

THE REFORM OF LEGISLATIVE DECREE NO. 33/2013
IN ITALY: A DOUBLE TRACK FOR TRANSPARENCY*

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Abstract

This Article is aimed at analyzing the evolution of the concept and regulation of transparency in the Italian public administration, especially in light of the amendments brought to the so-called transparency decree by Legislative Decree No. 97/2016. Since the first interpretations of the concept of transparency were advanced in literature, scholars have pinpointed various instruments related to administrative activity that are capable of implementing transparency. The main ones are publicity and access to records. As far as the former is concerned, the concept of transparency has a broader meaning than publicity, which in recent years, has been embodied mostly by obligations of publications established by legislative provisions. As for the latter, the 2016 reform of transparency decree marked the passage from restricted to generalized access. However, traditional access – the one provided for by Law No. 241/1990 – is still effective. Furthermore, the scope of exceptions to the new right of civic access has not yet been defined clearly. Therefore, the Author suggests caution about arguing that the 2016 reform of transparency decree resulted in the adoption of an actual freedom of information act in the Italian legal system.

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1. Introduction

The aim of this Article is to analyze the evolution of the concept and regulation of transparency in the Italian public administration, particularly in light of a recent reform. In the Italian legal system, administrative transparency is historically related to the image of a glass house. Hon. Filippo Turati coined this lucky metaphor¹ in 1908. During a parliamentary debate², he

1 See G. Arena, *Administrative Transparency and Law Reform in Italy*, in A. Pizzorusso (ed.), *Italian Studies in Law. A Review of Legal Problems*, 108 (1994) (underlining the “lucky turn” of the phrase). This phrase, indeed, was still used in the 1990s – when Arena wrote his essay – and so is today.

made the following statement: “Where a higher, public interest does not impose a temporary secret, the house of the Administration is to be made of glass.”³ It is interesting to note that in the United States, a corresponding image – that of sunlight meant as implying a need for openness in the public sector – took shape almost simultaneously⁴. In that country, indeed, usage of the term “transparency” in the sense at hand has become widespread only over the last two decades⁵.

Turati’s metaphor embraces the essential terms of the issue: Secrecy is just the other side of transparency⁶. As it has been sharply observed, in strict terms, transparency is simply “a property specific to a physical body,” and thus the very phrase “administrative transparency” is actually a metaphor, susceptible of different interpretations⁷. Indeed, both scholars and the

2 The debate was about the later-to-be Law June 25, 1908, No. 290 on the legal status of state civil servants. See R. Villata, *La trasparenza dell’azione amministrativa*, 5 *Dir. proc. amm.* 534 (1987).

3 G. Arena, *Administrative Transparency*, cit. at 1, *ibid.* I see it proper to specify that I made a slight adjustment to the translation of the statement as provided by Arena. The original statement of Turati is found in *Atti parl., Camera dei deputati*, session 1904-1908, June 17, 1908, 22962.

4 Justice Brandeis, to whom the creation of the metaphor is to be ascribed, related “sunlight” to the concept of publicity, thereby making it clear the way he meant the image of sunlight. When referred to the public sector, indeed, “publicity” substantially ends up being just a synonym for “openness.” See F.E. Rourke, *Secrecy and Publicity* (1961), 149-181 (pointing out that courts have to strike a balance between disclosure of activities carried out by the three branches of the Federal Government and secrecy, as unlimited publicity may cause to people involved in such activities damage that is hard to determine in advance). The entire statement of Justice Brandeis reads as follows: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” L.D. Brandeis, *What Publicity Can Do*, 58 *Harper’s Weekly* 10, 10 (1913), reprinted in *Id., Other People’s Money and How the Bankers Use It*, 92 (1914 and 1932).

5 See D. Metcalfe, *The Nature of Government Secrecy*, 26 *Gov’t Inform. Quart.* 305 note 1 (2009) (noting that the term “transparency” – referred to public administrations – migrated from Europe to the United States, where it has applied to federal agencies, at the beginning of the twenty-first century).

6 See R. Villata, *La trasparenza dell’azione amministrativa*, cit. at 2, 538.

7 G. Arena, *Administrative Transparency*, cit. at 1, 109.

legislator have filled the concept of transparency with various contents over time. In light of the amendments Legislative Decree May 25, 2016, No. 97 brought to Legislative Decree March 14, 2013, No. 33 [hereinafter – transparency decree], it may be argued that, finally, the Italian legal system has taken a path towards a freedom of information act (FOIA). The main model thereof is the U.S. FOIA, signed into law by President Lyndon B. Johnson on July 4, 1966,⁸ and entered into force exactly one year later⁹.

The Article proceeds as follows. Section 2 is concerned with the relation between Law No. 241/1990, the innovative significance of which is stressed, and secrecy. Section 3 dwells on the main interpretations of the concept of transparency advanced in literature both prior to the enactment of Law No. 241/1990 and with the original version of the law being effective. Section 4 starts off by providing an overview of legislation on transparency adopted by the Italian Parliament over time. It then focuses on the arrangement transparency decree ensured to the numerous obligations of publication established by unsystematic legislative provisions in the period 2005-2012. This purpose of legislative decree was laudable, as it inserted the subject matter of transparency into a more rational, coordinated system. It does not mean that such a system has since been unchanged. Other than providing for a generalized access to records, indeed, Legislative Decree No. 97/2016 altered this system by adding new obligations of publication and amending some of the provisions contained in the original version of transparency decree. Despite the amendments, however, transparency keeps having the function to prevent corruption and maladministration, a function that is closely intertwined with the widespread control over administrations carried out by citizens. Section 5 is divided into two sections. Subsection 1 deals with the relation between the concepts of transparency and publicity, and is aimed at putting emphasis on the broader meaning of the former than that of the

⁸ Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966).

⁹ The entry into force of the statute occurred on July 4, 1967, by virtue of Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967) – “An Act to amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487.”

latter. Subsection 2 is devoted to the main instrument of transparency other than publicity/publication – access to records. It is underlined that access to administrative documents was capable of implementing transparency from the outset, even though Law No. 241/1990 opted for a model of restricted access. Section 6 is concerned with the right of civic access. Firstly, it highlights the evolution of civic access: Established as a mere enforcement instrument towards the fulfillment of obligations of publication, it has become a form of access to records as a result of the 2016 reform of transparency decree. Secondly, the paragraph deals with such exceptions to the right of civic access as transparency decree as amended in 2016 enumerates. Section 7 analyzes a special form of access, inserted by the 2016 reform of transparency decree. Researchers working at universities and other institutions are entitled to exercise this form of access to obtain statistical data for purposes of scientific research. In the conclusions, I suggest caution about considering the current version of transparency decree as an actual FOIA.

2. Law No. 241/1990 and the Overcoming of the Rule of Secrecy

Law August 7, 1990, No. 241¹⁰ – namely, chapter V, devoted to access to administrative documents – marked the passage from secrecy to accessibility of administrative action. This law, which contained – and still does – the general regulation of administrative procedure in the Italian legal system, determined

10 This law was the result of a “long and tormented” legislative path. *Relazione conclusiva sull’attività della commissione di studio per l’attuazione della legge 7 agosto 1990, n. 241, recante “Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi”*, Atti parl., X leg., doc. XXVII, n. 7-bis (April 6, 1992), p. 17. On the legislative history in the Italian Parliament that led to passing the law, see D. Moro, *Illustrazione degli atti preparatori della legge 241*, in Aa.Vv., *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi. Aspetti generali e di attuazione nell’amministrazione regionale. Atti del Convegno Milano, 21 marzo 1991* (1991), 25.

“a change of course”¹¹ from the set of rules that previously governed participation and access to documents. Among scholars, someone even welcomed the regulation brought in by the new law as capable of realizing a Copernican revolution¹². As a result of this regulation, indeed, administrative action, which had always “taken refuge behind a mantle of impermeability, [became] all of a sudden penetrable by the individual.”¹³ Prior to 1990, special legislation provided for the publicity of certain categories of administrative acts – *rectius*, the publicity of acts and documents that were concerned with certain subject matters or adopted by certain administrations¹⁴. The general rule governing the public administration and its activity, however, was the “privacy of documentary public property.”¹⁵ At the time, secrecy was a corollary of the supremacy of public powers over citizens, who established contact with administrations for the release of

11 F. Cuocolo, *Articolo 22 (Commento all’)*, in V. Italia & M. Bassani (eds.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241)* (1995), 531.

12 For the reference to a Copernican revolution as the consequence of the right of access to administrative documents provided for by Law No. 241/1990, see F. Caringella, R. Garofoli & M.T. Sempreviva, *L’accesso ai documenti amministrativi. Profili sostanziali e processuali* (1999), 2. Frattini, too, used the phrase “Copernican revolution,” but referred it to the impact of the entire statute on the Italian legal system. See F. Frattini, *Una rivoluzione normativa ormai quasi compiuta ma resta il problema dell’applicazione reale*, in Aa.Vv., *Trasparenza amministrativa: i regolamenti e la giurisprudenza*, Guida al dir. – 4 Il Sole 24 ore, special issue, (1995).

13 F. Caringella, R. Garofoli & M.T. Sempreviva, *L’accesso ai documenti amministrativi*, cit. at 12.

14 Law July 8, 1986, No. 349 – the law that instituted the Ministry of Environment – already provided for a dichotomy between dissemination of information and access to records. Article 25 of Law December 27, 1985, No. 816, instead, recognized to all citizens the right to gain access to any adjudication adopted by municipalities, provinces, and other local authorities. For an accurate analysis of legislative precedents of Law No. 241/1990 in the subject matter of access to records, see L.A. Mazzaroli, *L’accesso ai documenti della pubblica amministrazione. Profili sostanziali* (1998), 10-22.

15 G. Paleologo, *La legge n. 241: procedimenti amministrativi ad accesso ai documenti dell’amministrazione*, 1 Dir. proc. amm. 11 (1991).

adjudications¹⁶. Since it determined a break with an age-long tradition¹⁷, the passage from administrative secrecy to a right to access to administrative documents represented an important change in Italy's legal culture¹⁸.

Article 24 of Law No. 241/1990 identified the limits to the right to access, and – accordingly – Article 28 of the law rewrote Article 15 of the Consolidation Law on State civil servants¹⁹ to turn office secrecy from rule – as it was in the past – to exception. It was prescribed that from then onwards; office secrecy should apply “only in cases legislatively engraved.”²⁰ Since the entry into force of Law No. 241/1990, the public administration has been entitled to invoke secrecy whenever secrecy is aimed at ensuring the care of interests – whether public or private – that are worthy of protection by the legal system. It is required that they are recognized by the Constitution, because only such interests may justify the imposition of a sacrifice to the right to know²¹. In this regard, chapter V of Law No. 241/1990 (articles 22-28) resulted in realizing a scholarly theory advanced in the 1980s. This theory advocated the passage from personal secrecy, related to the

16 See P. Alberti, *L'accesso ai documenti amministrativi*, in Aa.Vv., *Lezioni sul procedimento amministrativo* (1992), 121.

17 For a reconstruction of how secrecy was meant and applied in the states preceding the unification of Italy and during the Reign of Italy – i.e., from the Middle Ages to the first half of the twentieth century – see G. Arena, *Il segreto amministrativo. Profili storici e sistematici*, I (1983). The tradition of secrecy as the rule governing the relations between public administrations and individuals was common to the great majority of Western countries until the seventies of the twentieth century. Before then, indeed, only Sweden and the United States had adopted legislation recognizing freedom of information and generalized access to administrative records. See I.F. Caramazza, *Dal principio di segretezza al principio di trasparenza. Profili generali di una riforma*, 4 Riv. trim. dir. pubbl., 944-946 (1995).

18 *Id.*, 944.

19 Decree of the President of the Republic January 10, 1957, No. 3 – “Consolidation Law of provisions concerning the statute of State civil servants.”

20 F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi*, cit. at 12.

21 R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 539.

position of public employee, to real secrecy, based on the nature of the interests protected²². Indeed, the limits to access to administrative documents – which Article 24 of Law No. 241/1990 established and transparency decree first essentially confirmed, and later specified and broadened²³ – imply the protection of interests having constitutional underpinning²⁴. Whenever indiscriminate disclosure of records may cause harm to those interests, secrecy has the function to prevent the production of the harm. Therefore, not only is secrecy *per se* compatible with the democratic principle; it is even essential to protecting the legal system and such interests as the legal system considers capable of prevailing over the interest in transparency of administrations²⁵.

22 Arena deemed the “normal functioning” of public administration an “ambiguous and generic” notion, which could not be invoked to justify the application of secrets. G. Arena, *Il segreto amministrativo. Profili teorici*, II (1984), 161-162. The ability to deny the release of administrative records – the Author observed – is not an inherent feature of any civil servant whatever the situation. On the contrary, secrecy always serves the purpose to protect an interest, of which a given administration has to take care. Therefore, it is necessary the existence of a real secret – i.e., a secret, wherein “the objective element consisting in the information that is the subject of the secret and, indirectly, in the interests that form the actual content of [the secret itself] prevails.” *Id.*, at 184. The Council of State followed this theory in a 1997 Plenary decision. See Council of State – Plenary decision, February 4, 1997, No. 5, in *Foro it.*, III (1998), and in 11 *Giorn. Dir. Amm.* (1997), with notes of M. Bombardelli (1017) and A. Sandulli (1022), *La riduzione dei limiti all’accesso ai documenti amministrativi*.

23 See, *infra*, section 6.2.

24 See R. Villata, *La trasparenza dell’azione amministrativa*, cit. at 2, 539 (arguing that secrets have always to ensure constitutionally protected interests, as only such interests may “justif[y] and balanc[e] the sacrifice to the need for knowability”).

25 See G. Ferrari, *L’avventura del segreto nell’Italia Repubblicana negli anni tra il ’60 e l’80*, in *Aa.Vv.*, *Il segreto nella realtà giuridica italiana* (1983), 77. The Author stigmatizes the opinion that, by moving from the assumption that secrecy is indicative of an authoritative regime, ends up “demonizing each secret, characterizing it as a sort of deadly sin, and opposing to it rhetorically the model of the glass house.” Secrets – the Author continues – may well exist in a democratic system, provided that they are used in defense of interests that are considered worthy of being protected. *Id.*, at 78. See, also, R. Laschena – A. Pajno, *Trasparenza e riservatezza nel processo amministrativo*, 1 *Dir. proc. amm.* 5

3. First Interpretations of Administrative Transparency

Prior to the passage of Law No. 241/1990, scholars had already inspected about a possible definition of transparency, a definition that lacked for a long time within positive law. During the 1986 edition of the Varenna conference – an annual conference that has been held for decades and every year is devoted to a subject matter concerning public administration and its law – Villata sought to determine the meaning of administrative transparency. In his opinion, transparency did not consist in a specific legal institution, but it was rather “an attitude of administration, an objective or a criterion, to which the carrying out of [administrative] action by public subjects should be adapted.”²⁶ Furthermore, Villata correctly understood that access to administrative documents was not the only institution within – or related to – the administrative procedure that was capable of implementing transparency. The further instruments of transparency, in his view, were the following²⁷: the ability to be present when the administration was carrying out administrative action and forming a record, and – in more general terms – the participation to the administrative procedure; the publicity of administrative records, in its various forms; the motivation²⁸ of the adjudication – i.e., of the act that concludes an administrative procedure and embodies the decision of the administration²⁹. By

(1990) (observing that even though it confers a broad discretion, the secrecy power – i.e., the power of a public administration to impose a given secret – is legitimate and inevitable, as it enables the administration to carry out its functions and thus to take care of one or more public interests provided for by law).

26 R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 528.

27 *Id.*, 528-529.

28 To simplify things, I prefer to use the literal translation from the Italian term “*motivazione*,” instead of the phrase “statement of reasons.” This phrase is found, for instance, in the translation of Law No. 241/1990 into English provided by C. de Rienzo and amended up to July 1, 2010. See *The Italian Administrative Procedure Act – Law No. 241 dated 7 August 1990*, 2 IJPL 373 (2010).

29 R. Villata argued that since it was capable of revealing the reasons and purposes – at least, the stated ones – of the administrative action, motivation carried out a function of defense of the individual involved in an

the time Law No. 241/1990 was enacted, therefore, the ability of multiple institutions of the administrative procedure to be instrumental in realizing transparency had already been grasped in literature. Villata also expressed doubts about the possibility to give actual implementation to the metaphor of the glass house referred to administrations³⁰.

By taking up Villata's stance after the enactment of Law No. 241/1990, some scholars meant transparency as a concept capable of bounding the entire public administration to achieving an objective of openness. Chieppa considered transparency as "[a] rule of conduct of public administration."³¹ By making administrations' decision-making process more visible than it was in the past, Law No. 241/1990 – the Author observed – sought to cope with people's general disaffection towards public powers³². Transparency, indeed, fosters public participation³³ and is essential to detecting any wrongdoing in the exercise of power by administrations³⁴. Furthermore, Arena proposed two possible

administrative procedure and made it possible the exercise "of the so-called democratic control of citizens over the administration." *Id.*, 529. See also A. Cassatella, *Il dovere di motivazione nell'attività amministrativa* (2013); B. Lubrano, *Recenti orientamenti in tema di motivazione degli atti amministrativi*, in F.G. Scoca – A.F. Di Sciascio (eds.), *Il procedimento amministrativo ed i recenti interventi normativi: opportunità o limiti per il sistema Paese?* (2015), 31.

³⁰ Villata characterized the metaphor as a "slogan" and criticized it for the misleading message it conveyed. R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 534. Since secrecy is at times necessary for the protection of the legal system, Villata borrowed an image created by Meloncelli a few years earlier – the image of a glass house "with many windows that are screened or may be screened." *Id.*, at 535 (referring to A. Meloncelli, *L'informazione amministrativa* (1983), 35 nota 39).

³¹ R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, 3 *Dir. econ.* 616 (1994).

³² *Ibid.*

³³ *Ibid.* (arguing that increasing the transparency of administrations' decision-making process means increasing the chances for participation, and participation – in turn – "means not separating with barriers and screens the management of public affairs from citizens, [but rather] bring them back closer to public affairs.")

³⁴ R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, cit. at 31, 619 (pointing out that imposing transparency upon administrations results

acceptations of the concept of transparency. The first one enjoyed an extension that proved being extremely broad, as it embraced “practically the entire administrative activity.”³⁵ This acceptance of transparency, therefore, spans a series of administrative procedure institutions, which have in common the ability of implementing transparency³⁶. The institutions Arena pinpointed were more numerous than those mentioned by Villata. In addition to the latter, the list included the following institutions³⁷: circulation of information among administrations³⁸; the officer responsible for a procedure³⁹; the notice (or communication) of the commencement of a procedure⁴⁰; the obligation for the administration to conclude a procedure with an explicit adjudication within a time limit established by the law⁴¹; the preliminary determination of criteria and methods administrations have to follow in granting subventions, allowances, and other measures consisting in economic advantages⁴². Arena added two instruments of transparency that fell within the function of communication entrusted to administrations: the establishment of a public relation office

in bringing to light “anomalous situations of usurpation of powers or inaction by public administrations.”)

35 G. Arena, *Trasparenza amministrativa*, in XXXI Enc. giur., (1995), 2.

36 *Ibid* (contending that according to this interpretation, transparency constitutes “l’elemento «trasversale» [...] underlying the analysis of institutions that are very different but share the fact of being, in various ways, factors of greater administrative transparency”).

37 *Ibid*. As for translation of the institutions contained in Law No. 241/1990 into English, I mainly rely upon the English version of the law provided by C. de Rienzo that I already mentioned. See *The Italian Administrative Procedure Act*, cit. at 28, 369.

38 See M.P. Guerra, *Circolazione dell’informazione e sistema informativo pubblico: profili giuridici dell’accesso interamministrativo telematico*, 2 Dir. pubbl. 525 (2005).

39 Articles 4-6, Law No. 241/1990. See A.F. Di Sciascio, *Il responsabile del procedimento tra d.lgs. 163 del 12 aprile 2006 (Codice dei Contratti Pubblici) e legge 190 del 6 novembre 2012 (Legge “anticorruzione”)*, in F.G. Scoca & A.F. Di Sciascio (eds.), *Il procedimento amministrativo ed i recenti interventi normativi*, cit. at 29, 99.

40 Article 7, Law No. 241/1990.

41 Article 2, Law No. 241/1990.

42 Article 12, Law No. 241/1990.

within every administration⁴³, and the set of communications directed to users in the provision of public services⁴⁴. Even though the present Article is focused on the trilateral relation between transparency, access to administrative records, and publicity, I have deemed it proper to point out that a series of institutions related – more or less directly – to the administrative procedure contribute to realizing transparency⁴⁵.

4. The Regulation of Transparency

4.1. The Evolution of the Principle of Transparency in Legislation

Since its entry into force, Law No. 241/1990 recognized a dichotomy between access to records and publicity, two institutions that have in common the feature of being instrumental in ensuring transparency. The 1990 legislator appealed to transparency and participation to realize the passage from the concept of administration-bureaucracy to that of participated administration⁴⁶. The right to access has been traditionally deemed to contribute significantly to increasing not only the efficiency and effectiveness of administrative activity⁴⁷, but also – and above all – the level of democracy of a legal system. By resulting in overcoming a relation between the administration and citizens based upon the strict supremacy of the former over the latter, the right to access to administrative documents implied the adoption

43 See D. Borgonovo Re, *L'organizzazione per la comunicazione: gli URP*, in G. Arena (ed.), *La funzione di comunicazione nelle pubbliche amministrazioni* (2001), 129. See, also, G. Pizzanelli, *L'amministrazione colloquiale e gli uffici per le relazioni con il pubblico*, 6 Ist. fed. 991 (2004).

44 See G. Piperata, *La comunicazione nei servizi pubblici*, in G. Arena, *La funzione di comunicazione nelle pubbliche amministrazioni*, cit. at 43, 165.

45 For an analysis of the various institutions that are capable of implementing transparency within the administrative procedure, see P. Tanda, *Le molteplici espressioni del principio di trasparenza*, 2 Nuove aut. 329 (2007).

46 See T. Miele, *Il procedimento amministrativo e il diritto di accesso. Lo stato di attuazione della legge 7 agosto 1990, n. 241 con ampia rassegna di giurisprudenza* (1995), 181.

47 See F. Cuocolo, *Art. 22*, cit. at 11, 532.

of “organizational models usually participated and thus [...] democratic.”⁴⁸ The original version of the law on administrative procedure explicitly identified access to records as an instrument of transparency, but it assigned nature of general principle only to publicity. Transparency was not included among the general principles of administrative activity, either. However, the 1990 legislator was well aware that access to records had to be combined with the publication of records on administrations’ initiative, and thus without a previous request filed by an individual. Indeed, an article that is found within chapter V of Law No. 241/1990 – Article 26 – is devoted to publication, and originally was concerned with the publication of the categories of administrative acts with general content expressly mentioned. Transparency decree properly repealed Article 26, paragraph 1, which prescribed the publication of a series of general administrative acts concerning the organization and functioning of administrations⁴⁹, to prevent a patent duplication of legislative provisions⁵⁰. The other two paragraphs of the article, instead, are still in force. Even so, the publicity as meant in Article 26, too, contributes to making administrative action more democratic⁵¹.

Law February 11, 2005, No. 15 reformed Law No. 241/1990 as a whole. Article 1, paragraph 1, letter a), of Law No. 15/2005 inserted the principle of transparency into Law No. 241 and

48 *Id.*, 532-533.

49 See P. Alberti, *Articolo 26*, in V. Italia (ed.), *L’azione amministrativa* (2005), 1095 (noting that the scope of the obligation of publication established by Article 26 covered most of administrative acts with general content). For a deep theoretical analysis of general administrative acts in the Italian legal system, see G. della Cananea, *Gli atti amministrativi generali* (2000).

50 Article 53, paragraph 1, letter a), transparency decree.

51 See M. Spagnuolo, *La comunicazione negli enti locali* (2001), 24. For a stance criticizing the non-fungibility between access to records and publications of acts pursuant to Article 26, see M. Mazzamuto, *Sul diritto d’accesso nella L. n. 241 del 1990*, 6 *Foro amm.* 1578 (1992). See also D. Corletto, *Pubblicità degli atti amministrativi*, in XXV *Enc. giur.* (1991), 1 (arguing that publicity as provided for by Article 26 of Law No. 241/1990 ensures “potential, both practical and legal, [of the categories of administrative acts identified by the article] to be subject of knowledge, apprehension, perception by individuals, whether determinate or not.”)

assigned it the status of general principle governing administrative activity. In literature, however, it has been argued that inserting this principle into the law was tantamount to a merely formal operation, since transparency was already implicitly included among general principles under the original version of the law on administrative procedure⁵². This addition brought in by the 2005 reform, therefore, did not have a significant impact on the regulation of administrative action and ended up being “superfluous.”⁵³ Furthermore, Article 15 of Law No. 15/2005 rewrote entirely Article 22 of Law No. 241/1990, which contains – *inter alia* – the main definitions relevant to the subject matter of access to records, as well as the requirements of eligibility to exercise the right of access. Pursuant to the new paragraph 2 of Article 22, access to administrative documents is a general principle aimed at fostering participation and ensuring impartiality and transparency of administrative action.

In 2009, the legislation referred to as a whole as Brunetta reform entailed “a genetic mutation” of the concept of transparency⁵⁴. Article 4, paragraph 7, of Law March 4, 2009, No. 15 – delegation law – and Article 11, paragraph 1, of the legislative decree that implemented the delegation – Legislative Decree October 27, 2009, No. 150 – prescribed “total accessibility” of information held by administrations. Such accessibility was ensured by the publication of information on administrations’ official websites. A series of obligations of publication imposed upon administrations were comprised in a broader reform of administrative structures, which ranged from the establishment of new mechanisms for measuring and assessing public employees’

52 See V. Cerulli Irelli, *Osservazioni generali sulla legge di modifica della L. n. 241/90 – I parte*, Giustamm.it 1-2 (2005). The Author has found proof of his assertion in the fact that Law No. 241/1990 was at times referred to as “law on transparency,” as a series of institutions it contains are aimed at making administrative action knowable – and actually known – outside the administrative apparatus, and thus at realizing transparency. *Id.*, 2.

53 *Ibid.*

54 F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, 8 *Federalismi.it* 3 (2013).

performance to the modification of the control system⁵⁵. Transparency, therefore, gained a new meaning. In addition to the traditional procedural transparency, which carried out the function of defense of the individual involved in an administrative procedure, transparency was directly linked up to organizational aspects of administrations.

In its original version, transparency decree was titled "Reorganization of the regulation concerning the obligations of publicity, transparency and dissemination of information by public administrations." It implemented a delegation entrusted to the Government by Article 1, paragraph 35, of Law November 6, 2012, No. 190, better known as anticorruption law. Transparency decree enhanced the scope of obligations of publication incumbent on administrations. While the Brunetta reform had related total accessibility to information and data on administrations' organization and personnel, transparency decree added a considerable series of obligations of publication concerning administrative activity⁵⁶.

In 2014, a limited reform resulted in altering the scope of transparency decree. A decree-law - i.e., a legislative instrument, to which the Government is constitutionally entitled to resort only to meet needs of extraordinary necessity and urgency - extended the direct, total application of the provisions of transparency decree to independent administrative authorities. In this regard, I see it proper to start off by pointing out that establishing such an extension by decree-law seems to clash with the purposes of rationalization and coordination transparency decree pursued. Apart from that, the reform at issue forced administrative authorities to stop implementing the decree in its original text and abide by it as amended. Under Article 11, paragraph 3, of the

55 For an analysis of both such aspects, see F.G. Grandis, *Luci ed ombre nella misurazione, valutazione e trasparenza della performance*, 1 *Giorn. dir. amm.* 23 (2010).

56 On extension of mandatory disclosure to the domain of administrative activity, see E. Carloni, *I principi del codice della trasparenza*, in B. Ponti (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33. Analisi della normativa, impatti organizzativi ed indicazioni operative* (2013), 33-34.

original version of the decree, independent authorities of guarantee, oversight and regulation had to apply the decree in conformity with the provisions contained in their own regulations, and thus they were granted a certain level of discretion in implementing the decree itself⁵⁷. As a result, those authorities' overall regulatory framework turned out to be not only – as was predictable – rather ragged, but also characterized by a tendency of partial compliance with transparency decree and – especially – with its general principles⁵⁸. Article 24-*bis*, paragraph 1, of Decree-Law June 24, 2014, No. 90, converted with amendments into Law August 11, 2014, No. 114, rewrote Article 11 of transparency decree and shifted the reference to independent authorities from paragraph 3 to paragraph 1. The new formulation of paragraph 1 prescribed that authorities of guarantee, oversight, and regulation equate to public administrations as defined in Article 1, paragraph 2, of the 2001 consolidation law on civil servants⁵⁹. The direct consequence was the mandatory application of transparency decree in its entirety by independent authorities. To put it differently, the privileged regime they enjoyed in comparison to other administrative bodies – a regime that appeared to be hardly justifiable both logically and systematically⁶⁰ – ceased.

The legislator addressed transparency once again – but, unlike the previous one, this legislative intervention turns out to be very significant – with Law August 7, 2015, No. 124, also known as “Madia Law.” In general, this law provided for a large-scale reorganization of State administrations, as well as a revision and rearrangement of some regulatory sectors by deploying the instrument of legislative delegation. Among the subject matters subject to revision was transparency as regulated by Legislative Decree No. 33/2013. Article 7, paragraph 1, of the law conferred

57 See C. Raiola, *La trasparenza nelle Autorità indipendenti*, 2 *Giorn. dir. amm.* 166 (2015).

58 *Id.*, 166-167.

59 Legislative Decree March 30, 2001, No. 165.

60 See F. Giglioni, *L'ambito di applicazione (artt. 1, comma 3, 11, 48, 49, commi 2 e 4)*, in B. Ponti, (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013*, n. 33, cit. at 56, 136.

upon the Government a delegation to enact, by six months from entry into force of the law itself, one or more legislative decrees aimed at bringing integrations and corrections to transparency decree. The same provision also established eight leading criteria implementation of the delegation should follow. The criterion pinpointed by letter h), first part, had a pivotal value and prevailed over the others on a substantial level. After clarifying that the obligations of publication already contained in transparency decree were confirmed and thus remained effective, this criterion instructed the Government to introduce freedom of information by recognizing to anyone the right of access to administrative records, regardless of the existence of a qualified interest.

Legislative Decree May 25, 2016, No. 97 implemented the delegation. The new Article 2, paragraph 1, of transparency decree identifies as subject of the decree anyone's freedom of access to data and documents held by public administrations, unless one of the limits established to protect some essential public or private interests applies. Civic access and the publication of documents and data – as well as information⁶¹ – concerning organization and administrative activity realize the freedom of access. Article 2-*bis*, paragraph 1, of transparency decree establishes the scope of it by referring to the definition of public administration provided by the consolidation law on civil servants, but extends it to independent authorities, on which Decree-Law No. 90/2014 had already intervened, and to port authorities. Accordingly, Article 11 of transparency decree was repealed. Furthermore, Article 2-*bis*, paragraph 2, includes into the scope of the decree the following entities: economic public bodies; professional associations; private law bodies that meet the requirements set down in letter c). Those requirements are concerned with three different aspects of their activities or structure: amount of budget; funding; composition of the management or direction body.

61 See, *infra*, section 6.1.

4.2. Transparency Decree and the Systematic Arrangement of Obligations of Publication

Over time, there has been a reversal of the trend featuring the frequency of the resort to access to records and publicity at legislative level to ensure transparency of administrations. More generally, technological progress – namely, the development of ICT technologies – determined the emersion of new methods and instruments to make information in possession of administration knowable. Such methods and instruments use the Internet for dissemination of information and documents, while they do not imply the exercise of the traditional right of access⁶². Consequently, the Italian legislator was forced to deal with a new concept in this subject matter – the concept of availability of documents, data, and information. This concept refers to a form of publicity that targets an indiscriminate mass of people – *rectius*, users. The online availability of information differs markedly from access to administrative documents, traditionally provided for in the Italian legal system as a right conferred only upon those, who possessed a qualified interest and thus could claim its violation.

The 2005 legislation confirmed – and even strengthened – such a difference. Indeed, on the one hand, in reforming the general law on administrative procedure, Law No. 15/2005 restricted individual entitlement to exercising the right of access. In this regard, by taking up the traditional metaphor of the public administration's glass house, an authoritative scholar created the telling image of “[a] house with darkened glasses”⁶³ to describe the impact of such an amendment on administrative transparency. In addition, the same reform law codified into Article 24, paragraph 3, of Law No. 241/1990 an entrenched opinion of administrative courts, according to which the filing of access requests aimed at conducting only a generalized control over the

62 See E. Carloni, *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, 2 Dir. pubbl. 586 (2005).

63 A. Sandulli, *La casa dai vetri oscurati: i nuovi ostacoli all'accesso ai documenti*, 6 Giorn. dir. amm. 669 (2007).

functioning of administrations is forbidden⁶⁴. On the other hand, Article 54 CAD (Italian acronym standing for Code of Digital administration)⁶⁵ pinpointed the contents of public administrations' official website for the first time in the Italian legal system. This provision, which enumerated a series of "public data"⁶⁶ administrations had to insert onto their websites, was completely rewritten by transparency decree. Article 52, paragraph 3, of the decree deprived Article 54 CAD of any substantial content, thereby turning it into a reference provision – i.e., a provision that limits itself to referring to transparency decree for determination of the content of those websites. The legislator gradually established an enormous number of obligations of publication, thereby forcing administrations to broaden the content of their own institutional websites.

For a decade from 2005, publicity meant as fulfillment by administrations of obligations of publication prescribed by statutory law turned out to be the cardinal institution of administrative transparency in Italy⁶⁷. Until the reform of transparency decree prescribed in 2015 and accomplished in 2016, obligations to publish documents, data, and information constituted the core of the "peculiar Italian way to transparency [...]".⁶⁸ In the period 2005-2012, legislative provisions containing obligations of publication imposed upon administrations proliferated to an extraordinary extent⁶⁹. The legislator, however,

64 Article 24, paragraph 3, of Law No. 241/1990 reads as follows: "Access applications made with the aim of generally monitoring the work of public authorities shall not be admissible." As for court decisions mentioning this provision, see, e.g., TAR (Italian acronym standing for Regional Administrative Tribunal) Sicily – Palermo, section II, March 24, 2015, No. 725; Council of State, section III, March 4, 2015, No. 1009, available on www.giustizia-amministrativa.it.

65 Legislative Decree March 7, 2005, No. 82.

66 Article 1, paragraph 1, letter n), CAD defines public data as data that are "knowable by anyone."

67 See M. Savino, *La nuova disciplina della trasparenza amministrativa*, 8-9 *Giorn. dir. amm.* 797 (2013).

68 *Ibid.*

69 The Author underlines the existence of a sort of "legislative euphoria," which led in the period under consideration to adopting roughly one hundred

had inserted all these provisions without creating simultaneously an organic framework capable of keeping them together⁷⁰. By assigning the Government delegation to draw up and adopt transparency decree, the legislator pursued the commendable purpose to ensure rationalization and coordination to the unsystematic multitude of legislative provisions that had gradually added obligations of publication. Ensuring that the set of rules governing a certain sector be systematic means improving the coherence of that sector through operations of regulatory technique capable of correcting mistakes and remedying the inaccuracy of legislation⁷¹. Because of that, the entire legal system is set to become more systematic.

Transparency decree, however, did not limit itself to furnishing a systematic arrangement to the myriad of obligations of publication imposed by diverse laws upon administrations over the years. It also provided the subject matter of transparency with an innovative regulation, which started by establishing a new definition of the principle of transparency itself. The recent reform brought in by Legislative Decree No. 97/2016 amended both the principle of transparency and some of the obligations of publication⁷², thereby demonstrating that the impressive

provisions establishing many obligations of publication. Those provisions were endowed with “emphatic principled statements [and with] weak enforcement mechanisms.” M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 797-798.

⁷⁰ In 2012, the CIVIT (Italian acronym standing for Commission for the Evaluation, Transparency, and Integrity of public administrations) – later replaced by the ANAC (standing for National Anticorruption Authority) – conducted a public consultation among administrations and found 35 cases of obligations of publication overlapping. M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 798 note 16 (referring to CIVIT, *Per una semplificazione della trasparenza. Esiti della consultazione sugli obblighi di pubblicazione previsti in materia di trasparenza e integrità*, December 2012).

⁷¹ See M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione (art. 1, commi 15-16 e 26-36)*, in B.G. Mattarella & M. Pellissero (eds.), *La legge anticorruzione. Prevenzione e repressione della corruzione* (2013), 114.

⁷² Article 12, which is concerned with the publication of regulatory and general administrative acts, and article 42, which lays down rules on the

operation of arrangement realized in 2013 just boiled down to a step – albeit fundamental – of a broader process of rationalization. Therefore, it may well happen that the legislator makes other adjustments – whether more or less significant – to obligations of publication in the next future. On the contrary, it does not seem to be very likely that the Parliament will make further substantial amendments to the content of the principle of transparency.

4.3. The Principle of Transparency and Prevention of Corruption

Article 1, paragraph 1, of transparency decree as amended by Legislative Decree No. 97/2016, defines administrative transparency as total accessibility to documents and data held by public administrations. The new version of the definition differs from the previous one on three counts. Firstly, the new principle of transparency does not include an express reference to the notion of information, which is also missing in the scope of the freedom of access as pinpointed by Article 2⁷³. Secondly, the legislator shifted the distinction between administrations' organization and activity as the two components of the scope of obligations of publication into Article 2, paragraph 1. Thirdly, the definition of the principle of transparency that was effective in the period 2013-2016 established a unique purpose of transparency itself – to foster a widespread control by citizens over administrations in carrying out institutional functions and in

publication of contingent and urgent orders and other extraordinary measures adopted to tackle emergencies, respectively open and close the enumeration of obligations to publish. Among the amendments made in 2016 to this enumeration is the addition of Articles 15-*bis* and 15-*ter*. The former requires companies controlled by public authorities to publish not only adjudications, by which cooperation and advisory assignments or professional assignments are conferred, but also data related to assignments judicial or administrative bodies entrust either to administrators or to experts. Furthermore, Legislative Decree No. 97/2016 rewrote Article 31, which contains obligations of publication concerning a set of controls over organization and administrative action. Article 37, which regulates mandatory disclosure in the field of public procurement, was also rewritten.

⁷³ See, *infra*, section 6.1.

using public resources. This purpose was and still is at the heart of the concept of transparency. It recognizes citizens – whether or not they have an ongoing relation with a given administration – an active role in overseeing public authorities’ conduct. Had the legislator not envisioned such an active role, the principle of transparency would have been characterized by frail content. Therefore, even though the 2016 reform added two purposes into the definition of transparency – to protect citizens’ rights and to further participation in administrative action⁷⁴ – the exercise of a widespread control over administrations remains the main purpose. The reform has even favored the achievement of this purpose by providing for a generalized access to administrative records. Such access, indeed, results in overcoming – in the cases, in which the new civic access is set to apply – the clash that Article 24, paragraph 3, of Law No. 241/1990 brought about by forbidding access applications aimed at conducting the widespread control mentioned above⁷⁵.

Article 1, paragraph 2, encompasses a plurality of contents. Firstly, the provision refers to various forms of public law secrecy existing in the legal system and to the protection of personal data, which have to be ensured. It also mentions the democratic principle, which transparency decree contributes to realizing. The core of transparency, indeed, is closely intertwined with the need

74 Actually, the latter purpose was already inscribed in the scope of the one consisting in the oversight of public administrations. Such an oversight, indeed, constitutes one of the forms participation in administrative activity may take. To put it differently, carrying out control over administrations by using the set of instruments the regulation of transparency offers means participating in administrative organization and activity. The opposite, instead, is not true: Participation in administrative activity does not necessarily entail anyone’s ability to conduct an oversight over the way administrations act in performing their institutional functions. The regulatory framework existing in the Italian legal system until a few years ago was an example thereof. As a result, the regulation of transparency in Italy had not reached yet an advanced development back then.

75 See A. Simonati, *La trasparenza amministrativa e il legislatore: un caso di entropia normativa?*, 4 Dir. amm. 762 (2013).

for democracy⁷⁶. Secondly – and above all – the provision identifies the constitutional principles transparency decree is capable of realizing⁷⁷. Transparency as meant in the decree, however, may well be unable to realize all such principles at the same time in a given situation and thus force to choose which ones to implement and which to sacrifice⁷⁸. Thirdly, the last part of Article 1, paragraph 2, embraces – in turn – diverse contents. It starts off by highlighting that transparency is instrumental in ensuring “individual and collective freedoms, as well as civil,

76 See P. Tanda, *Trasparenza (principio di)*, III Dig. disc. pubbl. 887 (update, 2008) (arguing that “the democracy rate of a legal system, which is based on the so-called information society, necessarily depends on the amount of information that circulates within and, thus, on the degree of transparency of the legal system”).

77 The constitutional principles Article 1, paragraph 2, enumerates are the following: equality (Article 3 Const.); impartiality and good functioning of public administration (Article 97 Const.); responsibility (Article 28 Const.); civil servants’ integrity and loyalty in serving the nation (Article 54 Const.). The decree also entrusts transparency the function to ensure that administrations be efficient and effective in using public resources. Economy and effectiveness constitutes expressions of the constitutional principle of good functioning of administration that are codified at Article 1, paragraph 1, of Law No. 241/1990 as general criteria administrations have to conform to in laying down their own organization and in carrying out administrative action. See, e.g., V. Cerulli Irelli, *Lineamenti del diritto amministrativo* (2010), 258. Efficiency and effectiveness in the usage of public resources may contribute to increasing the degree of accountability of administrations, which has been traditionally modest in the Italian experience. See D.U. Galetta, *Transparency and Access to Public Sector Information in Italy: A Proper Revolution?*, 6 IJPL 235 (2014). The obligation incumbent on administrations to account for the usage of such resources has acquired an autonomous, peculiar value since the recent reform. Legislative Decree No. 97/2016, indeed, added Article 4-bis into transparency decree. This article implements the principle of transparency in the usage of public money by providing for the creation of a website, whose denomination is “Public Money.” It enables anyone to consult data concerning payments made by administrations. See, in general, E. D’Alterio, *I controlli sull’uso delle risorse pubbliche* (2015).

78 It has been noted, for instance, that implementation of publicity and transparency in carrying out administrative action may occur to the detriment of needs for readiness and quickness of such action. See F. Caringella, *Manuale di diritto amministrativo* (2015), 1073; E. Casetta, *Manuale di diritto amministrativo* (2015), 55.

political, and social rights.” Such a statement, actually, appears to be somewhat grandiloquent. Especially the reference to civil and political rights, indeed, could have already been inferred from paragraph 1, where the democratic principle is mentioned⁷⁹. Transparency, indeed, fosters individuals’ participation in administrative activity and – more generally – in the decision-making process affecting society as a whole⁸⁰. Literature has long acknowledged the existence of a direct relation between transparency, on the one hand, and participation in public powers and rights and freedoms guaranteed by the Constitution, on the other hand⁸¹. The core of the last part of Article 1, paragraph 2, however, lies in the remainder of the provision, where transparency is assigned both the function to realize the right to good administration⁸² and that to contribute to creating an “open administration at the citizen’s service,” i.e., to ensuring open government⁸³.

Finally, Article 1, paragraph 3, points out that by enacting transparency decree, the legislator exercised the State’s exclusive

79 By the same token, the principle of equality mentioned in the previous part of Article 1, paragraph 2, may be meant as already including an implicit reference to social rights.

80 See F. Cuocolo, *Il diritto di accesso ai documenti amministrativi (presupposti costituzionali)*, 3 Quad. reg. 1041 (2004).

81 See G. Abbamonte, *La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema*, in Aa.Vv. (eds.), *L’amministrazione pubblica tra riservatezza e trasparenza – Atti del XXXV Convegno di Studi di scienza dell’amministrazione, Varenna, 21-23 settembre 1989* (1991), 19.

82 On this right, see, e.g., F. Trimarchi Banfi, *Il diritto ad una buona amministrazione*, in M.P. Chiti & G. Greco, *I Trattato di diritto amministrativo europeo* (2007), 50; L. Perfetti, *Diritto ad una buona amministrazione, determinazione dell’interesse pubblico ed equità*, 3-4 RIDPC 789 (2010); D.U. Galetta, *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l’entrata in vigore del Trattato di Lisbona*, 3 Dir. amm. 601 (2010); Id., *Riflessioni sull’ambito di applicazione dell’art. 41 della Carta dei diritti UE sul diritto ad una buona amministrazione, anche alla luce di alcune recenti pronunce della Corte di giustizia*, 1 Dir. Un. eur. 133 (2013).

83 The phrase “open administration” found in transparency decree, indeed, is substantially nothing else than the literal translation into the Italian language of the concept of open government. See E. Carloni, *L’amministrazione aperta. Regole strumenti limiti dell’open government* (2014).

legislative power recognized by the Constitution in the two following subject matters: determination of the essential level of benefits concerning civil and social rights to be ensured on the entire national territory (Article 117, paragraph 2, letter m), Const.); coordination of statistical information and information on data of state, regional and local administration (Article 117, paragraph 2, letter r), Const.). Article 1, paragraph 3, adds that by establishing the essential level of benefits that has to be ensured uniformly over the whole Italian soil, the provisions of transparency decree also pursue the purpose to prevent and fight corruption and maladministration⁸⁴. In this regard, however, the Italian legislator limited itself to implementing provisions and standards that had been stipulated at international and supranational levels a decade before transparency decree was enacted⁸⁵.

Legislative Decree No. 13/2013, in its original version, explicitly assigned transparency realized through the publication of documents, data, and information on administrations' official websites the purpose to prevent corruption. The dissemination of records and data as a means for the prevention of corruption and maladministration is not a novelty ascribable to transparency decree, as the Brunetta reform was already driven by such intention. Only under transparency decree, however, the prevention of corruption became the predominant purpose. As

84 The same provision also considers the determination of the essential level of benefits instrumental in achieving transparency, but transparency is the subject of the decree. The meaning of this specific clause is that by pinpointing the essential level of benefits, the provisions of transparency decree realize transparency. It is quite evident that this clause ends up laying down a sort of tautology and thus could have been omitted.

85 Article 1, paragraph 1, of Law No. 190/2012 noted that this law implemented provisions contained in two different multilateral conventions: Article 6 of the United Nations Convention against Corruption (UNCAC), adopted by the United Nations General Assembly on October 31, 2003; Articles 20 and 21 of the Criminal Law Convention on Corruption of the Council of Europe, adopted on January 27, 1999. The Italian Parliament ratified and executed the former convention with Law August 3, 2009, No. 116, and the latter with Law June 28, 2012, No. 110.

already noted, Legislative Decree No. 150/2009 was mainly aimed at ensuring an improvement in the degree of efficiency of public administrations through a complicated system of evaluation of personnel's performance. In order to achieve this objective, the decree prescribed the online dissemination of data concerning administrations' organization. By adding a conspicuous series of obligations of publication concerning administrative activity, transparency decree strengthened significantly the purpose to prevent corruption⁸⁶.

Citizens may play a pivotal role in prevention of corruption. Since transparency decree was enacted, indeed, they have had at their disposal a broad framework of documents, data, and information pertaining to administrations' organization and activity. Citizens, therefore, are able to perform an oversight function over every aspect of the powers exercised by administrations, and this function acts – at least potentially – as deterrent against any abuse of such powers and – more generally – against any lawbreaking⁸⁷. The prevention of corruption is still at the heart of the transparency system after the 2016 reform. By equating the new right of civic access to obligations of publication, Legislative Decree No. 97/2016 resulted in splitting the subject of transparency decree, whose title, too, was broadened with an explicit reference to the right of civic access. Article 5, paragraph 2, of transparency decree, added by Legislative Decree No. 97/2016, entrusts a generalized access to records the purpose to foster forms of widespread control over the carrying out of institutional functions and the usage of public resources by administrations. Those forms of widespread control are – or, at least, should be – capable of preventing corruption or contributing to exposing cases of corruption within public administration.

86 See G. Gardini, *Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?*, 8-9 Giorn. dir. amm. 883 (2014).

87 See F. Merloni, *La trasparenza come strumento di lotta alla corruzione tra legge n. 190 del 2012 e d.lgs. n. 33 del 2013*, in B. Ponti, *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33*, cit. at 56, 18.

5. Transparency, Publicity and Access to Records

5.1. Publicity and Transparency

The original version of transparency decree generated doubts about a possible coincidence between the concept of transparency and that of publicity. According to Article 2, paragraph 1, the former consisted in a series of obligations of publications, which the provision called “obligations of transparency,” enumerated in chapters II to V of the decree. Article 2, paragraph 2, which was not amended by the recent reform, specifies that the fulfillment of those obligations occurs through the publication of documents, data, and information held by administrations on their own official websites. The consequence seemed to be a substantial overlapping between the two concepts⁸⁸. In this regard, transparency decree turned out to be consistent with the approach to transparency that the legislator followed in the period 2005-2012 and actually maintained until Madia law was enacted. As already noted, this approach focused on publicity in the form of obligations to publish, while it placed access to administrative records in a marginal position⁸⁹. Actually, even though first the Brunetta reform, then transparency decree appeared to bring about a correspondence between transparency and publicity, the two notions kept their own autonomy, as the recent reform confirmed.

Marrama drew a quite precise line of distinction between the concepts of transparency and publicity before Law No. 241/1990 entered into force. An administration is transparent – the Author argued – when it is able to meet needs “of clearness, of comprehensibility, of non-equivocality” in organizing its structure and carrying out administrative action⁹⁰. By meeting such needs, the concept of transparency protects citizens’ legitimate

88 See A. Simonati, *La trasparenza amministrativa e il legislatore*, cit. at 75, 761.

89 See M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione*, cit. at 71, 113.

90 R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, *Dir. proc. amm.* 419 (1989).

expectation⁹¹ and ensures compliance with the constitutional principles established by Article 97 Const. Transparency consists in “a *quid pluris*”⁹² compared with both access to administrative records and publicity.

Publicity represents the mere static condition of a record. Therefore, on the one hand, the concept of publicity has a neutral character and lacks “autonomous axiological pregnancy;”⁹³ on the other hand, ensuring publicity may not suffice to realize transparency. As a result, publicity may be deemed eligible to meet the need for transparency only according to a case-by-case analysis. Such a reasoning leads up to conclude that transparency consists in the substantial, dynamic aspect of publicity. While the latter ensures the knowability – i.e., the merely potential knowledge – of a record, transparency requires not only that a record be knowable, but also that the substantial content of the record may be grasped in its entirety. To be more precise, it has been contended that documents, data, and information published on administrations’ official websites – or made otherwise available to the universality of citizens – are able to implement transparency only if they jointly possess three features. Those features are the following: the subject of the record to be divulged has to be complete; the record has to be published or otherwise released, so that the full comprehension of its content – as already noted, from a substantial perspective – be possible for anyone; disclosure of the record has to reach an indefinite mass of individuals⁹⁴.

91 On the legitimate expectation that administrative information – i.e., information coming from administrations and related to administrative activity – generates in citizens, see F. Merusi, *L’affidamento del cittadino* (1970), 161-174.

92 F. Manganaro, *L’evoluzione del principio di trasparenza amministrativa*, 22 *Astrid Rassegna* 3 (2009).

93 R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza*, cit. at 90, 421.

94 See F. Merloni, *Trasparenza delle istituzioni e principio democratico*, in Id. (ed.), *La trasparenza amministrativa* (2008), 11. The last requirement just mentioned has a different application with respect to the two components of transparency. As far as online publication is concerned, the very fact of an administration publishing a record on its own official website meets the

Therefore, publicity *per se* may be unable to meet an individual's demand for knowledge. In such a case, publicity – by means of publication – boils down to a mere intermediate step towards the final goal – achieving the actual knowledge of documents, data, and information through the comprehension of their core meaning⁹⁵.

To explain the distance existing between the concepts of publicity and transparency, it has been proposed the telling example of the budget of a local government, namely the budget of a municipality⁹⁶. Indeed, the mere online publication of such a budget is quite likely not to suffice to ensure transparency, as the data it contains – normally of aggregate nature – are hard to comprehend for ordinary people. National or local authorities' budgets, indeed, usually tend to take a mere picture of active and passive posts. In this regard, Article 3, paragraph 1-*bis*, of transparency decree, added by the 2016 reform, vests the ANAC the power to pinpoint documents, data, and information that have to be published in a summarizing, aggregate form, instead of integral form⁹⁷. The purpose of this power is to protect the privacy of individuals that would suffer a damage if their personal data should be subject to indiscriminate disclosure. Therefore, the legislator envisioned a conflict between opposing interests and opted for a possible sacrifice of the interest in fully comprehending records in favor of the need to safeguard the privacy of those, whose personal data are included in the records.

requirement, as anyone having Internet connection may consult it by simply opening the website – namely, by opening the section of the website called “Transparent Administration.” This section is requisite, pursuant to Article 9 of transparency decree. As regards access to records, instead, the requirement at issue entails that a model of generalized access must be preferred to a model of restricted access.

⁹⁵ See G. Arena, *Trasparenza amministrativa*, in S. Cassese (ed.), *Dizionario di diritto pubblico* 5947 (2006).

⁹⁶ *Ibid.*

⁹⁷ In particular, according to the provision, by exercising this power, the ANAC prescribes that “the publication in integral form” of documents, data, or information subject to mandatory disclosure be replaced by the publication “of summarizing information, elaborated by aggregation.”

At the same time, Article 14, paragraph 1-*quater*, of transparency decree, added by Legislative Decree No. 97/2016, addresses the very comprehensibility of public administrations' budgets. The provision requires that the acts conferring public manager assignments and the relative contracts establish transparency objectives, the achievement of which is imposed upon the appointed managers. Such objectives are aimed at ensuring that data subject to publication may be understood by ordinary people, especially with regard to budget data on expenses and costs for personnel. The publication of these data have to occur not only in aggregate form, but also in analytic form.

5.2. Access to Records as Instrument of Transparency

Access to administrative records has been traditionally considered an instrument capable of implementing transparency⁹⁸, despite having a different structure – i.e., different functioning – from publicity⁹⁹. The original version of Law No. 241/1990 expressly recognized such a feature of access. The flaw – a sort of original sin – that marked the Italian legal system was the adopted of a restricted access to records instead of a generalized one¹⁰⁰. Since its entry into force, indeed, Law No. 241/1990 has codified access to administrative documents as a conditioned right, which only those possessing a qualified interest were entitled to exercise. Despite formally recognizing the right of access to “anyone,” the original text of Article 22, paragraph 1, required the existence of the requester's need to protect legal positions that were relevant to the legal system¹⁰¹. Therefore, the so-called *quisque de populo* – i.e., a person that is totally unrelated

98 See R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 531.

99 See M. Occhiena, *I principi di pubblicità e trasparenza*, in M. Renna – F. Saitta (eds.), *Studi sui principi del diritto amministrativo* (2012), 145.

100 See F. Merloni, *Trasparenza delle istituzioni e principio democratico*, cit. at 94, 9.

101 See G. Arena, *La trasparenza amministrativa ed il diritto di accesso ai documenti amministrativi*, in Id. (ed.), *L'accesso ai documenti amministrativi* (1991), 32 (observing that by referring to such a need, the portion of the provision following up the term “anyone” resulted in lessening the innovative significance of the provision itself).

to the administration holding the records she would like to obtain or that may not invoke anyway a qualified interest – was not allowed to exercise the right of access. Moreover, as already noted above, the 2005 reform of the general law on administrative procedure brought about a further restriction of individual entitlement to this right. Nonetheless, the right of access to administrative documents has always constituted an instrument capable of implementing transparency.

It seems to me questionable at least an opinion emerged in literature over the last decade. By relying on the existence of a model of restricted access in the Italian legal system, it has refused to define access to records as an instrument of transparency. Access to records as regulated in Italy – this opinion has argued – did not manage to reverse the traditional rule of secrecy but, on the contrary, ended up confirming it¹⁰². Therefore, access to administrative documents did not have any involvement in the relation between transparency and publicity¹⁰³. In other words, this theory has interpreted the traditional regulation provided for in Italy in the subject matter of transparency as characterized by the existence of two separated relations that did not interact with each other: the relation between transparency and publicity, on the one hand, and the relation between secrecy and access to records, on the other hand.

The Italian regulation of access to administrative documents disappointed from the outset those who hoped for the adoption of a model of generalized access. Actually, in 1990, when

102 See C. Marzuoli, *La trasparenza come diritto civico alla pubblicità*, in F. Merloni, *La trasparenza amministrativa*, cit. at 94, 45 and 50; C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all'informazione*, 1 Dir. pubbl. 99 (2007). Bonomo has clearly explained this theory by pointing out that the right of access to administrative documents “did not place itself in [the Italian] legal system as reversal of the rule of secrecy, but as an additional remedy recognized only to someone, to overcome at times a situation that kept maintaining a character of persisting secrecy.” A. Bonomo, *Il Codice della trasparenza e il nuovo regime di conoscibilità dei dati pubblici*, 3-4 Ist. Fed. 729 (2013).

103 See C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all'informazione*, cit. at 102, 132-135.

the general law on administrative procedure was passed, opting for such a solution would not have been as far-fetched as it might appear *prima facie*. A generalized access, indeed, would have come to light long ago had the Italian Parliament turned into law without any amendments the draft bill on access to administrative documents elaborated by the Nigro Commission in 1984¹⁰⁴. Article 1, paragraph 1, of the draft bill, indeed, recognized to “anyone” the right of access to administrative documents, entitlement to exercising which was not subject to any individual limitations¹⁰⁵. The legislator, however, appealed to practical reasons to exclude the acceptance of a generalized access. Such a form of access – it was pointed out – would have undermined the efficiency and effectiveness of administrative activity. Individuals, indeed, may have filed an excessive amount of access applications, thus causing administrations’ paralysis¹⁰⁶. Actually, administrative courts have used analogous argumentations – based on the need to safeguard administrations’ efficiency and effectiveness – to justify the prescription laid down in Article 24, paragraph 3, of Law No. 241/1990, which prevents individuals from filing access applications solely aimed at carrying out a widespread control over the conduct of public administrations¹⁰⁷.

I argue that at least two reasons lead to objecting to the theory mentioned above. Firstly, even though it was instrumental in meeting only needs for defense of an individual somehow

104 The text of the draft bill can be found in G. Corso & F. Teresi, *Procedimento amministrativo e accesso ai documenti* (1991), 173 and in Quad. reg. 1349 (1984).

105 Therefore, unlike the provision that was finally inserted into Law No. 241/1990, the 1984 draft bill meant the term “anyone” not just formally, but substantially. See, *supra*, note 101.

106 See P. Alberti, *L'accesso ai documenti amministrativi*, cit. at 16, 128. For an analysis of concerns about the impact of a generalized access on administrations’ organization, as expressed by members of Parliament when the provision for a right of access to administrative documents was under consideration, see A. Cingolo, *Dal diritto di accesso al diritto alla curiosità: breve storia di una involuzione*, 2 *Rass. avv. Stato* 311 (1994).

107 See, e.g., TAR Lazio – Rome, section II, December 13, 2011, No. 9709; Council of State, section VI, January 12, 2011, No. 116, in www.giustizia-amministrativa.it.

related to the administration holding the sought records, the restricted access constituted all along an important remedy for public administration' secrecy¹⁰⁸. The etymological meaning of transparency - i.e., to make something visible¹⁰⁹ - suggests that access to administrative documents marked - albeit in cases where the applicant proved her position to be privileged by virtue of a qualified interest - the starting point of an openness path that has reached a considerable degree of advance just recently. Secondly, drawing a rigid line of demarcation between access to records, on the one side, and the relation transparency-publicity, on the other side, may lead up to advocating a misleading coincidence between the concepts of transparency and publicity. The fact that this coincidence emerged in literature after the enactment of transparency decree¹¹⁰ appears to prove my assumption.

Furthermore, I argue that the coincidence just mentioned may not be championed any longer after the 2016 reform of transparency decree. By assigning the same value to the set of obligations to publish documents, data, and information and to access to records - in the new form of a generalized access - the reform overcame the peculiar Italian way to transparency existing previously¹¹¹. By equating access to records to the publication of documents, data, and information administrations accomplish on their own initiative pursuant to a legislative provision - the so-called proactive disclosure - Legislative Decree No. 97/2016

108 See F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi*, cit. at 12 (underscoring that since Law No. 241/1990 was enacted, access to administrative documents has constituted an indispensable "picklock [instrumental in] the democratic guarantee of transparency of public powers' *agere*") (italics in original).

109 See G. Arena, *Administrative Transparency*, cit. at 1, 111 note 12 (noting that "transparency" is a compound word of Latin origin, which puts together two Latin terms - "trans" and "apparent" - and literally means "that which is seen-through [...].") Similarly to Arena, R. Chieppa pointed out that "transparency" derives from Latin terms "trans" and "parere," and means "to make appear, i.e., to let see, to let know." Chieppa, *La trasparenza come regola della pubblica amministrazione*, cit. at 31, 615.

110 See, *supra*, section 5.1.

111 See M. Savino, *IL FOIA italiano: la fine della trasparenza di Bertoldo*, 5 Giorn. dir. amm. 594-596 (2016).

created an actual double track for transparency. Since such a double track turns out to be essential to any FOIA legislation worldwide, it represented a major step towards the adoption of a FOIA regime in the Italian legal system.

6. The Right of Civic Access

6.1. The New Right of Civic Access: From Enforcement Instrument to Sheer Right of Access to Records

The most prominent novelty the original version of transparency decree brought in consisted in civic access, provided for by Article 5. Legislative Decree No. 97/2016 amended this institution significantly. Apparently, Article 5, paragraph 1, may indicate that the institution maintain the nature it undoubtedly had when transparency decree was enacted – the nature of enforcement instrument¹¹². Civic access, indeed, was aimed at enforcing obligations of publication, as anyone was entitled to invoke it to demand that a given administration fulfill one or more of those obligations when the administration was failing to do so. This function to remedy administrations' inaction towards obligations imposed by law still exists today. However, paragraph 2 of Article 5, added by Legislative Decree No. 97/2016, patently vests the new civic access with the character of a generalized access. Pursuant to the provision, anyone has the right to gain access to administrations' documents, data, and information other than those already subject to mandatory publication. The 2016 reform removed any restriction to individual entitlement to access provided for by the general law on administrative procedure. The only limitations to the exercise of the right of access consist in such exceptions as the new transparency decree establishes to protect some essential interests. Previously included within the framework of sanctions the original text of transparency decree was endowed with, therefore, civic access became a sheer right of

112 See M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 804; F. Merloni, *Istituzioni di diritto amministrativo* (2016), 301.

access to documents and data held by administrations¹¹³. Even before the reform, actually, the scope of civic access could be meant as being broader than a formal interpretation of Article 5 suggested by envisioning an application of the institution beyond the cases in which complete fulfillment of obligations of publication was demanded¹¹⁴.

By rewriting Article 5 and – in particular – by inserting a new paragraph 2 into it, Legislative Decree No. 97/2016 implemented the leading criterion established by Article 7, paragraph 1, letter h) of Law No. 124/2015. This criterion required – *inter alia* – that freedom of information be realized and all restrictions to individual entitlement to the right of access erased. As far as the subject of the new right of civic access is concerned, Article 5, paragraph 2, identifies it as including documents and data held by administrations and by authorities equating to them pursuant to transparency decree itself, but not also information. Such a provision proves consistent with Article 2, paragraph 1, of transparency decree, which by the same token excludes information from the subject of freedom of access.

In literature, the legislator's choice to leave information out of the scope of civic access has been welcomed as proper¹¹⁵. I do not agree. Firstly, as the same scholar taking a stand in favor of the solution adopted by the legislator has acknowledged, the notions of data and information do not coincide¹¹⁶. Therefore, a specific mention of the latter, which enjoys autonomy on a theoretical level, would have been proper. Secondly – unlike the provisions contained in articles 5, paragraph 2, and 2, paragraph 1 – Article 5,

113 See D.U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D.Lgs. n. 33/2013*, 5 *Federalismi.it* 9 (2016).

114 See B. Ponti, *Il regime dei dati oggetto di pubblicazione obbligatoria: i tempi, le modalità ed i limiti della diffusione; l'accesso civico; il diritto di riutilizzo*, in *Id.*, *La trasparenza amministrativa*, 99-101.

115 See D.U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione*, cit. at 113, 8-9 (arguing that the inclusion of information among the subjects of civic access as provided for in the original text of transparency decree was misleading).

116 *Id.*, at 9.

paragraph 1, includes information in the subject of obligations of publication, the fulfillment of which anyone may demand. An objection to this argument may underline that access to records – in the form of the new right of civic access – and proactive disclosure by administrations fulfilling obligations established by law are two different institutions, and thus they may well be assigned a different scope. However, since these institutions have in common the purpose to realize transparency, the discrepancy just mentioned appears to be noteworthy. Thirdly, adding information to the scope of civic access would have improved the systematic character of the legal system in the subject matter of transparency. In particular, it would have ensured a better coordination – at least on a regulatory-formally level – with special forms of access such as access to environmental information¹¹⁷ and access to records and information in possession of local authorities¹¹⁸.

Unlike Article 5, paragraph 2, the following paragraph of the same article includes information in its scope. In addition to excluding any restrictions to individual entitlement to exercising the right of civic access, paragraph 3 provides that a civic access application does not require a motivation but has to pinpoint the documents, data, and information the requester wishes to obtain. In light of what I explained above, since it explicitly comprises information in the possible subject of a civic access application, Article 5, paragraph 3, turns out to be more inclusive than the previous paragraph, as well as than Article 2, paragraph 1, and Article 1, paragraph 1, of transparency decree¹¹⁹.

117 Legislative Decree August 19, 2005, No. 195 – “Implementation of Directive 2003/4/EC on public access to environmental information.”

118 Article 10 of Legislative Decree August 18, 2000, No. 267 – “Consolidated text of laws on the legal system of local authorities,” better known as Consolidation law of local authorities or TUEL (the relative Italian acronym). Article 43, paragraph 2, TUEL is concerned, instead, with the right of access recognized to local authorities’ councilmen and councilwomen.

119 See M. Bombardelli, *Nuove questioni relative alla legittimazione soggettiva e all’oggetto del diritto di accesso*, 8 *Giorn. dir. amm.* 1114-1115 (2010) (stressing that the concept of information is broader than that of administrative document).

Article 5, paragraph 4, establishes a rule that exempts applicants from paying almost any fees for the exercise of civic access. This rule applies whether the requested records are electronic or paper-based. However, the release of a copy of such records is subject to the payment of duplication costs if the records are reproduced “on material supports.” The provision specifies that the burden to prove the sustained cost shall lie on the administration. There is no exception to the rule excluding fees, instead, whenever a civic access application is aimed at gaining not a copy of the requested records but just their mere exhibition.

Paragraph 5 and the following ones of Article 5 deal with procedural aspects. First of all, paragraph 5 is concerned with a traditional institution related to access to records – the notice of an access application directed to counter-interested persons¹²⁰. Prior to the adoption of a model of generalized access, obviously, the regulation of such an institution was tailored to the traditional form of access – the one provided for in Law No. 241/1990¹²¹. The counter-interested persons the proceeding administration pinpoints have a ten-day period to file a reasoned opposition. The timeframe within which the administration has to process and respond to a given access application is stayed during these ten days just to enable counter-interested persons to intervene in the administrative procedure and state their case.

120 As I already did with respect to the term “motivation,” by using the terms “counter-interested persons,” I opted for a literal translation from Italian instead of using a circumlocution. C. de Rienzo, for instance, translated the Italian terms “*soggetti controinteressati*” with the following circumlocution: “parties with conflicting interests.” See *The Italian Administrative Procedure Act*, cit. at 28, 396.

121 Article 3 of the regulation adopted by the Government to implement Law No. 241/1990 as reformed in 2005 in the subject matter of access to administrative documents – Decree of the President of the Republic April 12, 2006, No. 184 – is devoted to the notice to counter-interested persons towards access applications. For an analysis of this institution, see S. Morrone, *Notifica ai controinteressati*, in R. Tomei (ed.), *La nuova disciplina dell'accesso ai documenti amministrativi* (2007), 129; S. Secci, *Art. 3 (Notifica ai controinteressati)*, in Aa.Vv., *Il regolamento sull'accesso ai documenti* (2006), 214.

Paragraph 6 assigns the proceeding administration a thirty-day timeframe to decide on an access application by adopting an explicit adjudication. The officer responsible for prevention of corruption and transparency has the power to gain information on the progress made by administrative procedures pertaining to access applications. Pursuant to paragraph 7, this officer is also the authority the requester may turn to for a review of the decision if the access application has been denied – in whole or in part – or if the administration has not processed the application by the deadline established by law. Substantially, the review consists in an administrative remedy, on which the officer responsible for prevention of corruption and transparency has to adopt a final determination within twenty days from the filing of the review request¹²². If the right of civic access has been exercised at regional or local level – i.e., if a civic access application has been filed to a regional or local authority – the administrative remedy may also be directed to the civic defender (ombudsman) having territorial competence¹²³. The requester may challenge the decision of the proceeding administration on the civic access application or that on the application review adopted by the officer responsible for prevention of corruption and transparency before the administrative judge pursuant to Article 116 of the code of administrative process¹²⁴.

122 The situation at issue differs significantly from the one in which an individual files an application aimed at obtaining the re-examination of an affair already decided by the competent body of the administration through an explicit adjudication. In such a case, by filing the application, the individual intends to obtain a new exercise of the administrative power on the affair by seeking to have an administrative court ascertain the administration's inaction on the re-examination application. The individual, however, possesses a merely factual interest, and the administration that has received the application is not obliged by Article 2 of Law No. 241/1990 to adopt a new determination on the affair. The administration, indeed, enjoys discretion about "*an*" (Latin term standing for "whether") to carry out a new administrative procedure and conclude it with an explicit adjudication. See TAR Lazio – Rome, section II-ter, March 20, 2015, No. 4401.

123 Article 5, paragraph 8, transparency decree.

124 Legislative Decree July 2, 2010, No. 104 and subsequent amendments.

As far as the enforcement of the provisions of transparency decree, the 2016 reform maintained the overall framework of sanctions but made some amendments to it. The main ones are the following. Two different amendments were concerned with Article 43, devoted to the officer responsible for transparency. Firstly, Legislative Decree No. 97/2016 repealed Article 43, paragraph 2, which assigned to this officer the power to update the three-year program for transparency and integrity, now replaced by the three-year plan for prevention of corruption. Secondly, paragraph 4 was amended. While previously only the officer responsible for transparency had an oversight function and was responsible for ensuring “the regular implementation of civic access,” the 2016 reform entrusted the same function and responsibility to the managers in charge of administrations. Furthermore, Legislative Decree No. 97/2016 markedly strengthened the enforcement character resulting from Article 45 of transparency decree. Firstly, prior to the reform, a more generic formulation featured paragraph 1 of this article. The provision assigns the anticorruption authority an oversight function over the fulfillment of obligations of publication. In addition to the power to prescribe the removal of conduct or deeds contrasting with plans and rules on transparency, which has remained unchanged, the original version of transparency decree provided for the authority’s generic power to order the adoption of acts or adjudications required by law. This power, too, still exists, but the 2016 reform added a more pregnant power of the ANAC to order that administrations fulfill obligations of publication contained in legislative provisions within a thirty-day timeframe. Secondly, paragraph 4 was subject to some amendments. In particular, now the provision explicitly clarifies that failing to fulfill one of those obligations of publication constitutes a disciplinary tort. Furthermore, as regards the anticorruption authority’s duty to communicate any violations of such obligations to the appropriate office of the inspected administration, Legislative Decree No. 97/2016 removed any reference to the seriousness of the violations

committed¹²⁵. Finally, the 2016 reform intervened on Article 46, paragraph 1, to make it consistent with the new, broader subject of transparency decree. Under the original version of the provision, failing to fulfill obligations of publication constituted an element to consider in evaluating managerial responsibility, as well as a possible reason for liability for the relevant administration's image damage, and it was also taken into consideration for the granting of benefits to managers. The reform linked the same consequences to cases in which civic access is denied, put off, or limited absent application of one of the exceptions to openness established by transparency decree.

In light of the overall regulation provided for in transparency decree, there exist two issues, the implications of which will probably be clearer after some time has passed from the entry into force of the 2016 reform¹²⁶. Those issues are the following: the room that is left to the form of access provided for by chapter V of Law No. 241/1990, i.e., the form of access that I have referred to as traditional access; the actual scope of the exceptions to the new civic access. As far as the first issue is concerned, in reforming transparency decree, Legislative Decree No. 97/2016 confirmed the force of the traditional access by expressly referring to it¹²⁷. As a result, it is likely that administrative practice and administrative courts' decisions will bring about the formation of categories of situations in which – *a priori* – there should be no doubt about the application of

125 The original version of the provision, instead, began with the following clause: "In consideration of their seriousness," where the adjective "their" was referred to all cases in which there was either default of or only partial compliance with obligations of publications by administrations.

126 Article 42, paragraph 1, of Legislative Decree No. 97/2016 required that all authorities to which transparency decree applies conform to the provisions of the decree itself and ensure implementation to the new civic access within six months from the entry into force of the reform, which occurred on June 23, 2016.

127 Article 5, paragraph 11, of transparency decree – added by Legislative Decree No. 97/2016 – indeed clarifies that "the different forms of access of interested persons provided for by chapter V of Law August 7, 1990, No. 241" are still effective.

traditional access. While the original version of transparency decree was effective, the Council of State, in decision No. 5515/2013¹²⁸, excluded – on a theoretical level – any possible overlapping between transparency decree and chapter V of Law No. 241/1990, thus between their respective scope. The two regulations – the Council of State argued – have different purposes and a different subject, despite the “common inspiration to the principle of transparency.”¹²⁹

What position will the Council of State take after the reform? Where exactly will the border between the two regulations be drawn? At the moment, it does not seem to be easy to answer these questions. In the decision mentioned above, the Council of State reformed the first-degree decision, the one adopted by the regional administrative court¹³⁰, which had meant civic access more extensively than the original text of Article 5 of transparency decree allowed by referring to the FOIA model. Because of the amendments brought in by Legislative Decree No. 97/2016, transparency decree has gotten much closer to this very model. Therefore, in determining the actual relation between the right of civic access and the traditional access, the administrative judge – namely, the Council of State – will have to take into adequate consideration that the former embodies a model of generalized access. To put it differently, any possible attempt to enhance traditional access excessively would end up frustrating the spirit of the 2016 reform.

6.2. The Exceptions to the Right of Civic Access Established by Article 5-bis

Article 5-bis of transparency decree, added by Legislative Decree No. 97/2016, establishes exceptions to the right of civic access and thus to openness. The original version of transparency decree pinpointed limits to the exercise of civic access in a

128 Council of State, section VI, November 20, 2013, No. 5515, in www.giustizia-amministrativa.it.

129 *Ibid.*

130 TAR Lombardy – Milan, section IV, July 18, 2013, No. 1904, in www.giustizia-amministrativa.it.

somewhat generic fashion. The legislator, indeed, substantially limited itself to referring to the limits to access to administrative documents laid down by Article 24, paragraphs 1 and 6, of Law No. 241/1990¹³¹. Article 5-*bis*, too, uses general clauses to identify exceptions to civic access, but enumerates them more precisely than the law on general procedure did. In this regard, the legislator appeared to give significance to theoretical classification. It divided exceptions into two categories: those instrumental in protecting public interests and those relating to cases, in which disclosure of documents, data, and information would cause harm to individuals as such – i.e., absent implications for the community of people. Such a distinction corresponds to a different location within the article: Paragraph 1 contains exceptions aimed at safeguarding public interests, while paragraph 2 is devoted to exceptions concerning private interests. Furthermore, paragraph 3 provides for some traditional limitations to access to records and publicity – namely, state secret and other cases of secrecy established by legislative provisions. This provision is manifestly modeled upon Article 24, paragraph 1, of Law No. 241/1990, which indeed is mentioned in the provision.

In particular, Article 5-*bis*, paragraph 1, enumerates as limitations to the new right of civic access the following interests – *rectius*, the following matters and underlying interests: a) public security and order; b) national security; c) defense and military issues; d) international relations; e) state financial and economic policy and stability; f) law enforcement proceedings; g) the regular carrying out of investigations. All these matters and interests embody the typical sovereign functions of a state. The other category of exceptions is composed of interests aimed at protecting individuals' personal data (letter a)), at ensuring freedom and secrecy of correspondence (letter b)), and at safeguarding economic and commercial interests of natural or legal persons (letter c)). Privacy and individuals' property related to their business appear to be the two main values underpinning

131 Article 4 of transparency decree, repealed by Legislative Decree No. 97/2016.

this category of exceptions. As far as the third subcategory is concerned, Article 5-*bis*, paragraph 2, letter c), specifies its scope by expressly referring to intellectual property, copyright, and commercial secrets. In its opinion on the draft legislative decree aimed at amending transparency decree, the Council of State pointed out that the large number of exceptions the new civic access is subject to might induce administrations to mean them extensively. If that should happen, the significance of transparency decree as reformed could be at least compromised¹³². The ANAC is assigned the power to adopt operational guidelines on the content of exceptions¹³³. Only practice, however, may show whether administrations will tend to interpret exceptions in an extensive or strict fashion.

7. Access for Scientific Purposes to Data Gathered in the Carrying Out of Statistical Activities

Article 5-*ter* of transparency decree, added by Legislative Decree No. 97/2016, provides for a special form of access for scientific purposes that is concerned with elementary data gathered by entities of the National statistic system¹³⁴ in carrying out their institutional functions. The provision confers entitlement to exercising this form of access upon researchers belonging to universities, research entities, and public or private institutions included in a list drawn up by Eurostat or deemed eligible for access. The same entitlement lies in such research institutions as the authority empowered to release the sought data deem eligible

132 See Council of State, Advisory section for regulatory acts, opinion of February 24, 2016, No. 515/2016, par. 11.14, www.giustizia-amministrativa.it.

133 Article 5-*bis*, paragraph 6, of transparency decree specifies that the ANAC establishes the guidelines in accord with the Authority for the protection of personal data (Italian Data Protection Authority - DPA) and after the Unified Conference has expressed its opinion thereupon. The direct involvement of this independent authority is proper in consideration of the importance that the value of privacy has, especially within the category of exceptions provided for in Article 5-*bis*, paragraph 2.

134 See M.P. Guerra, *Ordinamento statistico*, in S. Cassese, *Dizionario di diritto pubblico*, cit. at 95, 3977.

for the access. It is this very authority, therefore, that assesses the existence of entitlement to access. The university or other entity filing an access application has to subscribe, by means of a representative, a statement identifying methods of using the requested data. Such methods are supposed to ensure the privacy of individuals involved in carrying out statistical activities. A further condition for exercising the special form of access at issue is the approval of a research proposal by the authority holding the data. The proposal advanced by the applicant has to provide the following information: the purpose of the research; the reason for the access application and – thus – the need to know in the specific case; the names of researchers participating in the research; the methods employed to conduct it; “the results that are meant to be disseminated.”

The rules laid down by Article 5-*ter* lead to considering this special form of access extraordinarily burdensome for the institution resorting to it. As a result, a paradox emerges. On the one hand, transparency decree as reformed in 2016 provides for a generalized access, which is meant to realize freedom of information and whose restriction is possible just to protect some essential interests. On the other hand, the access for purposes of scientific research to data gathered in carrying out statistical activities is subject to such strict requirements that its usage appears to be discouraged. A paradoxical effect derives from the regulations contained – respectively – in Articles 5 and 5-*ter*. Researchers – whose access to data ought to be eased, as it is instrumental in the conduct of scientific research – end up being penalized because of burdens that prove excessive if compared to those to which the ordinary civic access is subject.

8. Conclusions

The evolution of legislation leads to deeming outdated the first interpretations of the concept of transparency that sprang up prior to Law No. 241/1990 and when its original text was effective. However, they already grasped the broad scope of transparency and pinpointed various institutions capable of

implementing transparency itself. The Brunetta reform essentially meant transparency as total accessibility to information and data concerning administrations' organization. Transparency decree then enhanced the scope of the definition considerably by extending it to records concerning administrative activity. The Brunetta reform and transparency decree certified a reversal of the trend, which legislation had fostered from 2005, in the relation between access to administrative documents and publicity as instruments of transparency. The latter – in the form of obligations to publish documents, data, and information on administrations' official websites – prevailed markedly over the former in the decade 2005-2015.

The concepts of transparency and publicity do not coincide, as the former has a broader meaning. It implies not only accessibility to records and information, but also the need that their content be comprehensible and clear. Only if all these requirements are met, knowability may turn into actual knowledge. Since fulfilling obligations of publications on administrations' official websites does not ensure *per se* that what is published possesses these requirements, it is proper to keep distinguishing – on a theoretical level – between publicity and transparency. This distinction has found confirmation in transparency decree as amended by Legislative Decree No. 97/2016.

The 2016 reform of transparency decree resulted in equating civic access to obligations of publication imposed upon administrations as to the function to implement transparency. Civic access is not just an instrument aimed at enforcing such obligations anymore, but constitutes now a generalized access manifestly modeled upon typical FOI (freedom of information) legislation¹³⁵. Such legislation requires a double track for transparency – access to records recognized to anyone with limited exceptions, on the one hand, and proactive disclosure of documents and information by administration, on the other hand

135 Actually, such legislation has a scope much broader than access to records, data, and information, which is only a component of it. See T. Mendel, *Freedom of Information: A Comparative Legal Survey* (2008), 29-41.

– and that is exactly what the 2016 reform realized. The traditional access provided for by Law No. 241/1990, however, is still effective and is destined to act whenever the new right of civic access will not apply. Only practice will determine the relation between the two forms of access. Practice will also show the actual scope of the exceptions to the new civic access – and to obligations of publication – established by Article 5-*bis* of transparency decree.

Overall, the current regulatory framework of transparency leads to formulating two final observations. On the one hand, it is probably better not to be too enthusiastic – and thus to discuss with due caution – about the adoption of an actual FOIA in the Italian legal system¹³⁶. On the other hand, it is undeniable that the house of the administration is finally starting to have walls made of glass.

136 See M. Savino, *IL FOIA italiano*, cit. at 111, 594. The Author argues that in reforming transparency decree, Legislative Decree No. 97/2016 embraced the FOIA model. On the one hand, the new right of civic access is consistent with a FOI regime. On the other hand, however, the fact that the 2016 reform of transparency decree did not repeal traditional access should not be overlooked. At the moment, indeed, there is no practical evidence supporting the Author's assertion that traditional access will become "superfluous" over time. *Ibid.*