statute itself so provides and the interpretative contribution in the guidelines is compatible with the content of the rules.

In the 2016 guidelines, the National Anti-Corruption Authority, together with the Data Protection Authority, followed what one might call a cautious approach. Faced with significant doubts about the implementation of the 'new' generalised access, the Authorities often just address the open questions and offer general references for their proper solution, without directly indicating them. For instance, there is an effort to guide the administration in implementing the various kinds of access, by proposing a complex terminology. The 'traditional' right of access ruled in Law No. 241/1990 is called *documental access;* access to compulsorily public documents, provided for since 2013, is called *civic access,* while the 'new' civic access introduced by Legislative Decree No. 97/2016 is referred to as *generalised access.* It is made clear that civic access has a narrower scope than generalised access, while documental access

47 See: Bombardelli (n 7) 657–685; Simonati (n 13) 749–788.

48 The guidelines are published (unfortunately, in Italian), in <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3134436> accessed 5 April 2019.

49 See art. 8 and art. 11.1.d, Legislative Decree No 196/2003.

50 An interesting example contained in the Guidelines (see pp. 10–11 and 13) concerns wedding banns, the publication of which clearly aims primarily at combatting polygamy and has nothing to do with administrative transparency.

has the narrowest object but allows a deeper knowledge of the content of the documents. Moreover, the guidelines invite the individual authorities to issue specific regulations, and to explain the rules in force and indicate best practices.

About the possible effect of an administrative decision to accept a request for the 'new' civic access, some general suggestions aim at helping to solve the deepest doubts. Considering the legislative text,[51] one could infer that, when the request for generalised civic access is accepted the knowledge of the document or information must be open to anyone. These rules, which seem to be very auspicious for a widespread implementation of administrative transparency, will on the contrary perhaps induce authorities to be severely restrictive in allowing the 'new' civic access or at least to limit it to applicants only. In the guidelines, it is made clear that the administration may always protect the (public) interest in the economy of its action, in accordance with the relevant E.U. case law.[52] The necessary balance of all the relevant (public and private) interests allows the competent authorities to choose the best solution in light of the characteristics of the single case, in order to implement as widely as possible the principle of administrative transparency. Besides, the guidelines note that the rules, according to which the administrative decision on the request for generalised access must be expressed and it must give reasons, may be clearly dangerous and counterproductive. This can happen whenever access is denied in order to prevent the disclosure of secret or confidential data, especially when even their existence is unknown to the public. Therefore, an important exception to the administrative duty to give reasons for the decision is indicated, whenever giving reasons would reveal confidential information on public activity or on the counter-interested parties.

The third example of the 'indirect approach' of the 2016 guidelines in solving the open problems connected with the implementation of the rights of access relates to the limits to the 'new' civic access. Also from this point of view, the guidelines do not contain specific indications, but they offer some useful explanations. In particular, they distinguish between absolute and relative exceptions to generalised access. The former work when a rule of law strictly prohibits access to protect fundamental public interests (let's think of state secrets and other secrets, as provided for in specific pieces of legislation) or private rights (let's think of the right of privacy regarding sensitive data). The latter work when a specific evaluation by the administration, in light of the characteristics of the single case, shows that disclosure of documents, data or information could be concretely harmful to fundamental public interests (public security and defence; international relations; monetary and current policies; public

[51] According to art. 3, Legislative Decree No. 33/2013 (as amended in 2016, all the documents and data which are the object of civic access are public (which means *must* be made public), here comprised the ones which are compulsorily to be published. Moreover, art. 7 of the 2013 Decree holds that all the documents, information and data that have been the object of civic access (in both its forms, one could infer considering the text in force) must be published online in open access and can be re-used with no broader limitations than the duty to mention their source and to use them properly.

[52] In fact, in the guidelines, Court of first instance, First chamber, extended composition, Judgment of 13.4.2005, Verein für Konsumenteninformation/Commission is mentioned (see 4.2.).

order, prevention of and combating crime) or private interests (protection of personal data, freedom and secrecy of correspondence and protection of economic and commercial interests). In such cases, a careful decision-making process by the competent authority is necessary, in light of the specificities of the single case; it seems to be very similar to the exercise of discretionary power. In particular, when private confidential data is concerned, generalised access should probably be forbidden when the data is sensitive or concerns the fundamental rights of individuals (such as genetic data or detailed economic information). The expressed legislative reference to *concrete* damage is important, because it requires the administration to choose a proportionate solution in any event, which also means that postposed or partial disclosure must be normally preferred to total denial. Partial disclosure in particular may be the proper solution, whenever personal confidential (but not sensitive) data is concerned.

It is also useful to point out that, according to the 2016 guidelines, there are important differences between groups of counter-interested parties. Individuals tend to be wholly protected, in light both of the rules on personal data processing and of the rules on the defense of the right of privacy. The rules contained in Legislative Decree No. 196/2003 on personal data processing do not concern, however, subjects other than private individuals. Therefore, legal persons and associations are surely protected, but only in relation to their right to freedom and secrecy of correspondence and in relation to their economic and commercial interests.

The guidelines analysed represent the starting point for other interpretative acts, which show the effort by administrations to solve the problems arising from the coexistence of the various kinds of access. In particular, a circular was released in 2017 by the Department of Public Service,[53] in order to help the individual authorities in their practical activities. In the circular, the principle of reasonabless seems to be key concept. Generalised access is indicated as the expression of a general right of information; therefore, administration is required to reduce as much as possible the exercise of the power of denial. Hence, when access is requested without any specification of its legal title, it should be considered as generalised access; besides, the request should be considered inadmissible only if it does not make clear its fundamental elements. In a practical perspective, the circular contains some suggestions about so called 'pro-active' access: according to it, administration should publish in the institutional websites those documents and data that (at least) three different subjects have asked for them to be published during the latest year. At the same time, however, denial of access is possible whenever satisfying the request would compel the administration to an excessive effort (which happens, for instance, if the same request is repeatedly presented by the same subject).

[53] See Ministero per la semplificazione e la pubblica amministrazione, Accesso civico generalizzato (FOIA). Circolare applicativa, 30.5.2017, No. 2, in <http://www.funzionepubblica.gov.it/articolo/dipartimento/01-06-2017/circolare-n-2-2017-attuazione-delle-norme-sull%E2%80%99accesso-civico> accessed 5 April 2019.

V Final Remarks

A synthetic analysis of the contemporary Italian legal system shows that pluralism is the main characteristic of both the principle of transparency and administrative access as a tool to grant transparency. The reasons for this phenomenon are to be found primarily in the progressive complication of administrative action, which depends on the multiplication of its tasks and field of intervention and on the introduction of technological instruments to fulfil its competencies.

From one point of view, this clearly could be a positive side of the system, because it determines a multiplication of the legal tools for administrative transparency at the disposal of citizens. However, in practice, the same factor is a point of weakness: the coexistence of the right of access to administrative documents and the 2013 civic access had already created serious implementation problems, which are quite evident in the recent case law; the addition of generalised access has complicated things further, especially in light of the statutory indication of limitations to it, that it is not really exhaustive and leaves a wide space for discretionary power. As practitioners often point out, at present the citizens are rather confused and they don't know exactly which kind of access they have to ask for.

The concept of transparency has been changing in recent years, especially when it has been legally connected with the need for accountability and to reveal corruption. Nevertheless, polysemy is maybe unavoidable, because it is also an effect of the influence of supra-national law,[54] where there is not just one accepted notion of the right of access, or at least the accepted notions have different nuances.

In the EU system, both in art. 15 TFEU and in art. 41-42 of the Charter of Fundamental Rights, access is provided for not only as a fundamental right of European citizens but also as an executive tool of the principle of transparency, which is intended as an instrument to allow democratic control of administrative action. Hence, the conceptual basis of access primarily lays on the aim of protecting the public interest.[55] At the same time, in the ECHR case law, the right of access to administrative activities is often considered as an expression of freedom of information, protected in art. 10 of the European Convention for the protection of human rights and fundamental freedoms.[56] This shows that, in the view of the European Court, even

---

[54] See Mario Savino, 'The Right to Open Public Administrations in Europe: Emerging Legal Standards (2010)' <http://www.oecd-ilibrary.org/fr/governance/sigma-papers20786581> accessed May 2017.

[55] See: D. Curtin, P. Leino-Sandberg, *Openness, Transparency and the Right of Access to Documents in the EU. In-depth analysis for the PETI committee* (European University Institute 2016, Badia Fiesolana); D. Curtin, J. Mendes, 'Art. 42 – Right of Access to Documents' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights* (Nomos 2014, Baden-Baden) 1142–1163.

[56] For instance, in the recent ECHR case law, see: *Társaság a Szabadságjogokért v Hungary,* 14.4.2009; *Youth Initiative for Human Rights v Serbia,* 25.6.2013; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria,* 28.11.2013; *Roşiianu v Romania,* 24.6.2014; Grand Chamber, 8.11.2016. Among the scholars, see Lucy Maxwell, 'Access to Information in Order to Speak Freely: is this a right under the European Convention?' (19.1.2017) <http://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention> accessed 28 August 2017.

if the involvement of public interest is clear as well, access primarily still works as the expression of individual interests, with a direct link to fundamental rights. Furthermore, Italian Law No. 190/2012 (which, as already indicated, is the origin of the acceptance of the 'modern' idea of transparency in the national system) is itself the effect of compliance with the supranational rules. In fact, it is the implementation act at the national level, among other things, of the UN Convention against corruption (31.10.2003)[57]. Therefore, one could infer that, in the supranational legal orders, the accepted concepts of administrative access are quite different and tend to aim at different priorities. While in the EU attention is paid in particular to the public interest in fair administration, the Court for the Protection of Fundamental Freedoms rather takes the exercise of access into the field of individual rights protection; at the UN level, the link between transparency and highlighting corruption (which is at the heart of the recent introduction in Italy of civic access and of generalised access rights) is strongly perceived.

Moreover, it is clear that not only are publicity and transparency not synonyms, but also openness/publicity (even on-line publicity) is not able in itself to assure real transparency.

It is maybe a challenge for the administrative law scholars to show that the 'traditional' idea of transparency is different from the 'new' one, not only because of its content, but also because of its fundamental nature. The 'new' principle of transparency is satisfied when documents, information or data are published or communicated to the interested parties; the 'traditional' principle of transparency not necessarily has to do with the results of administrative action, but properly with administrative action (procedures and final measures) as a whole. This specificity is perhaps not useless and must be maintained, because administrative action has peculiar characteristics, which are often different from those of the other public law activities (the rule-making and the judicial ones). So, we could say that transparency may work at two different levels: as a 'concrete' rule of law according with the legislator's will, but also (and maybe primarily) as a general principle of good governance, even apart from the production of specific statutes.

The original perception of the concept of transparency allows some elements that are not included in the modern legislative notion to be kept in mind. A basic factor concerns the quality of public communication, as even a document that has been fully published is not really transparent if it is written using language that is not comprehensible to the citizens. Replacing the 'traditional' principle of transparency as an expression of good governance with the 'new' one would be simplistic and wrong; it would produce a severe loss of significance and legal implications. Legislative reforms may effectively change the borders of specific legal tools, but it should not be assumed that, so doing, they are also able to affect basic concepts and principles. Despite the normative definition in force, one may infer that transparency in Italy still is what it used to be: the sum of comprehensibility and checkability of administrative

[57] In the text of the Convention (which was ratified in Italy with Law No. 116/2009), there is a clear and direct link between administrative transparency and contrast of corruption: see art. 5.1., art. 7.1(a) and 7.4, art. 9, art. 10.1, art. 13.1(a). About the right of access, see art. 10 and art. 13 of the Convention.

action. The core of such a principle should therefore be in clarity and accountability; disclosure of documents, data and information certainly is an element of the mechanism of transparency, but they do not necessarily overlap with it. The co-existence of the three rights of access is blatant proof of this. In the contemporary transforming society, seeking a balance between the various souls of administrative access is a challenge for scholars and practitioners.