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THE INTRODUCTION OF THE FREEDOM OF INFORMATION ACT IN THE LAW N. 124/2015

From the need to know to the right to know: news, difficulties and perspectives of the Freedom of Information Act, from online digital campaign to implementation of a new instrument of transparency and participation.

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Abstract: 1. From the right to access provided by the law 7**th** August 1990 n. 241 to the Freedom of Information Act; 2. The digital campaign for FOIA and the presentation of the amendment in committee on Constitutional Affairs; 3. Problems and possible "side effect" of the Freedom of International Act.

1. From the right to access provided by the law 7th August 1990 n. 241 to the Freedom of Information Act

The introduction of the Freedom of Information Act in the Italian system has revolutionised the right to access as traditionally understood and organised in Art. 22 of the Law n. 241/1990. The "classic" access provided for by law about the administrative process is influenced by a series of limitations and conditions: it is necessary a qualified interest to express the request as well as the burden of motivation charged to the applicant; it assumes the pre-existence of the document about the request to legitimate the practice of that right and it cannot be abused to make a check on the behaviour of public administration. It represents a path of knowledge available to citizens and general principle of administrative activity but, initially, it was not predestined to obtain specific guarantees of transparency. Only with Legislative Decree n.33/2013[1], transparency was defined as the total accessibility of information relating to activities and organisation of administrations and understood according to a control logic by citizens on public administration, in order to support the relationship of trust between the two parties, promote legality and prevent corruption[2].

However, the civic access provided by Art.5 of Legislative Decree n.33/2013 presented two important limitations: even if it was admitted for anyone, so with no restrictions related to subjective legitimacy, it referred only to determined documents and information that were object of necessary publication for the administrations. It was not a real right but a penalty in case of lacking fulfilment of the publication requirements by law, charged to the public administration.

In this legislative context, the absolute and innovative feature of **FOIA** appears which, on the contrary, it is independent from particular and motivated interests and it supposes only that of the citizen, who in autonomous way endeavours to request the information to the public administration, even if the obligatory publication of the data is lacking.

The FOIA acronym refers to the same access expected in Anglo-Saxons systems and mainstay of transparency in public administration, by the time current in more than ninety countries and that indicates the most important passage from the "need to know" to the "right to know". In Law 7**th** August 2015 n.124, it is included this model of civic access,

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admitted for anyone, without the necessity of being owner of significant legal situation, to data and documents detained by public administrations.

2. The digital campaign for FOIA and the presentation of the amendment in committee on Constitutional Affairs

The Freedom of Information Act is introduced in the draft law with an extra amendment in Committee proposed by the Democratic Party deputies Anna Ascani, Paolo Coppola and by the Gruppo Misto's deputy Mara Mucci, all members of the innovation intergroup to the Chamber[3] and approved in the committee on Constitutional Affairs with the following text: "in paragraph 1, after letter c), include the following: c-bis) subject to the obligations of publication, identification of the freedom of information through the right of access, even online, of anyone, independently from the ownership of significant legal situation, to data and documents detained by public administrations, obeying the limitations about the safeguard of public and private interests, in order to promote widespread forms of control on pursuing of institutional procedures and on using public resources; simplification of registration procedures to the wish lists, which in article 1, paragraph 52, of Law 6**th** November 2012, n.190, with modifications to the related discipline, through unification or interconnection of databases of expert central and marginal Administrations, and the prevision of a six-monthly monitoring system, aimed to the update of lists established in Prefectures; prevision of penalties charged to the Administrations which do not observe the normative dispositions about access, of appeal procedures to National Anti-corruption System about civic access and about access pursuant to the present letter, as well as of jurisdictional safeguard pursuant to the article 116 of the legislative decree 2**nd** July 201, n.104".

The approval of this amendment has established the first and fundamental step for the real constitution of a long-announced right until then never realised. The role and the influence used also by civil society have been very important during the process of elaboration and approval, even though the Prime Minister has showed his intention thus.

Thirty associations on FOIA 4 Italy platform have collected eighty-nine thousands of signatures and written an early synthetic text which, step by step, could give a direction and be a mentor on the subject, keeping high the attention on the matter up to its final adoption in May 2016, taking part also to a try-out in committee on Constitutional Affairs and describing "ten inalienable points" [4] for an effective Freedom of Information Act, disclosed on 18**th** February to members of parliament of the innovation intergroup. The document was the outcome result of the online public consultations for the reform on the right of access, occurred from October 2014 to January 2015. The deputy Anna Ascani, during the Perugia Journalism Festival in 2015, announced that FOIA would be included

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in the law on public administration, back the influence of the same Madia Minister.

Initially, however, the adopted text was very different from the one proposed by the civil society. The same Council of State had expressed its doubts[5], linked to the fact that there was just one office deputy able to provide needed information; it had also harshly criticized the absence of penalties in case of lacking answer. Moreover, the early text had some problems linked to exceptions, expressed in an unclear way and related to "economic and commercial interests".

Many of the observed critical issues have passed by the final adopted text, modified in more passages, also according to the request of opinions expressed in parliamentary committees: the rejection silence has been eliminated, earlier expected in case of no response after 30 days[6]; in addition, the original text was about "data" detained by public administration but it did not include references to "documents", a significant difference, not only terminological, filled by the final text.

Requiring document or data will be free: initially, costs had to be charged to the applicant with no details about the regulation, nor about the records or procedures to follow. The same rejection needs motivation, following the signal by the Council of State, which denounced that "the rejection silence represents... a very complicated establishment from the viewpoint of the participation of citizens to the administrative life, even more when there is not the need to justify the expressed rejection, as in this case"[7].

Legal safeguards expected in case of rejection represented another problem; the government has intervened allowing the possibility to file an appeal with the transparency manager or with the ombudsman, and of course with the Regional Administrative Court.

3. Problems and possible "side effects" of Freedom of the International Act

Nowadays, finally exists an instrument useful to control the work of the public administration in an adequate way and also useful to obtain important information although it should be improved.

This obligations to publish and communicate to the public administration, always more cogent, are clear in the request of an always greater security by citizens on activity and administration of the public matter. However these innovations, especially about the **access of the deeds**, have highlighted two problems: the former is related to the cumulative existence of two different types of access, that they would presume the preference to file an appeal with the FOIA. "Classic" access as expressed by law n.

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241/1990 and civic access ex legislative decree n. 33/2013 as modified by legislative decree n. 97/2016 will coexist; probably the citizen will prefer filing an appeal with the civic access, having more advantages, among which the motivation that is not necessary but, on the contrary, requested by the so called "classic" access.

The second problem already exposed, in particular, by National Anti-corruption System and by the Council of State and civil society, which are important representatives even in the process of installation of the FOIA currently in progress, concerns the real danger of uneven application by public administrations in response to requests of access.

The legislative decree of 25**th** May 2016 n. 97, in the article 6 introduces the modifications to the art. 5 of the legislative decree n. 33 of 2013 and it includes articles 5 bis and ter: citizens can file an application to know also deeds not subjected to obligatory publication ex lege. However, cases of exclusion remain very generic [8]; according to art. 5 bis of the law, civic access is denied in order to avoid prejudices in security and law and order, national security, safeguard and military matters, international relations, politics and economic and financial stability of the State, the launch of investigations on crimes and their prosecution, the regular execution of inspections.

They are not the only cases in which the access is left out: further hypothesis in which the access can be denied in right way are represented by possible prejudice to private interests such as the safeguard of personal data, the freedom and secrecy of mails, economic and commercial interests of a natural or legal person also in regard of commercial strategies, copyright, state secret (art. 5 bis, paragraphs 2 and 3) [9].

Obviously, supporters of a FOIA as unconstrained as possible, worry about the possibility that these numerous and generally formulated exclusions and limitations of access can represent an effective alibi for the administration, which it does not want to reply to citizen, evading de facto the Freedom of Information Act. In defence of this right, precisely in order to prevent a possible administrative inattention with no consequences on responsible people, it is specifically introduced a prevision that modifies art. 46 of legislative decree n. 33/2013 according to which "the deferment and the limitation of civic access, beyond hypothesis exposed by article 5-bis, represent the element to evaluate executive responsibilities, potential reason of liability for the administration; they are also evaluated relating to the payment of the compensation of result and of the optional treatment linked to the individual performance of people in charge".

The introduced access is so wide that refers also to data elaborated by the same public administrations and it is not limited only to the information contained, including what has been previously established by art. 24, co. 3. 241/1990. Also the Law of the Council of

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State was determined to exclude this possibility precisely for the purpose to which the access was preordained, that is the safeguard of a well defined interest and not an inspection on the conducted administrative activity. In particular, the Council of State Secc V, in the declaration n.408 of 31.01.2007, stated that "where the access request to the deeds assume an elaborated and evaluative activity of these, owned by the administration, its granting is precluded because it shows the intention to control the administrative activity and it does not respect the aims for which the aforesaid instrument can be used, that is just that of a well specified interest".

This situation worries because the new access could prevail on the "classic" one according to Law 241/1990, but this point will be clarified by future Jurisprudence.[10]

In the light of necessary problems, a behaviour characterised by stable surveillance and attention is essential, even in this phase of implementation. Also the role played by National Anti-corruption System, Privacy guarantor and civil society will be important to make effective and defensive this innovative instrument of transparency and participation for public administrations, and not an excuse for them.

Notes and references

[1] The decree fixed the power of attorney included in anticorruption law n. 190/2012, that established transparency as essential level of performances related to civil and social rights in art. 117, paragraph 2, lett. m).

[2] For details on discipline about the access to deeds and on legislative developments on transparency matter v. D. Urania Galletta, Civic access and transparency of Public Administration in light of (expected) modifications to the dispositions of legislative decree n. 33/2013, in federalism.it, p.3 e R. Garofoli, The fight against corruption. Law 6**th** November 2012, n.190, the transparency decree and necessary policies, in giustizia-amministrativa.it, 30**th** March 2013.

[3] The innovation intergroup is an association of deputies who belong to different parties ,with aim to promote technological innovation in Italy; through online discussions which the intergroup uses, they decide to present, individually or in group, amendments in Committee or in general parliamentary proceedings.

[4] 1. The right of access is admitted for anyone, with no motivational obligation (deleting restrictions provided by Law n.241/1990).

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2. All documents, deeds, information and developed data, detained or in possession of a public subject, can be object of access.

3. It rules to the Administrations and also to subsidiaries and manager of public services.

4. The answers of Administrations should be sudden (max 30 days).

5. Exceptions to access are clear and compulsory.

6. The access to computer documents is free (even reproduction costs are not obligatory)

7. In case of analogical deeds and documents, it can be requested only the effective reproduction cost and possible shipping.

8. When an information has been object of at least three different access requests, the administration should publish the information in the section titled "Transparent Administration".

9. In case of denied access, judiciary and extrajudicial remedies are quick and not onerous for the applicant.

10. It expects penalties in case of denied access in illegal way.

[5] In particular, it refers to the counsel n.515/2016 expressed by the Council of State, full of observations on all the most important modifications according to Law n. 190/2012 and legislative decree n. 33/2013.

[6] At the beginning, probably, it was provided for assimilation with "classic" access.

[7] Cf. par. 11.11 of the counsel n. 515/2016.

[8] Law n. 241/1990 identified in the art. 24, paragraph 1, categories of deeds excluded from the access: "The right of access is excluded: a) for documents protected by State secret under law 24**th** October 1977, n. 801, and following modifications, and in cases of secret or prohibition of publishing explicitly provided by the law, state rules according to paragraph 6 and by public administrations under paragraph 2 of the present article; b) in tax procedures, for which their particular rules remain stable; c) regarding activities of

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public administration to the emission of normative, general administrative deeds, for which their particular rules remain stable; d) in selective procedures, regarding administrative documents including psycho-aptitude information relating to third parties", beyond other hypothesis provided for by law.

[9] Art. 5 also clarifies the appropriate procedure to follow, with a particular interruption of the ordinary boundary, equal to 30 days, in case of participation of the person involved, adopting in this way the counsel of Council of State n. 515/2016.

[10] Indeed, on 8**th** June 2016 the law was published in G.U. and on 23**rd** June 2016 it entered into force, so now it is not possible to exclude the appeal by citizens, even for deeds of "classic" access.
