# THE ITALIAN FREEDOM OF INFORMATION ACT 2016. WHY TRANSPARENCY-ON-REQUEST IS A BETTER SOLUTION(*)

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*Abstract*

The relationship between Public Administration and Transparency is often misunderstood and misrepresented, especially in the political science discourse. While most part of administrative action gives rise to the issuing of individual acts and measures, with either favourable or unfavourable effects, the 'deliverable' most political scientists have in mind when addressing transparency issues is rather administrative rule-making, if not even primary and secondary legislation. In the latter case, while referring to citizens-administration relationship, it is rather the elected-voters relationship the background idea political scientists have concretely in mind. This leads to all sorts of misunderstandings and false expectations as to the concrete 'deliverables' of FOI policies. The paper, first of all, refers only to the activity of Public Administrations when issuing individual acts and measures and or administrative rule-making. Secondly, it takes into consideration and compares the two possible FOI's options: information released pro-actively and information released upon request, to express a positive judgment on the choice made with the Italian FOIA 2016, rather in favour of information released upon request. Indeed, only information released upon request - and with the possibility of the applicant to concretely interact with a public administration's officer - can turn transparency from just a 'manifesto commitment' to a concrete reality in the citizens-public administration relationship.

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## 1. Introduction

FOI regulations are certainly a wonderful tool used by demagogical politicians in order to win the favour of naïve voters: but they do not automatically produce the desired change in the reality of citizens-public administration relationship.

According to a widespread opinion Freedom of Information (FOI) is rooted in the Enlightenment idea that information is the 'oxygen' of democracy[1].

In this specific 'cultural perspective' FOI regulations are often put forward as 'the solution' to the problem of democracy that is simply 'not democratic enough'[2].

When analysing national FOI regulations it appears that the principles they most commonly refer to are transparency, accountability, public participation and informing citizens[3]. FOI regulations are meant to increase transparency and openness, to

[1] B. Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 Governance: An International Journal of Policy, Administration, and Institutions 562 (2010). The international human rights NGO, Article 19, Global Campaign for Free Expression, has described information as "the oxygen of democracy". See at: https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf.

[2] A. Giddens, *Runaway World: How Globalization is Reshaping our Lives* (2000), 61.

[3] T. Mendel, *Freedom of Information: A Comparative Legal Survey* (2008), 141.

increase accountability, to improve the quality of government decision-making, to improve public understanding of decision-making, to increase public participation, to increase public trust[4].

The relationship between Public Administration and Transparency is nonetheless often misunderstood and misrepresented, especially in the political science discourse. While most part of administrative action gives rise to the issuing of individual acts and measures (adjudication), with either favourable or unfavourable effects, the 'deliverable' most political scientists have in mind when addressing transparency issues is rather administrative rule-making, if not even primary and secondary legislation. In the latter case, while referring to citizens-administration relationship, it is rather the elected-voters relationship the background idea political scientists have concretely in mind[5].

This leads, in my opinion, to all sorts of misunderstandings and false expectations as to the concrete 'deliverables' of FOI policies[6].

In the following paper I will therefore, first of all, refer only to the activity of Public Administrations (Agencies in the USA) when issuing individual acts and measures and or administrative rule-making.

In this specific context I will then take into consideration the two possible FOI's options: information released pro-actively (open data policies) and information released upon request (access to administrative documents).

Starting from this specific perspective I will explain the Italian FOI legislation, both before and after the recent legislative

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[4] B. Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government* 2010, cit. at 1, 564.

[5] Cfr., for instance, the authors quoted in the previous notes.

[6] Foia4Italy - a network of more than 30 civil society organizations that campaigned for the adoption of an Italian FOIA and logged 88,000 names on a petition for it - commented positively on the final result, while underlining some critical points. The strongest criticism was, however, based on such a misunderstanding as the one I have just referred to: as Foia4Italy essentially complains about the absence, in the Italian FOIA, of a participatory process concerning the *legislative reform* of the Italian Public Administration. It is therefore, in my opinion, a rather senseless criticism. See at: http://www.foia4italy.it/.

reform adopted by the *Renzi* Government, in order to highlight its essential contents and the most recent developments.

Contrary to widespread opinion which aprioristically identifies the pro-active disclosure model of FOI regulation as the best one, I will then argue that the recent Italian choice, rather in favour of information released upon request, is a good step forward, in the direction of real transparency. Indeed only information released upon request - and with the possibility of the applicant to concretely interact with a public administration's officer - can turn transparency from just a 'manifesto commitment' to a concrete reality in the citizens-public administration relationship.

## 2. Access to administrative documents and to public sector information in Italy before and after Law No. 241/90 on administrative procedure

According to Art. 97 of the Italian Constitution public offices shall be organized in such a way as to ensure efficiency (or, rather, a good performance: *buon andamento*)[7] and impartiality of Public Administration. To this regard it was previously pointed out in the reports of the Italian Constituent Assembly of 1946-48, that a general law on public administration was required also to regulate the possibility for citizens to view and obtain copies of administrative documents in order to "counter the bad habit prevailing in the public administration to hinder such knowledge"[8].

The constitutional background of the rules on access to documents is in any case wider than just the provisions of Art. 97 and Art. 98. It includes, first of all, the principles of democracy, protection of personal rights and equality set under Art. 1, 2, and 3 of the Italian Constitution; secondly, the general guarantee of those freedoms that provide a democratic connotation to the

[7] There isn't, in fact, a proper English translation for the term "*buon andamento*" which is in translated either as "efficiency" or as "proper conduct", depending on whether the emphasis is placed on the administration's performance, or on the relationship with the citizen.

[8] F. Cuocolo, *Commento all'articolo 22,* in V. Italia, M. Bassani (eds.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241 e regolamenti di attuazione)* (1995), 527.

citizen/authority relationship, most notably freedom of information, which is guaranteed under Art. 21 of the Italian Constitution but, moreover, by the entire Italian Constitution[9]. Further constitutional grounds supporting access to administrative documents are to be found also in Art. 24 and 113 of the Italian Constitution due to the broader guarantee that the right of access to administrative documents provides to the judicial protection of the rights and interests set forth therein[10].

After several failed attempts made in the previous decades, only in 1990 the Italian legislator finally succeeded in adopting a general regulation on administrative procedure (Italian APA - Law No. 241/90[11]), which implements also the above mentioned principles. Legal scholars agreed that, with the provisions on the right of access set forth under Art. 22 of Law No. 241/90, the principle of secrecy in administrative activities had finally been overturned in favour of the opposite principle of transparency[12].

Indeed, in its original version, Art. 22 of Law No. 241/90 explicitly provided that "[i]n order to ensure transparency in the administrative activities and to facilitate impartiality thereof, anyone who may be interested therein for the protection of legally relevant situations is granted the right to access administrative documents pursuant to the formalities established under this law." However, in the years following the introduction of the above-mentioned legislation, a restrictive interpretation approach began to widespread commonly in court rulings[13], aimed at equating the interest to gaining access to administrative documents to the so-called interest to bring a legal action. The

[9] B. Selleri, *Il diritto di accesso agli atti del procedimento amministrativo* (1984), 24.
[10] A. Sandulli, *La riduzione dei limiti all'accesso ai documenti amministrativi*, in Gior. dir. amm. 535 (1998).
[11] Law No. 241 of 11 August 1990 setting new rules concerning administrative procedure and the right of access to documents, published in the Official Gazette of 18 August 1990, No. 192.
[12] See A. Sandulli, *La riduzione dei limiti all'accesso ai documenti amministrativi*, cit. at 10, 535, who underlines the overcoming of the idea of secrecy as a subjective predicate (a document is secret just because it is of the public administration), for a transition to a concept of secrecy as an objective requirement of the document, rather related to the substance of the information contained therein.
[13] Italian Council of State, IV, 10 June 1996, No. 1024; VI, 7 December 1993, No. 966; VI, 19 July 1994, No. 1243; IV, 26 November 1993, No. 1036. See F.C. Gallo, S. Foà, *Accesso agli atti amministrativi*, in Dig. disc. pubb. 6 ss. (2000).

consequence of this was that the applicant was required to provide evidence of a *direct, concrete, and actual* interest to access administrative documents as is required, in the Italian system of administrative judicial protection, of anyone who wants to bring a legal action[14].

Later on a new piece of legislation was introduced, in 2005 (hereafter the 2005 Reform)[15], that radically changed the provision of Art. 22 of Law No. 241/90 and adopted the above mentioned restrictive interpretation established in court rulings. Therefore, the 'classical' right of access[16] is now granted – pursuant to Art. 22.1, letter b), of Law No. 241/90 – only to the stakeholders, who are to be understood as "all private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested".

A new provision was also introduced (in Art. 24.3), according to which "no requests of access made with the intention of generally monitoring the work of public administrative bodies shall be accepted".

Under the new legal regime a request of access under Art. 22 of Law No. 241/90 must therefore be duly motivated so as to show the qualified interest that is now necessarily required in order for the right of access to be granted.

According to widespread opinion this means that, with the 2005 Reform, transparency has been *de facto* expunged from the right of access provided for by Law No. 241/90[17].

However, the provisions of Art. 22 of Law No. 241/90 do not prevent the possibility to introduce a broader right of access in special sectorial legislations. This is the case, for instance, of

[14] R. Villata, *Interesse ad agire (Diritto processuale amministrativo)*, in XVII Enc. giur. Treccani 3 (1989).

[15] Law No. 15 of 11 February 2005 that introduces Amendments to Law No. 241 of 7 August 1990, relating to general rules on administrative action, published in the Official Gazette of 21 February 2005, No. 42.

[16] As distinct from what we will later on refer to as 'public access' (*accesso civico*). See *infra*, para. 3. ss.

[17] See E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. pubbl. *passim* (2009).

Legislative Decree No. 195/2005[18] on the environment, which makes environmental information available to anyone who applies for it, with no need to state or qualify his or her interest (*accesso ambientale*). And it is the case, also, for the public access to administrative documents (*accesso civico*) provided for now by Legislative Decree No. 33/2013 (see *infra*, para. 3. ss.).

### 3. The following step: from access to administrative documents to transparency developed as an "Open Data Policy"

Before describing the above mentioned new piece of legislation on public access to administrative documents (Legislative Decree No. 33/2013), and in order to correctly understand its origin and its innovative content, it is necessary to shortly retrace the evolutionary path leading to its adoption.

In 2003 the European Union adopted the so called Public Sector Information Directive[19] (hereafter the PSI Directive). Although the aim of the PSI Directive was only to establish a minimum set of rules governing the re-use (for private or commercial purposes) of existing documents held by public bodies of the Member States, and although the Directive aimed at building on the existing access regimes in the Member States, without changing the national rules on access to documents,[20] it did represent a starting point for the adoption of open data policies in many Member States, including Italy[21]. In fact, while it merely aimed at providing a minimal harmonization and did not pose any obligation to allow re-use of documents, *de facto* it encouraged a broader availability of public sector information

[18] Legislative Decree No. 195 of 19 August 2005, "Implementation of Directive 2003/4/EC on public access to environmental information," published in the Official Gazette of 23 September 2005, No. 222.

[19] Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, which was recently amended by Directive 2013/37/EU of the European Parliament and Council of 26 June 2013. See at: http://www.eurlex.eu.

[20] Directive 2003/98/EC cit., recital No. 9.

[21] Even in its 2013 amended version the adoption of 'open data' is not is not what the PSI Directive prescribes. Cfr. M. Van Eechoud, *Making Access to Government Data Work*, in 29-2016 Amsterdam Law School Legal Studies Paper Research 79 (2016).

with the idea that such an extended availability would represent some sort of added value also for the public body itself, by promoting transparency and accountability[22].

Following this Open Data Policy trend, in 2009 and in 2013 the Italian Government adopted two legislative decrees bearing the paradigmatic headings: "Optimization of productivity of public work and efficiency and transparency of the public administration" (Legislative Decree No. 150/2009[23]) and "Reorganization of the rules concerning the obligations of publicity, transparency and dissemination of information by public authorities" (Legislative Decree No. 33/2013[24]).

In this general Framework Art. 11 of Decree No. 150/2009 expressly stated that "transparency has to be understood as *full accessibility*, including publishing information on the institutional websites of the public administration bodies." Furthermore, it expressly specified that, contrary to the above mentioned provision of Art. 24.3 of Law No. 241/90 - which in its version post 2005 expressly excludes access to such a purpose -, this provision aims "at fostering widespread forms of monitoring, so as to make sure that the principles of efficiency and impartiality are complied with" (Art. 11.1).

As far as the pursued goals are concerned, transparency – as regulated by the legislator in 2009 – can be considered to be aimed at two main goals, i.e. the efficiency of the public administration, which is pursued through transparency on the performance of public administrations and public services, and prevention of corruption, which is pursued through transparency of the procedure and of the organization[25].

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[22] See now Directive 2003/98/EC as amended by Directive 2013/37/EU quoted above, recital No. 4.

[23] Legislative Decree No. 150 of 27 October 2009, published in the Official Gazette of 31 October 2009, No. 254.

[24] Legislative Decree No. 33 of 14 March 2013, published in the Official Gazette of 5 March 2013, No. 80.

[25] In accordance with the provisions of Art. 9 of the United Nations Convention against corruption, stating that "taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate".

The second goal was actually the focus of the subsequent Legislative Decree No. 33/2013, whose specific aim was to prevent and eradicate illegality in the Public Administration.

More specifically, Legislative Decree No. 33/2013 - in its version prior to the legislative changes of 2016 - obliged all public administration authorities to comply with the transparency requirements set forth in it and applicable to all of their activities, mainly by using the "institutional website" of each individual administration.

Information regarding the activity and the organization of the public bodies had therefore to be published on the home-page of the institutional websites in the section on "Transparent Administration", in order to allow citizens to have access to this information (and only to *this* information) without having to go through an authentication process or being identified in any manner[26].

Accordingly public administrations had to guarantee the quality of the information published on the institutional websites in compliance with the duty of disclosure established by the law, and had to ensure that such information is intact, currently updated, comprehensive, timely, user-friendly, easily understandable, easy to access, true to the original documents held by the administration, and indicate its origin and re-usability[27].

In this regard, section VI of Legislative Decree No. 33/2013, which governs the supervision of the implementation of provisions and sanctions, is particularly important. Indeed, the Italian legislator was stricter here than in the past as it introduced sanctions in case of failure to comply with the applicable rules, which provide for disciplinary, management, and administrative responsibilities, as well as the application of administrative sanctions, publication of the relevant measures, and cancellation of resources previously allocated to agencies or bodies[28].

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https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. Accessed on 10 June 2014.

[26] Specific restrictions to transparency are obviously provided for in order to guarantee a possible balance between the transparency obligation and the need to protect privacy.

[27] Art. 6 et seq. of Legislative Decree No. 33/2013.

[28] See Art. 46 et seq. of Legislative Decree No. 33/2013.

The transparency officer - instituted *ex novo* under Decree No. 33/2013 - is the key subject and in charge of monitoring that the public administrations comply with the applicable provisions[29].

The applicable sanctions apply both to the transparency officer, with reference to his/her specific duties, and to the managers of the Public administration and political bodies that are required to supply data in order to finalize the publication. In addition to the sanctions that are applicable to individual subjects, there are sanctions that are applicable to the relevant administrative decision, thus making it ineffective[30].

The regulatory framework described thus far shows - in my opinion rather clearly - that in this first version of Legislative Decree No. 33/2013 transparency was understood, primarily and essentially, as an "Open Data Policy", while totally neglecting the other aspect of transparency: namely the kind of transparency-on-request provided for by old Art. 22 of Law No. 241/90 on the right of access to administrative documents (see *supra*, para. 2).

There was nevertheless a rather peculiar exception to this general rule: old Art. 5.1. of Legislative Decree No. 33/201, which provided for a for a remarkably peculiar sanction and stated that "the obligation established under the legislation in force for the public administration to publish documents, information, or data implies the right for anyone to request such documents, information or data in case of failure to publish them". Which means that it implied a right to public access to such documents, information or data which had to be published but had not been!

It is, therefore, in this rather peculiar way that the so-called public access (*accesso civico*) finds its way into the Italian legal order. And, as I will explain in the following paragraphs, apart from this first paragraph of Art. 5 (which has remained

[29] The duties of this subject included: the obligation to update the Three-Year Programme for transparency and integrity (which also provides specific monitoring measures on the fulfilment of transparency duties and further measures and initiatives aimed at promoting transparency in coordination with the Anti-Corruption Plan) and to report any failure or delay in complying with the disclosure duties to the policy-making body, the Independent Assessment Body (*Organismo indipendente di valutazione* – OIV), the National Anti-Corruption Authority, and, in the most severe cases, the disciplinary office. See Art. 43 of Legislative Decree No. 33/2013.

[30] See Art. 15.2; Art. 26.3; Art. 39.3 of Legislative Decree No. 33/2013.

unchanged even in its wording) this is exactly the part of Legislative Decree No. 33/2013 which has recently undergone the most extensive revision, concerning both the meaning of public access and its scope of application.

### 4. Transparency and Public Access to administrative documents after the "*Madia* Reform": The Italian Freedom of Information Act

With an important Law of August 2015 (Law No.124/2015) the President of the Italian Council of Ministers, *Matteo Renzi*, together with the Minister for Public Administration, *Marianna Madia*, launched a general reform of the Italian Public Administration.

Law No.124/2015 (the so called "Madia Law")[31] - which was widely glorified in the press as a revolutionary law - contains important provisions concerning also the topic of access to administrative documents and to public sector information.

Such provisions, although they leave certainly enough room for future improvement (see *infra*, para. 5.), involve a fundamental change of perspective of the Italian legislator as to access to administrative documents and, as a matter of fact, state (for now) the victory of the transparency-on request approach (of which I am a strong supporter) over the transparency-by-pro-active-release-of-information approach, which had become quite fashionable among Italian scholars in recent times[32].

According to its Art. 7, "without prejudice to the obligations of publication", freedom of information through the right of access to data and documents held by public authorities, also by electronic means, shall be granted "to anyone, regardless of ownership of a legally protected situation", except in cases of secrecy or prohibition of disclosure provided for by law and within the limits necessary for the protection of public and private interests. The aim shall be to "promote widespread forms of control over the pursuit of official duties and the use of public

[31] Law of 7 August 2015, n. 124, published in the Official Gazette of 13 August 2015, and entered into force on 28 August 2015.

[32] See E. Carloni *L'amministrazione aperta. Regole strumenti limiti dell'open government* (2014), 17 ss.

resources"[33].

The above mentioned provision certainly deserves a positive comment. As I already underlined in a previous paper of mine[34], the current restriction contained in Art. 22, para. 1b (of Law No. 241 of 1990 on administrative procedure) of the right of access to administrative documents *only* to private parties having a "direct, concrete and existing interest corresponding to a legally protected situation that is linked to the document to which access is requested" is widely disappointing. Especially for those scholars like myself who believe that it would be more consistent with the very meaning of the right of access to administrative documents to provide for a right of access connected to the need for informational-social control of the administrative action, regardless of the participation in a specific administrative procedure, or of the link with the adoption of an administrative decision in which the person is individually involved[35]; and believe therefore that, in this respect, the provision of Legislative Decrees No. 150/2009 and No. 33/2013 in their original versions certainly did not match the desired change.

A Legislative Decree on transparency dated 25 May 2016, n. 97[36], whose aim is to implement the above mentioned provision of the Madia Law, has recently been passed (hereafter the Italian FOIA)[37].

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[33] So Art. 7.1, letter h) of Law No. 124/2015.

[34] D.-U. Galetta, *Transparency and Access to Public Sector Information In Italy: a Proper Revolution?*, in 6 I.J.P.L. 231 ss. (2014).

[35] See G. Pastori, *Il diritto d'accesso ai documenti amministrativi in Italia*, in 1 Amministrare 147 ss. (1986); G. D'Auria, *Trasparenze e segreti nell'Amministrazione italiana*, in 1 Pol. Dir. 111 ss. (1990); M. D'Alberti, *L'accesso ai documenti amministrativi*, in Id. et al. (eds.), *Lezioni sul procedimento amministrativo* (1992), 122; A. Pubusa, *L'attività amministrativa in trasformazione. Studi sulla l. 7 agosto 1990, n. 241* (1993), 134 ss.; A. Romano Tassone, *A chi serve il diritto di accesso. Riflessioni su legittimazione e modalità di esercizio del diritto di accesso nella legge n. 241 del 1990*, in Dir. amm. 318 ss. (1995).

[36] With Decision no. 251/2016 of November 25, 2016 (ECLI:IT:COST:2016:251) the Italian Constitutional Court has recently declared part of "Law Madia" to be unconstitutional. As a consequence, it has deprived of legal basis some of the legislative decrees adopted on its basis. This Decision does not affect, however, the FOIA Decree.

[37] Legislative Decree 25 May 2016, No. 97, Review and simplification of the provisions on prevention of corruption, openness and transparency, amending Law of 6 November 2012, No. 190 and Legislative Decree of 14 March 14, 2013,

A part from the unchanged Art. 5.1., Legislative Decree No. 97/2016 operates a radical modification of the provisions of Decree No. 33/2013 concerning public access (*accesso civico*). While, in fact, in the original provisions of Art. 5 of the Decree No. 33/2013 public access was limited only to those documents, information, or data which the public administration are obliged to publish and was meant (and designed) as a mere sanction in relation to the infringement of this 'obligation to publish', the Italian FOIA operates here a true revolution. The new Art. 5.2 of the Decree states in fact that "In order to promote widespread forms of control on the pursuit of the institutional functions and on the use of public resources and to promote public participation in public debate, everyone has the right to access data and documents held by the public administrations, additional to those which are subject to publication in accordance with this decree". Public access to data and documents held by the public administrations is therefore to become the default rule. Restrictions are nonetheless possible when they appear necessary "for the protection of legally relevant public and private interests" (new Art. 5.2, last paragraph - see *infra*, para. 5.).

It is, in my opinion, a real 'paradigm shift' in the Kuhnian sense[38]: as the Italian FOIA designs now transparency as freedom of access to the data and documents held by public authorities guaranteed firstly, through a general public access to such data and documents (*accesso civico*); and, (only) secondly, through the publication of documents, information and data.

Public access (*accesso civico*) to data and documents held by public authorities is therefore to become the main instrument to achieve transparency understood mainly as transparency-on-request, and is not to remain relegated, as it was till now, in the role of a mere exception to the general rule stated in Art. 22 of Law No. 241/90. A rule which - as I have already underlined (see *supra*, para. 2) - after the 2005 Reform clearly designs access to documents as a peculiar right granted only to the stakeholders and with the sole purpose of ensuring the defense of a subjective

No. 33, in accordance with Article 7 of Law of 7 August 2015, No. 124, on reorganization public administrations, published in the Official Gazette of 8 June 2016, No. 132.

[38] See in Stanford Encyclopedia of Philosophy at: http://plato.stanford.edu/entries/thomas-kuhn/

legal position which could be adversely affected by the decision of a public authority.

The Italian FOIA states on the contrary that, in addition to the 'classical' right of access for stakeholders, provided for in Law No 241/90 (and which remains totally unchanged)[39], a general public access (*accesso civico*) to data and documents held by public authorities shall be granted for the future.

Indeed, according to Art. 6 of the Italian FOIA an applicant requesting public access does not need to possess a so called "qualified interest" and does not even need to give reasons for his/her request for access to documents.

Furthermore, according to the provisions of the FOIA Decree the application may be transmitted electronically and the release of information or documents in electronic or printed form is totally free: except for the possibility - which is not likely to be used by the public administrations[40] - to ask for reimbursement of the cost actually incurred (and duly documented by the administration) for the reproduction of data and documents on material supports.

This change of perspective also allows Italy to comply with the EU standards concerning transparency; as EU law recognises that there is a fundamental connection among transparency, good governance, and the right of access to public documents.[41]

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[39] See to this regard D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, in 5 Federalismi.it 15 s. (2016), in part. para. 10.

[40] One wonders, in fact, how the single administration can and/or should document its "actual cost" and if the activity seeking to document such cost will not represent a further burden on the recipient administration, such as to push the latter to desist from claiming repayment from the applicant.

[41] Already the first European Ombudsman, Jacob Söderman, had on several occasions stressed the fundamental connection linking transparency, good administration and the right of access to administrative documents. In his first special report to the EU Parliament – based on an investigation he began upon his own initiative in 1996 - he had already focused on public access to documents possessed by Community institutions and bodies. And the conclusion of this investigation was: "On the basis of the above analysis, the Ombudsman concludes that failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration." Consequently, in addressing the institutions and bodies forming the object of the investigation, the Ombudsman recommended the adoption of "... rules concerning public access to documents" specifying that

This emerged clearly already in the Commission's White Paper of July 2001 on European governance[42]. And was confirmed by the adoption, also in 2001, of EC Regulation no. 1049/2001 on public access to the documents of the institutions[43].

In this same vein, while Art. 15.1 of the Treaty on the Functioning of the European Union (TFEU), provides that "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices, and agencies shall conduct their work as openly as possible", its third paragraph reiterates the provisions of the old Art. 255 TEC, according to which "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices, and agencies, whatever their medium"[44].

In this respect, before the adoption of the Italian FOIA, there was a clear discrepancy between the approach concerning access to documents chosen by the Italian legislator and the one adopted by the European Union according to which "in principle, all documents of the institutions should be accessible to the public" and therefore "The applicant is not obliged to state reasons for the application"[45].

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"The rules should apply to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality". See D.-U. Galetta, *Transparency and Administrative Governance in European Law*, in M.P. Chiti (ed.), *General Principles of Administrative Action* (2006), *passim*.

[42] Communication from the Commission of 25 July 2001 "*European governance - A white paper*" - COM(2001) 428 final - Official Journal C 287 of 12.10.2001.

[43] EC Regulation no. 1049/2001 of the European Parliament and of the Council of 30 January 2001, concerning public access to documents of the European Parliament, Council and Commission, GUCE, 31 May 2001, n. L. 145, 43.

[44] See also J. Ziller, *Origines et retombées du principe de transparence du droit de l'Union européenne*, in G. Guglielmi, E. Zoller (eds.), *Transparence, démocratie et gouvernance citoyenne* (2014), *passim*.

[45] So Recital no. 11 and Art. 6 para. 1 of EC Regulation no. 1049/2001 cit. See further on this point D.-U. Galetta, *Alcuni recenti sviluppi del diritto amministrativo italiano (fra riforme costituzionali e sviluppi della società civile)*, in XI Giust. Amm. 1-6 (2014).

### 5. Continued. Restrictions to Public Access in the Italian FOIA: the Legislator leaves the floor to the National Anti-Corruption Authority (ANAC)

This new, extended right to public access provided for by the Italian FOIA is, anyhow, by no means designed as an unlimited right. On the contrary, it is surrounded by a vast number of possible restrictions, aimed at protecting a wide number of public and private interests.

Alongside the 'classical' access restrictions, aimed at protecting public interests such as the ones relating to public safety and public order, national security, defense and military matters, international relations, policy, financial and economic stability of the State, investigations on crimes and their prosecution, inspections, there is also a rather long list of other possible restrictions concerning the protection of private interests. This includes the protection of personal data, secrecy of correspondence, as well as economic and business interests of a natural or legal person, including intellectual property, copyright and corporate secrets[46].

It is a rather long list which includes many different restrictions to public access - which can concretely lead to access denial, to postponement of access or to limiting access only to certain parts of the requested documents - even if they aim at protecting the core of legitimate public and private interests, it appears to be a bit too broadly defined[47]. Therefore, in order not to risk to unintentionally expand the area of activities of the public administration which are not subject to the requirement of transparency and "raise doubts about the practical effect" of the FOIA's provisions, they certainly need further concretization[48].

In fact, in the absence of further concretization by the national legislator, it remains necessarily a discretionary decision of each single public administration to identify the actual content of such potentially unlimited restrictions to public access; or it will

[46] See Art. 6 of the Italian FOIA.

[47] D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 9 ss.

[48] Cfr. Opinion of the Italian *Consiglio di Stato* n. 515/2016, at: http://giustizia-amministrativa.it, p. 85 et seq. (Council of State, Consultative Section for Normative Acts, 18 February 2016, No. 515)

be up to the administrative courts to finally decide: if concrete restrictions to public access are challenged by their addressee[49]. What is nevertheless sure is that such restrictions, although broadly defined, are in any case to be interpreted in the light of the principle of transparency, "meant as total accessibility of information about the organization and activities of public administration, in order to protect citizen's rights, promote the citizens' participation in administrative activity and promote widespread forms of control over the pursuit of institutional functions and the use of public resources" (Art. 1.1. of Decree No. 33/2013 in the version modified by the Italian FOIA). It is thus to be understood as a real freedom of access (*libertà di accesso di chiunque*), in the line of reasoning put forth by the American FOIA[50].

In order to address the above mentioned problem the FOIA legislator has in the end chosen to 'leave the floor' to the National Anti-Corruption Authority (hereafter ANAC). In the final version of the Italian FOIA a new provision has suddenly appeared (Art. 6.11 of the Italian FOIA). This brand-new provision integrates Art. 5-bis of the Decree No. 33/2013 with a sixth and last paragraph, according to which it will be up to the ANAC (in agreement with the Authority for the protection of personal data and after consultation with the Joint Conference of State, cities' and local governments) to adopt guidelines (*linee guida*) containing 'operational indications' for the purpose of defining the exclusions and limitations to civic access.

There is at present a great debate in Italian academic literature - involving also the Council of State in its advisory role[51] - regarding the legal nature of guidelines adopted by an Independent Agency such as the National Anti-Corruption

[49] Up to now the most delicate issue regarding accessibility of documents has concerned the relationship between the right of access and privacy protection and the Italian administrative courts that took a rather wavering position on the issue of the actual balance between access and privacy. See eg. Italian Council of State, V, 28 September 2007, No. 4999.

[50] Cfr. D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 7 ss.

[51] See to this regard the opinion delivered by the Italian Council of State on the scheme of the Public Contracts Code (opinion of 1 April 2016, No. 855, at: http://www.giustizia-amministrativa.it).

Authority. It is, actually, kind of a 'soft law' that will produce a very hard outcome: i.e. concretely define the real substance of public access redesigned by the Italian FOIA.

It is obviously not possible to further investigate the matter here[52]. I therefore limit myself to raise doubts about the appropriateness of entrusting also this competence to an Independent Agency such as ANAC, whose aim and nature is that of working as an 'anticorruption watchdog'. In fact, the choice made by the Italian legislator to this regard is based on the assumption, that it is possible to identify a clear and unambiguous link between public access, transparency and combating corruption. The existence of such an unequivocal link remains instead, in my opinion, yet to be proven.

### 6. Why transparency-on-request is a better solution: Conclusions

The adoption of an 'Italian FOIA' has been a manifesto commitment of the *Renzi* Government since the very beginning. On the day of its definitive approval the Minister for Simplification and Public Administration, *Marianna Madia*, gloriously stated as follows: "We have kept that promise. With the decree implementing the public administration reform, finally approved, Italy has adopted a law on the Freedom of Information Act model. Citizens have now the right to know data and documents held by the public administration, even without possessing a direct interest"[53].

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[52] See to this regard C. Deodato, *Le linee guida dell'ANAC: una nuova fonte del diritto?*, published on 28 April 2016 at: https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/.../nsiga_4083067.docx, 1-22; G. Morano, *Le linee guida ANAC nel sistema delle fonti del diritto*, in Diritto.it 1-8 (published on 11 May 2016 at: http://www.diritto.it/docs/38202-le-linee-guida-anac-nel-sistema-delle-fonti-deldiritto).

[53] See at: http://www.funzionepubblica.gov.it/articolo/riforma-della-pa/16-05-2016/foia-e-trasparenza-ora-e-legge. Furthermore these are, in the opinion expressed by Minister Madia, the central points of the Italian FOIA:
1) requesting a document will be free of charge;
2) an administration that refuses to issue a document will have to motivate its refusal in a clear manner;
3) the citizen who has been refused by an administration to release information will be able to contact the transparency and anticorruption officer (responsabile

As a matter of fact, while confirming the obligation of public administrations to publish a certain amount of documents and data on their institutional websites[54], the Italian legislator has opted, with the FOIA, for transparency understood as free-access-on-request to data and documents held by public administrations. It is exactly that "transparency-on-request" option referred to in the title of this paper. And it means a quite fundamental (and in my opinion very positive) change of perspective of the Italian legislator as to access to administrative documents.

However, this choice of the Italian legislator to move away from the idea of transparency understood just as pro-active disclosure of information (transparency as an "Open Data Policy") and embrace the transparency-on-request solution has also attracted major criticism, thus requiring me to provide some concrete reasons why it is, in my opinion, a very happy choice. I will just therefore now try to concisely explain the three most important reasons.

1) First of all, it is not true that transparency as an "Open Data Policy" is simply more transparent[55]. Transparency understood as pro-active disclosure of information implies, on the contrary, that the choice on *what and when* an information has to be rendered public remains totally in the hand of the public power. As German scholars have very well underlined, a transparency which is "*anbieterorientiert*"[56] (and where it is for the public authority to choose whether or not to render certain documents public) is in fact a much less satisfactory transparency than the "*nachfrageorientiert*"[57] transparency, where it is for the 'adult citizen' (in the metaphorical sense) to decide whether or not to

della prevenzione della corruzione e della trasparenza) or the ombudsman and, in any case, to appeal to the competent Regional Administrative Tribunal (TAR).

[54] To this regard the Italian FOIA introduces also a significant rationalisation, by reducing excessive burdensome obligations to publish. See D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 17.

[55] See to this regard, for example, in the Web-Site of the Sunlight Foundation, at http://sunlightfoundation.com.

[56] Literally translated: "Provider-oriented".

[57] Literally translated: "demand-driven".

request access to certain documents[58]. Thus, consciously or unconsciously, open-data-policy supporters have a conception of citizens as kind of 'eternal minors' who should be guided and protected by a public authority, which will decide in their place what is useful for them to know (and is therefore to be published) and what it is not (and is therefore neither to be published, nor to be asked for via access to documents).

Nonetheless this is in fact still the feel-good reading of the whole story about "*anbieterorientiert*" transparency. Obviously there is also a non-good reading, i.e. a more cynical one, according to which pro-active disclosure of information essentially aims to generate a so called "opacity for confusion" rather than transparency. Because - as it has been well highlighted in academic literature - information overload may just cause disorientation[59]: the useful information, the interesting one, is perhaps made available; but it is mingled together with a plenty of other information devoid of any interest, thus producing "opacity for confusion" [60].

2) On the other hand, even if we decide to stick to the feel-good reading, it has to be clear that a serious Open Data Policy perforce involves the risk of neglecting data protection.

Indeed, as I have already underlined in another paper of mine, pro-active transparency, when it is genuinely meant, implies that public administration won't be able to operate those evaluations and case by case decisions which alone can ensure an adequate balance between the conflicting interests at stake. Interests - and this should be absolutely clear - that are all the expression of fundamental constitutional values: transparency, on the one hand, and the privacy of individuals and the protection of their personal data, on the other[61].

So, while transparency of the Public Administration is certainly an important issue for modern democracies, it still

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[58] G. Wever, *Wundermittel Transparenz? Über Informationsfreiheit und Transparenzgesetze*, in Informationsfreiheit und Informationsrecht 62 (2014).

[59] M. Fenster, *The Opacity of Transparency*, in Iowa Law Rev. 921 ss. (2006).

[60] E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. pubbl. 806 (2009).

[61] D.-U. Galetta, M. Ibler, *Decisioni amministrative "multipolari" e problematiche connesse: la libertà di informazione e il diritto alla riservatezza in una prospettiva di diritto comparato (Italia- Germania)*, in 9 Federalismi.it 17 ss. (2015).

cannot be understood as a value in itself and its consistency with other founding values, such as privacy and data protection, has to be guaranteed at all times.

3) The opinion expressed a long time ago by a U.S. Supreme Court Justice, *Louis Brandeis*, in favour of transparency, as a useful tool to fight again the abuses of the 'Money Trust', is often quoted by open-data-policy supporters.

The well-known quote "A little sunlight is the best disinfectant"[62] has been used by plenty of authors in plenty of papers addressing transparency issues. It is nevertheless a pity that they always omit to quote the second part of Brandeis' sentence, according to which, if "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman". And electric light, unlike sunlight, is not dependent on the weather; but it certainly needs someone to turn it on.

This someone can solely be - in my opinion and to conclude my plea in favour of transparency-on-request via access to document - the public authority possessing the data or document itself: to which citizens have to turn to with their concrete request for access.

To this regard it should be recalled here, that the Italian APA includes from the very beginning an important (and at the same time innovative)[63] provision concerning the duty of the public authority to appoint an official responsible for managing each administrative procedure. Such responsible official (*responsabile del procedimento*), which is actually the one who is entrusted with the task to take care of the concrete relationship between citizens and public administration[64], shall easily be entrusted also with the task of serving as a link between public administration and citizens asking for transparency: as such

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[62] L. Brandeis, *Other People's Money - and How Bankers Use It* (1914), Chapter V: *What Publicity Can Do* (at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-by-louis-d.-brandeis).

[63] See now also European Ombudsman - The European Code of Good Administrative Behaviour, Art 14 (2). See also the European Parliament resolution for an open, efficient and independent of 9 June 2016. With this resolution, the European Parliament called on the Commission to adopt a general Regulation for an open, efficient and independent European Union administration.

[64] Arts 4-6 of Law No. 241/90.

citizens shall not just expect to be allowed to see/watch (according to the Turatian glasshouse metaphor[65]) everything that happens inside the public administration; they shall rather wish to be enabled to understand it, at least to a certain extent, thanks to help provided by the responsible official.

To sum up, it seems incontrovertible to me that, in any case, access to documents and data held by the public administration, if it is to produce effective outcomes in terms of useful information[66] (and not to turn out into a simple disclosure of plenty of incomprehensible data and documents), must be, more often than not, accompanied by the concrete support of an administrative officer, able to 'shed light' and decrypt useful information for the citizens.

Furthermore (but this would open a new chapter), I would like to give (it seems rather sensible to me!) a public officer the possibility to concretely check requests for access and, in case, exclude (on his own responsibility, involving also that of the transparency and anticorruption officer, as is correctly stated in the Italian FOIA)[67] access requests that are not guided by the desire to learn about and participate in administrative activity, but rather by the desire to create obstacles to the proper functioning of public administrations (and are therefore in contradiction with Art. 97 of the Italian Constitution)[68].

To conclude, the new direction in which the 'Italian journey' towards transparency has recently moved towards is, in my opinion, the right one: from a very restrictive regime of access to administrative documents (the one designed by Law No. 241/90, which is however still applicable for those documents and data which are excluded from public access) - lately accompanied by a rather demagogical obligation imposed on public

[65] The Italian Politician Filippo Turati is the first one who referred to the idea of public administration as a "glass house" that anyone should be able to look at from the outside: F. Turati, *Intervento*, in *Atti del Parlamento Italiano, Camera dei deputati*, session 1904-1908, 17 June 1908, 22962.

[66] The distinction between data and information comes from the language of informatics and is a very important one. As Kock puts it: "data will only become information or knowledge when they are interpreted by human beings". N. Kock, *Systems Analysis & Design Fundamentals: A Business Process Redesign Approach* (2006), 4.

[67] See Art. 43 ss. of the amended Legislative Decree No. 33/2013.

[68] See *supra*, para. 2.

administrations to disclose a set of information in the context of so-called open data policies[69] - Italy has moved forth to the hoped-for[70] transparency-on-request approach.

Indeed, allowing free public access to data and documents held by public administrations seems to me to be the most correct way to implement the principle of transparency. To do it the other way round - i.e. by obliging public administrations to publish an increasingly large amount of incomprehensible and, in themselves, meaningless documents and data - has in fact very little to do with making information not only downloadable to citizens, but also useable and meaningful[71].

Last but not least, the transparency-on-request approach does not seems to me to be at odds with the position of those who argue that public bodies hold information not for themselves, but as custodians of the public good and that "In this respect, right to information laws reflect the fundamental premise that the government is supposed to serve the people"[72]. It is, on the contrary, a choice that is exactly consistent with that idea!

[69] On this point, see specifically F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, in 8 Federalismi.it para. 2 (2013).

[70] See D.-U. Galetta, *Transparency and Access to Public Sector Information In Italy: a Proper Revolution?*, cit. at 34, 234.

[71] See P. Canaparo, *La via italiana alla trasparenza pubblica: Il diritto di informazione indiffeRenziato e il ruolo proattivo delle pubbliche amministrazioni*, in 4 Federalismi.it para 10 (2014); G. Napolitano, *L'attività informativa della pubblica amministrazione: 'less is better'*, in F. Manganaro, A. Romano Tassone (eds.), *I nuovi diritti di cittadinanza: il diritto d'informazione* (2005). But also Raines, commenting on the most innovative US Transparency Act (DATA): J. Raines, *The Digital Accountability and Transparency Act of 2011 (DATA): Using Open Data Principles to Revamp Spending Transparency Legislation*, in 57 N.Y.L. Sch. L. Rev. 342 (2012-2013).

[72] T. Mendel, *Freedom of Information: A Comparative Legal Survey*, cit. at 3, 4.