

**THE ADMINISTRATIVE TRANSPARENCY THROUGH THE
INSTITUTE FOR ACCESS TO DOCUMENTS, FOR THE CIVIC
ACCESS AND FOIA: THE EVOLUTION OF THE NORMATIVE
SYSTEM FROM THE LAW 241/90 TO THE LGS D.97/16**

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ABSTRACT: *The first device in the matter of access are found in the L 349/86, which introduced the right of "any citizen" to have access "to the information about the state of the environment".*

But the general rule in the subject of the access to documents is the Law 241/90 that foresees the right of the citizen with a particularly qualified interest, or rather direct, concrete and current, connected to the required document, to have access to the documents in the possession of the public administration. However, only with the Lgs D.33/13 regarding administrative transparency, the project of transparency as "total accessibility" to the public administration has been carried out, thanks also to the introduction of the civic access or FOIA.

This has been integrated by the Lgs D.97/16 which has widened the range and has extended to everybody the possibility to have access to the information, documents and data held by the public administration, apart from having a particularly qualified interest and apart from a special reason.

KEY WORDS: *administrative transparency , access to documents, FOIA, civic access, Madia Law*

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The framework rule on access is the L. 241/90 that, in articles. 22 and following, regulates the right of access to information contained in an administrative document held by a public administration. It expressly provides that the active legitimation is not for all citizens, but only for those who hold a particularly qualified or direct interest, real and present, connected to the document for which access is sought ¹. But in our country there is a difference in the regulation of access rules depending on the subject. For this reason, together with the general rule, there is a specific legislation for environmental subjects.

Indeed the right to access in environmental subjects dates back to the first regulatory act found in the Law 8th July 1986 n. 349, that created the Ministry of Environment. It is

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¹P. Cortese, L'accesso agli atti in materia ambientale; peculiarità del D.Lgs 195/2005 e differenze con le previsioni della L. 15/2005 I Contratti dello Stato e degli Enti pubblici 1122-3235 , anno 2006, fascicolo 4, pag.519-541 T.A.R.. D.Torsello, Evoluzione e problematicità del diritto di accesso ambientale nell'ordinamento comunitario e nazionale, Rassegna dell'Avvocatura dello Stato, anno 2010, vol 62, fascicolo 4, pag 59-86

currently regulated by Decree 195, 19th August 2005, which transposed the European Directive 2003/4 / EC on access to environmental information, thereby repealing the previous legislation referred to Legislative Decree 39 of 1997². This decree introduced the principle of administrative transparency in our legal system, replacing that of secrecy as a general principle in the administration (1).

As mentioned, the first act on the environment by our legislator is the L. n. 349, July 8th 1986 which identified the close link between the circulation of information and protection of the environment, ahead of time compared to the Community directives. This law, art. 14, paragraph 3, imposed on the Ministry the burden of wider dissemination of information on the subject, introducing for the first time the right of "every citizen" to access "to information on the state of the environment, in accordance with the laws in force, at the offices of the public administration ", and provided the right to obtain a copy upon refund of the costs of copying. It was thus established a true "right to information" which is itself a wider concept than that of access to administrative documents, which, anyhow, will arrive four years later. (1)

Since the right of access to environmental information is part of administrative transparency, whose major expression is the most comprehensive right of access to documents of the public administrations, it is noted that compared to the latter, the former has an additional feature : access to documents generally satisfies the need for transparency in the exercise of administrative action in order to verify the impartiality, while access to environmental information is functional to the application of the principles of prevention and preservation of environmental balance and ecosystem protection.

In a time when there was no legislation, it is a first important recognition of the principle of transparency, not subject to a specifically qualified interest in relation to the documents requested and concerning not only the documents but also the information,

With Article 3 of Legislative Decree 24th February 1997 n. 39, coupled with article 14 of the above mentioned Law 349, the Directive 90/385 of the Council of 7th June 1990 was implemented. It includes an access model to environmental information with a very broad legitimacy and not conditioned by particular requirements³. The right to access as a subjective public right, equally recognized for anyone, and not only as to the measures but also the data and information.

Legislative Decree n.39 and Legislative Decree n.195 dated 19th August 2005 reinforce the previous regulations and guidance and seem to anticipate today's civic access or FOIA (Freedom of Information Act), as well as existing provisions on transparency and access (Legislative Decree 33/13 and 97/16). As a matter of fact there is a so-called "disclosure and information model", which binds the government to the prior dissemination of information, without waiting for a request on behalf of the citizen (3) and active legitimacy is generalized, extending it to anyone who requests it, regardless of a particularly qualified interest. Transparency has now assumed the character of essential level of performance, in accordance with art. 117 Cost., Paragraph 2, letter m, as such, it cannot be compressed by regional laws and local regulations. They can only innovate the

² Francesco Francica, Carnelutti Studio Legale | 20 marzo 2015 Il diritto di accesso alle informazioni ambientali: ampliamento del novero dei soggetti legittimati nella giurisprudenza amministrativa ambiente DIRITTO 24 DE IL SOLE 24 ORE

³ Valerio Torano, Il diritto di accesso civico come azione popolare, in *Diritto Amministrativo*, fasc.4, 2013, pag. 789, ed GIUFFRÈ

discipline extending it (This article has been replaced by art. 3.Cost. L October 18th , 2001, n. 3)⁴.

Apart from the specific environmental legislation surely the Law 241/90 is the first tool designed to ensure and guarantee the actual claim to the transparency of administrative action by citizens. They are awarded the right to inspect and obtain copies of documents containing information related to ongoing proceedings, where they have particularly qualified interests, meaning direct, concrete and up to date⁵.

The request must be properly motivated with references to specific acts in order to enable the administration to assess the existence of interest by law and it must also contain sufficient identification elements to identify what is required. Requests that do not relate to existing administrative documents do not fall into the category of access, and in particular "... every graphic representation, film photos, electromagnetic pictures or any others of the content of acts, including internal ones or not related to the specific procedure, held by a public administration and concerning activities of public interest, ..." as identified by art. 22, paragraph 1, letter d). Information held by a public administration that is not an administrative document is not accessible (article 22, paragraph 4).

The right of access is exercised by inspection and copying of the administrative records; examination of documents is free while the copy shall be subject only to reimbursement of the cost of reproduction (Article 25, paragraph 1). In any case, access requests that give rise to a general monitoring of the work of the P.A are not accepted.

The procedure for access must be completed within 30 days from receipt of the request, after this period the application is meant rejected (Article 25, paragraph 4). In case of expressed or implied refusal, or deferment, it is possible to appeal to the Regional Administrative Court, to the Commission for access to administrative documents, whether central or local governments of the State are affected, or to the Ombudsman in case of involvement of local or territorial bodies.

If the content of the document reveals the presence of one or more counterparties, the administration will be required to inform them by registered mail or other means that provide a record of receipt.

The other party may object within 10 days of receipt of the notice. After the 10 days the administration will decide whether to provide the document, also considering the reasons given by the other party.

The request can be rejected, not only in cases of lack of any of the above assumptions, but also when justified by the circumstances of exclusion under Art. 24 L 241/90 and 8 of Presidential Decree 352/92, such as in the case of documents covered by state secrecy or in the cases expressly provided by law secret, in tax procedures, in respect of the public administration procedures for 'enactment of legislation and general administrative acts, when it could derive a specific and identified damage to the security and national defense, or it could damage the processes of formation, determination and implementation of monetary and foreign exchange policy; when documents concern the structures, the means, the equipment, personnel and actions strictly connected to the maintenance of public order and the prevention and repression of crime, etc. etc.

⁴ Cosmai Paola, Diritto di accesso agli atti in materia ambientale, in *Ambiente & sviluppo* ISSN: 2240-2403, 2013, fascicolo 5

⁵ Corte Cost., Sent. 104/2006; art. 1, co. 1, 3, 22, l. n. 241/1990

Specific provisions concern the case where the required documents contain personal data, so that the showing of the documents would undermine someone's right to privacy. In these cases, the Lgs.D. 196/03, the specific interventions of the Guarantor for the protection of personal data and consolidated laws have introduced the principle of necessity, that the personal data can only be provided when it is necessary for the protection of ' interest underlying the request of access. In any case, the P.A. must carefully analyze the interests involved, taking into account the fact that the interest in judicial protection is necessarily prevailing and that there is a limit of super sensitive personal information.

With Law no. 15/2005 (which amended in various parts the Law 241/1990), the concept of the right of access has been expanded and elevated to a fundamental principle, thus becoming a formidable instrument of democratic control of the public administration by citizens.

A stronger orientation in the sense of transparency of administrative action has occurred, however, with the Legislative Decree 33/13, also called transparency Decree. This has provided a wider access, called "civic access " and art. 1, introduced a new concept of openness, intended "as total accessibility of data and information concerning the organization and activities of public administration", and widespread control tool on the pursuit of institutional functions and the use of public resources . The Decree provides for the obligation to "publishing spreading" or the obligation for the public authorities to publish in their corporate websites "... documents, information and data on" their organization and activities, "which corresponds to the right of anyone to access the sites directly and immediately, without authentication and identification "(art. 2, paragraph 2 of Legislative Decree 33/13).

This decree marks a decisive step forward in the project of transformation of the public administration in a glass house, a project that will be accomplished only with the Decree 97/2016, better known as Madia Law, from the name of the proposing Minister ⁶. The Decree imposes stringent obligations to administration on advertising and, for the first time, it puts on them the burden of transparency, no longer left only to the initiative of a private citizen, but a real legal obligation on the authorities themselves, obliged to make public a number of acts, information and data in their possession. Moreover, with the introduction of the civic access, it allows anyone, though not the bearer of a specially qualified interest, to access to data held by the P.A., with the only purpose of protecting the public interest and general legality, fairness in the exercise of public power and in public resources management. The legislator has now realized that transparency is a tool for the protection and respect of fundamental human rights as it "helps to implement the democratic principle is the constitutional principles of equality, fairness, good performance, accountability, effectiveness and efficiency in 'use of public resources, integrity and loyalty in the service of the nation. It is a condition of guarantee of individual and collective freedoms and the civil, political and social rights, it integrates the right to good administration and it contributes to the realization of an open administration , serving the citizen "(Article 1, paragraph 2, of Legislative Decree

⁶ E. Carloni, La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa, in *Diritto pubblico*, 2009/3, p. 806.

33/2013). It was said that the civic access designed by the Transparency Decree is comparable to FOIA (Freedom of Information Act), of Anglo-Saxon tradition.

However, according to the writer, civic access is undoubtedly a step forward compared to the previous access to administrative documents, it does not replace it, but it couples it, but it is still far from the British FOIA. For the latter it was not until Madia Law, namely Legislative Decree 97/2016, which introduced into Italian law a civic access comparable to Common Law FOIA.

Before moving on to the examination of the new legislation on transparency and access, namely the Leg.Decree 97/16, and for a complete historical and legal reconstruction of the path, it is appropriate a synthesis of Leg.Decree 33/13 in the version prior to the amendment made with the last Leg.Decree 97/16. However, throughout the combined provisions of Articles 3 and 5 paragraph 1 of Legislative Decree n. 33/13 the Italian version of the FOIA emerges. Article 3 provides that "all documents, information and data object to mandatory publishing under current legislation are public and anyone has the right to know them, to use them for free, and use and reuse them in accordance with Article 7"; on the contrary, Article 5, paragraph 1, states that the obligation under the current regulations placed on public authorities to publish documents, information or data includes the right of everyone to access them, when their publication has been omitted. "What emerges is therefore not an unlimited civic access but a civic access operated only in ancillary to the obligation to state publication on public administrations. Only in the event that an obligation to publish, rejected by the PA, pre-exists, this marks the right of everyone, without any need of motivation or a legally relevant interest, to access to data and information subject to the obligation itself. Certainly a step forward from the L 241/90 has been made but, as mentioned, it was not until Madia Decree that the FOIA was introduced within our legal system.

The turning point came with the Legislative Decree no. 97 of 25th May 2016 (published in the Official Gazette on June 8th and entered into force on 23rd), often mentioned as Madia Decree. In implementation of the provisions on the prevention of corruption and lawlessness in the public administration of Legislative Decree n. 190/12 and amending the Legislative Decree n.33 / 13 on transparency, it has provided a new kind of civic access that, overcoming all the limitations of the previous version, introduced in our legal system the closest model to the Anglo-Saxon FOIA.

So transparency considered as "total accessibility" concerns not only data, but also "the documents held by public authorities", and it is aimed at protecting the rights of citizens, to promote the participation of the stakeholders in the administrative activity and to facilitate spread forms of control on the pursuit of institutional function and on the use of public resources (art. 1, paragraph 1). Article. 5, radically changed, introduces the new figure of civic access and after stating that the obligation on authorities to publish documents, information and data makes it possible for anyone to request them in case of default (art. 5, paragraph 1), maintaining the pattern of the first version of civic access, it adds that "everyone has the right to access to data and documents held by public authorities, other than those subject to publication in accordance with this decree." However, together with a 'formally unlimited accessibility, the legislator provides that the requests should be conducted for the public control over the pursuit of institutional functions and use of resources, including promotion of participation in the public debate; the above within the limits for the protection of interests of victims relevant under article

5 bis. Therefore, the new form of civic access differs from the previous one because it substantially expands object of the access.

Anyone can access, regardless of a specific motivation and therefore also regardless of having a legal interest. You can access for the protection of an individual interest but above all for the protection of the collective interest. Even now, as already provided for access referred to in L 241/90, the administration has 30 days , from receipt, to conclude the procedure. However, in this case, the possibility of a silent refusal is not foreseen and the process must necessarily lead to the adoption of an express measure, motivated, communicated to the applicant and to the potential counterparties (Article 5, paragraph 6). Apart from mandatory publication, if the instance of access counterparties are found, the administration, as envisaged by L 241/90, must inform them of access and wait, within 10 days of receipt of the communication, that they present a reasoned objection (Article 5, comma5).

The application may also be sent electronically and presented alternately to:

- a) the office that holds the data, information or documents;
- b) the Office of Public Relations;
- c) another office specified by the administration in the "Transparent Administration" section of the administration website;
- d) the person responsible for the prevention of corruption and transparency, if the object of the instance are data, information or documents required to be published under this decree.

"In the case of acceptance, the Administration shall promptly notify the applicant of the data or documents requested, or, if the application refers to data, information or documents required to be published under this decree, to publish the data, information or documents required on the website and to inform the applicant of publication, highlighting the hyperlink "(Article 5, paragraph 6).

Cases of exclusion of access are similar to those already provided by the L 241/90. Article. 5 bis provides that civic access is denied if it is necessary to protect certain public or private interests, such as those relating to public safety and public order, national security, defense and military matters, international relations, inquiries dealing with offenses, the financial and economic policy of the State and inspections. Or, regarding private interests, the protection of personal data, freedom and secrecy of mail, economic and commercial interests of a natural or legal person. In the case of personal data contained in documents that are not subject to publishing, consider what was said about the dating more access to administrative documents relating to the balancing of the interests involved.

However, if access was denied or delayed to protect the confidentiality, the head of the prevention of corruption and transparency takes a decision, after informing the Guarantor for the protection of personal data, who shall answer within ten days from the request (Article 5, paragraph 7). In other cases of partial or total refusal or failure to reply within the deadline, the applicant may submit a request of revision to the person in charge of the prevention of corruption and transparency, who decides with a motivated act, within a period of twenty days. Other appeal forms already discussed above in the context of Articles. 22 and L 241/90: All measures, including those issued in the review, may be appealed to the Administrative Court as well as to the Ombudsman, if a local or regional

authority is involved, or to the Commission for access in the event of central or local governments.

It is to say that the original bill had been rightly harshly criticized by both the Council of State, by the parliamentary commissions, and by the Guarantor for the protection of personal data and by the Joint Conference. However, upon conversion, the legislator has accepted almost all of the observations raised. Therefore, it was introduced the obligation to complete the procedure with a fast and motivated act, not expected before; It was introduced the possibility of submitting the application to various offices and not only to the person responsible for transparency; It was, most recently, decided that the release of data and documents is free of charge and it was overcome the obligation to clearly identify the data and documents required.

In order to summarize the main and distinctive elements between the old access to administrative documents and the current FOIA, we can state the following:

1) in the first case the particularly qualified and legally relevant stakeholders are active entitled, on the contrary, in civic Access, anyone has the right to access the data, information or documents held by the PA;

2) In Law 241/90 the object of the request is made of pre-existing documents held by the public administration, and any elaboration process is excluded that, if necessary, makes the request unacceptable. The object of the FOIA are not only documents but also the data and information that the authorities are aware of: they not only can but also must process the items in their possession to follow up the requests;

3) Law n. 241/90 provides that access is designed to protect the interests of the private action and to the correct administrative procedures that if unlawful, is potentially detrimental to its own interests. On the contrary, civic access is functional to the general interest, to the correctness, legality and impartiality of the administrative action and the use of resources;

4) In view of the possibility to recognize access to anyone, the FOIA requires a general motivation; by contrast, in the access provided for in Law 241/1990, a detailed statement of reasons relating to each of the documents requested constitutes a condition of admissibility.

We have to say that the fact that in this subject there has been a long succession of numerous laws, some of which are still in force raises many perplexities. In fact, despite the Legislative Decree n.33 / 13 and the subsequent Legislative Decree n.97 / 16, the access system is binary: the access to administrative documents referred to in Title V of the law 241/90 remains in place, but it is accompanied by the civic access specified earlier by the Transparency Decree and later expanded in the most extensive form of the FOIA by Legislative Decree n./16. It is impossible to understand what are the reasons for this excessive number of regulations when it comes to access, or whether it makes sense to maintain the old access to administrative documents, compared with a strong orientation to the transparency of public action. Maybe it is just a "gradual" transition to a new way of being in public administration.

As it emerged from the examination of the new civic access, the legislator, aware of the importance that a transparent management of public affairs has in combating corruption, inefficiency and wastes, has tried to import in our country the Anglo-Saxon FOIA. The seriousness of the efforts is evident from the full adoption of all the criticisms and observations made. The effectiveness of the legislation and of maintaining the effects

of the dual access system, can only be assessed with time. More time is needed in order to make any judgments, we need to wait for the harsh judgment of practical application.

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