

The Specious Denials of Access to Administrative Documents: Practical Problems in the Transparency Era with the Case of Italian Military Court of Verona

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Abstract

The contribution examines the institution of the right of access to administrative documents between coarse and pretentious denials in the Italian public administration and particularly the case of the reiterated illegitimate denials of access to the Military Court of Verona. The age of transparency between information to the consumer, right of access to documents and civic and the lack of responsibility of the public employee for abnormal denial is therefore still connoted by abnormal and inadmissible cases of denial of access particularly by the military state administration unable to adapt to the principle of transparency.

Keywords: Public Administration; right of access; transparency; military justice; Military Court of Verona.

Introduction

The right of access to administrative documents represents a real breakthrough for citizens by ensuring an efficient development of the relationships between Government and Public Administration in general, yet above all by ensuring full transparency as regards the activity of the latter. The right at issue is well known for having been introduced in the Italian legal system by means of the Law adopted on 7 August 1990, No. 241, which came into force on 2 September 1990. Both constraints and effective implementation of law were established by introducing specific access regulations included in Presidential Decree of 27 June 1992, No. 352, which is in force since 13 August 1992. This date marks the formal historic entry into force of the national legislation on public access to administrative documents in favour of ordinary citizens. At a later time, the Decree was abrogated and replaced with the Presidential Decree issued on 12 April 2006, No. 184.

Technically speaking, access to documentary resources¹ in Italy has always gone hand in hand with certain legitimate circumstances (which, according to the original wording of Law 241/1990, consist in a «juridically relevant situation»). Such a case should not be confused with the so-called right of civic access², recently introduced by means of Legislative Decree of 14 March 2013, No. 33 (later modified by the following Legislative Decree of 25 May 2016, No. 97, also known as the Italian *Freedom of Information Act*, FOA, since it follows the pattern of the American homologous law issued on 4 July 1966). Right of civic access grants the widest access to every citizen to the information concerning both organization and activities of public administrations³.

It is clear that right of access to administrative documents represents a fundamental achievement within the Italian legal landscape, especially for common citizens, in so far as it plays a key role in their direct approach to public administrations, even though it took more than forty years after the adoption of the Republican Constitution for its formal implementation. Indeed, the right at issue, as expressly provided for by the legislature, is no more than a tool citizens can make use of in order to get acquainted with documents held by public administrations. The ultimate target is to guarantee an overall preordained system based on the pursuit of the highest possible transparency in terms of administrative behaviour.

Public administrative tasks were carried out for decades mostly on the basis of principles such as the secrecy one and the impossibility to gain access to documents concerning interested parties. It followed then a phase devoted to the implementation of primary rules, after which it eventually came at the date of August 1992, heralding right of access to administrative documents through the intermediary of averagely capable bureaucrats and petty clerks being part of the passive workforce section of public administration.

¹ As regards access to documentary information, see, without claiming to be exhaustive: A. Girella, F. Girella, *L'accesso ai documenti amministrativi nel comparto sicurezza*, Orvieto, Intermedia, 2017; G. Bausilio, *Il diritto di accesso ai documenti amministrativi: profili giurisprudenziali*, Vicalvi, Key, 2016; J. Schwarze, *Access to documents under European Union law*, in «Rivista italiana di diritto pubblico comunitario», 2015, 2, 335-344; L. Califano, C. Colapietro, *Le nuove frontiere della trasparenza nella dimensione costituzionale*, Napoli, Editoriale Scientifica, 2014; D. Giannini, *L'accesso ai documenti*, Milan, Giuffrè, 2013; C. Colapietro (ed.), *Il diritto di accesso e la Commissione per l'accesso ai documenti amministrativi a vent'anni dalla legge n. 241 del 1990*, Napoli, Editoriale Scientifica, 2012; P. Burla, G. Fraccastoro, *Il diritto di accesso ai documenti della pubblica amministrazione*, Rome, Laurus, 2006; R. Proietti, *L'accesso ai documenti amministrativi*, Milan, Giuffrè, 2004.

² As regards the right of civic access, see: C. De Benetti, *Diritto di accesso agli atti "ex lege" 241/90 e "nuovo" accesso civico "generalizzato" ex d.lgs. 97/16: qualche criticità nella sovrapposizione dei procedimenti*, in «GiustAmm.it», 2017, 9, 1-22; M. Lucca, *Il diritto di accesso civico, generalizzato e documentale alla luce delle Linee guida ANAC n. 1309/2016*, in «Comuni d'Italia», 2017, 1-3, 26-40; C. Colapietro, *La terza generazione della trasparenza amministrativa dall'accesso documentale all'accesso generalizzato, passando per l'accesso civico*, Naples, Editoriale Scientifica, 2016; M. D'Arienzo, *Diritto alla trasparenza e tutela dei dati personali nel d.lgs. n. 33/2013, con particolare riferimento alla disciplina dell'accesso civico*, in «Diritto e processo amministrativo», 2015, 1, 123-164; M.R. Spasiano, *Riflessioni in tema di trasparenza anche alla luce del diritto di accesso civico*, in «Nuove autonomie», 2015, 1, 63-79; V. Torano, *Il diritto di accesso civico come azione popolare*, in «Diritto amministrativo», 2013, 4, 789-840.

³ See: M. Lunardelli, *The reform of legislative Decree n. 33/2013 in Italy: a double track for transparency*, «Journal of Public Law», 2017, 1, 1-46.

It is no coincidence that it was precisely thanks to the dedicated, persistent work promoted by the jurisprudence that such fundamental right of the citizens was ultimately shaped and ratified. Another crucial factor was the collaboration with the Commission for Access to Administrative Documents (CADA), specifically established by the Presidency of the Council of Ministers and Regional as well as Local Ombudsmen, later abolished in 2011.

The right of access to administrative documents between specious and gross denials

After almost thirty years, right of access to administrative documents still serves as cornerstone of the Italian administrative system, despite numerous controversies in the field. Indeed, it has frequently occurred that access to given documents was denied on the sole basis of narrow, that is specious, interpretations provided by public authorities and their respective officials. Particularly, the present work aims at analysing concrete case studies in order to establish whether it was actually the case of specious gross, and therefore irrelevant, access denials supported by illegitimate motivations, or not.

First of all, it is fundamental to consider the event of an increase in office management tasks which may weigh on competent authorities as a consequence of onerous, in terms of time and cost, applications for access to a certain document, hence the conditions for a denial. On the contrary, authorities may subsume the event of applications for access to administrative documents submitted for sole emulative purposes, furthermore, potentially causing the petitioner to bear fiscal responsibilities.

Nevertheless, the jurisprudence has always firmly, and reasonably, acknowledged that «it is necessary to evaluate as rigorously as possible suitable circumstances which could justify the denial to duplicate a document. It is, moreover, necessary to avoid arguments such as economic sustainability profiles in terms of costs related to the substantial denial, which, incidentally, have to be borne by the petitioner pursuant to Art. 25, para. 1, of Law No. 241/1990⁴». It follows that both organisational and structural boundaries cannot be taken into account as objective limitations, justifying in that way access denial. As an example, it is sufficient to mention applications submitted by private entities for access to graphic materials whose large dimensions prevent the authority involved from making photocopies.

Similarly, the alleged existence of «a concrete objective impossibility to bear material liability» cannot represent an acceptable reason for a denial. Indeed, public administrations are obliged to equip themselves with a proper bureaucratic apparatus

⁴ Italian Council of State, sect. IV, 10 April 2009, No. 2243.

capable of fulfilling their duties and responsibilities⁵. Local authorities, just as every single public administration, are likewise required to handle documents falling within their jurisdiction, including the allocation of the necessary equipment (personnel, technical instrumentation, various appliances) for the purpose of performing their tasks and duties⁶.

Regarding local minor authorities, another unacceptable argument is the one linked to the economic burden that could arise from «the reproduction of drawings, tables and drafts», resulting in a potential «slowdown in bureaucratic daily tasks» as a direct consequence of the difficult gathering process of single documents and archival researches. However, that does not change the fact that every single administrative authority shall possess a proper bureaucratic apparatus capable of fulfilling its duties and responsibilities⁷, hence, in such cases, the blatant groundlessness of access denials.

Moving now to a hypothetical situation of access denial to documents in the form of photostat copies, the denial itself should be regarded as illegitimate, since a similar request would not unnecessarily burden the regular office workload of the administration. The considerable amount of requested documents could at most justify the gradual issue of the copies in the long term⁸.

Moreover, in the event of applications for access to administrative documents entailing onerous procedures, the process of responding to duplication requests could be carried out during an undefined timeframe in order not to interfere with ordinary office tasks. By way of example, it is sufficient to recall a case study which stands out for a provision, later deemed to be illegitimate, denying access to the list of building permits granted over the period from June 2002 to September 2005, as well as to the list of public works subcontracted in the same period. Therefore, the event of an interruption of the implementation of ordinary office tasks can represent a valid reason to delay up to a later point in time the issuing process of the copies. That being said, such an argument cannot be exploited as excuse to deny access to administrative documents⁹.

Eventually, the jurisprudence stated that a potential significant amount of access requests submitted by municipal councillors cannot be considered as legitimate limitation or, even worse, as legitimate obstacle to the exercise of the right under discussion. Still, it is essential that petitioners submit proper processing requests in

⁵ Regional Administrative Court of Sardinia, sect. I, 29 April 2003, No. 495.

⁶ Italian Council of State, sect. V, 4 May 2004, No. 2716.

⁷ Regional Administrative Court of Emilia-Romagna, Bologna, sect. II, 29 January 2004, No. 140.

⁸ Regional Administrative Court of Sardinia, sect. II, 12 January 2007, No. 29.

⁹ Council of State, sect. IV, 21 August 2006, No. 4855.

the most reasonable and adequate way, in accordance with operational needs of each office, yet, above all, in the sole interest of performing their own political duties¹⁰.

However, ordinary cases of gross specious denials should be clearly distinguished from those in which institutions formally opt for the instrument of access denial in response to an instance of general civic access pursuant to Art. 5, para. 2, Legislative Decree No. 33/2013 and to the modifications to the latter introduced by means of the Legislative Decree No. 97/2016. Specifically, the last-mentioned decree concerns executive decisions, with reference to pertinent annexes, made during the whole year by accountable persons. It is actually the case of an indiscriminate, overabundant and pervasive request according to its formulation; not to mention the fact that it is contrary to good faith, as intrinsically part of the institution of general access to administrative documents. For this reason, the situation/condition above underlined lays down the requirements for the existence of (an) abuse of rights¹¹.

In the Italian legal system it is acknowledged the prohibition of abuse of every kind of subjective attitude. Pursuant to Art. 2 of the Constitution and to Art. 1175 of the Civil Code, such prohibition affects not only substantive behaviours related to the exercise of civic rights, but also procedural courses of action¹², though without necessarily being valid for cases of numerous and burdensome access instances.

Indeed, the founding elements of abuse of rights, as described by both doctrinal and jurisprudential branches¹³, are the following: 1) a subject of law is entitled to a subjective right; 2) the concrete exercise of the above-mentioned right can take place in many different, yet non strictly predetermined, ways; 3) the event that the exercise of the above-mentioned right could be carried out in a censurable way with respect to judicial or extrajudicial criteria, although formally in line with the overall attributive frame; 4) as a consequence of the context above outlined, the event of an unjustified disparity between the advantages the right-holder would enjoy and the sacrifice the counterpart would have to endure.

However, the event of a drift in terms of emulative control-oriented behaviours is quite unlikely to happen, since similar measures are not allowed by the legal system in order to preserve the regular functioning of public offices without unnecessarily resorting to both human and instrumental resources, which, incidentally, would also be somewhat expensive. Even if that were the case, it would then arise the obligation to report the abuse to the Regional Prosecutor of the Court of Auditors. The latter

¹⁰ Council of State, sect. V, 17 September 2010, No. 6963.

¹¹ Regional Administrative Court of Lombardy, sect. III, 11 October 2017, No. 1951.

¹² Council of State, plenary session, 23 March 2011, No. 3 and Supreme Court of Cassation, *en banc* session, 15 November 2017, No. 23726.

¹³ Supreme Court of Cassation, sect. III, 18 September 2009, No. 20106, on the abuse of the right of withdrawal at will and Council of State, sect. V, 7 February 2012, No. 656.

serves actually as specific public body entrusted with investigation powers with the purpose of ascertaining cases of financial damages at the hands of public employees and administrators to the detriment of Public Administration¹⁴.

Speaking of this, it should be made clear that by “financial damage” it is not meant every monetary decrease which may affect the assets of a public institution, but rather a significant episode of financial damage which can be deemed to be “unfair” in an unbiased way. It follows that, on the one hand, such damage could turn out to be an unnecessary expense, wholly or partially, with just as much doubtful benefits in both cases of a singular institution or a collectively-run one. On the other hand, it could be causally linked to a case of unlawful conduct (deliberate contravention or grossly negligent breach of service duties).

As access to administrative documents enjoys a wide scope of application, it could be basically supposed that, as a matter of fact, right-holders mainly take advantage of it in an instrumental way by trying to protect their own subjective positions, even in jurisdictional contexts.

The only way a similar conjecture could be outclassed is through the presence of reliable evidence proving the contrary: indeed, a so-called “unfair financial damage” could meet its *raison d’être*, provided that it is demonstrated that the right to claim on the authority was exercised incorrectly by the petitioner or even hindered running counter to the objective of Law. Thereby, it results that the documents the petitioner gained access to in the form of photocopies are completely useless neither for legal subjective circumstances as above described nor for the purposes of the latter themselves.

Thus, there seems to be little doubt that the whole issue can only lead, from a conceptual perspective, to the field of public accountancy, as long as costs weighing on public finance are concerned. Furthermore, another element to be taken into account is the constant supervision of the above-mentioned costs in order to spot potential financial damages to the detriment of public administration. As a matter of common knowledge, public accountancy is intended as a complex system made up of regulations and principles which presides over financial and patrimonial management of both State and public local authorities. In particular, public accountancy, as inspired by precepts ascribable to specific constitutional provisions, deals with the management of revenues and public money¹⁵.

¹⁴ See: R.M. Merlo de Fornasari, *La richiesta di accesso agli atti non si attegga a ispezione popolare e non è funzionalizzata a verificare in proprio la regolarità dell'attività di controllo effettuata dalla P.A.*, in «Nuova rassegna di legislazione, dottrina e giurisprudenza», 2009, 10, 1296-1300.

¹⁵ Court of Auditors, sect. I, 13 May 1987, No. 91; Supreme Court of Cassation, *en banc* session, 2 March 1982, No.1282.

After all, it once occurred, as regards accounting jurisdiction, that the head of a local administration was held accountable for providing illegitimate denial in response to an access request. As a consequence, the offender was convicted by the Municipality to bear costs for court fees¹⁶. The episode proves that there is actually no room for specious access denials supplied by indolent public officials just for the sake of it. Therefore, it appears rather difficult to suppose the existence of alleged financial damages resulting from costs related to the reproduction of administrative documents for purely defensive purposes.

The case of the military Court of Verona and its repeated instances of illegitimate access denial to administrative documents

Concerning the compliance of the legislation on the subject of access to administrative documents, it is precisely the chaotic mess of jurisprudential interpretations that widely proves the presence within public administration of remaining pockets of resistance. In such context, only few cases of wearying instances are reported; these are usually characterized by significant amounts of documents access is asked for, meaning that similar requests are purely based on emulative intentions.

Speaking of central administrations, the case of the military Court of Verona stands out as an emblematic example. The Court serves as peripheral subsidiary judicial body of the Ministry of Defence; it exercises criminal military justice towards members of the military who commit crimes in northern Italy. The Court has been frequently involved in repeated instances of illegitimate access denial to administrative documents concerning labour relations of civilian employees. The Presidency of the Council of Ministers supplied a specific Commission for Access to Administrative Documents (CADA) in order to ascertain the above-mentioned instances of access denial, taking also focused definitive measures. None of these measures was contested at the Regional Administrative Court of Lazio on behalf of its respective ministry.

Turning to the details, the Commission ascertained that the Court had to do with seventeen instances of illegitimate access denial to administrative documents regarding labour relations of a four-year long period¹⁷. Such documents had been requested for tutelary purposes, so did the Commission as well.

The above-described situation forms part of a broader framework including repeated violations of the most basic principles of transparency and data advertising. This is

¹⁶ Court of Auditors, sect. Umbria, 5 June 1997, No. 284.

¹⁷ Commission for Access to Administrative Documents (CADA), 27 March 2013, No. 50; CADA, 18 April 2013, No. 45; CADA, 12 September 2013, No. 67; CADA, 12 September 2013, No. 73; CADA, 25 October 2013, No. 81; CADA, 11 February 2014, No. 62; CADA, 10 February 2015, No. 59; CADA, 10 February 2015, No. 60; CADA, 10 June 2015, No. 82; CADA, 11 February 2016, No. 70; CADA, 7 April 2016, No. 60; CADA, 7 April 2016, No. 62; CADA, 28 April 2016, No. 79; CADA, 15 December 2016, No. 98; CADA, 7 September 2017, No. 136; CADA, 19 October 2017, No. 75; CADA, 18 January 2018, No. 107. All documents are available on: <http://independent.academia.edu/ProvvedimentiGarantePrivacyTribunalemilitarediVerona> (last accessed on 09 July 2018).

even more compounded by the fact that access denials were arranged by the highest members of the institution. Indeed, although enjoying a special military nature, which is different from an ordinary one, the military Court shall be bound by a sense of duty as regards both knowledge and implementation of jurisprudential legislation. However, it should be also noted that serious infringements of law due to ignorance or inexcusable negligence are important elements of magisterial accountability pursuant to Art. 2, para. 1g, Legislative Decree of 23 February 2006, No. 109. Similar infringements can be ascertained and ultimately sanctioned by the respective self-governing body, in this case by the Council of the military judiciary.

Beyond that, criminal military case law has embarked on an antiquated anti-historical approach, whose main features are high operating costs of the apparatus, considering the poor conditions of Court workloads after the suspension of compulsory military service since the very first day of 2005 (with an annual average of way less than 100 pending criminal proceedings)¹⁸. The military Court of Verona “sticks out” also for numerous serious discriminatory instances and for unlawful processing instances of civilian employees’ personal data, as pointed out in several, yet mostly undelivered, parliamentary questions addressed to the Minister of Defence¹⁹. As a result, no disciplinary action was taken against magisterial representatives responsible for the above-mentioned infringements; so far, they have never been held accountable for any violation of subjective rights. It can therefore be stated that what was actually carried out, was a fully-fledged, *de plano* dismissal of the self-governing body involved. Indeed, it was acknowledged that «the magistrate, being the head of the office, acted properly and diligently»²⁰.

With regard to the serious nature of harms deriving from specious access denials to administrative documents, it is sufficient to remind that already during the plenary session of the Council of State it was managed to arrive at an important conclusion. On this occasion indeed, the right of access was recognized as a subjective circumstance which «offers to the interested party powers of a procedural nature aimed at safeguarding in an instrumental way a juridically relevant interest (rights or interests)», rather than providing any kind of ultimate advantage²¹.

¹⁸ On 31 December 2017, the three national military Courts accounted for 163 pending criminal proceedings, 37 of which were registered in the Veronese Court alone. 43 criminal proceedings were instead registered in the military Court of Rome and, lastly, it was the case of 83 proceedings for the military Court of Naples. See statistics attached to the reports of the opening of the military judicial year 2018 that are available on the e-portal of military justice: <http://portalegiustiziamilitare.difesa.it/default.aspx?Id=1194> (last accessed on 10 October 2018).

¹⁹ Parliamentary questions addressed to the Minister of Defence of 9 July 2014, No. 4-05466 and 4-05467, 15 July 2014, No. 4-05528, 7 August 2014, No. 5-03469, 17 December 2015, No. 5-07239, 22 March 2017, No. 5-10907 and 26 July 2017, No. 5-11986: collated documents available on: <http://independent.academia.edu/InterrogazioniGiustiziaMilitare> (last accessed on 10 October 2018).

²⁰ Deliberation of the Council of the military judiciary of 20 June 2017, No. 6097, related to the President of Military Court of Verona, Massimo Bocchini. As regards access denial to the detriment of the petitioner, see: Regional Administrative Court of Lazio, Rome, sect. I-a, appeal No. 5424/2018, hearing of 15 November 2018.

²¹ Council of State, Plenary Session, 20 April 2016, No.7.

In particular, the ascertained instances of illegitimate personal data processing, in both cases of common and sensitive data and judicial and healthcare one, produced, as a consequence, the unlawful acquisition and preservation of administrative documents. Together with the principles laid down in Legislative Decree 196/2003, this is how a framework of unlawful practice of employment relationships took shape. In practical terms, it occurred that, during a period of approximately three years and six months²², the Italian Data Protection Authority ascertained five liability cases of illegitimate personal, judicial and healthcare data processing. Indeed, it happened that, in case of sickness, employees' physicians were directly contacted, getting to know personal data of the employees themselves²³. All of this took place amid the general silence of both press and national political institutions, avoiding to discuss in that way the abolition of such a pointless special jurisdiction, which, incidentally, can also rely on the support offered by academics of the criminal field of study, although not directly related to military judiciary²⁴. It should be also added that precisely this issue was the subject of many judgments by the Supreme Court of Cassation, which ruled on the illegitimacy concerning cases of legal guarantee of soldiers' freedom of expression²⁵.

Reference is made here to the so-called Surano case; Surano is a soldier of the Italian finance police, who was twice held guilty of defamation to the detriment of his superiors by writing an online critical post and was then convicted by military trial judges. Both judgments were eventually annulled by the Supreme Court of Cassation, which, incidentally, is embodied by no military judges²⁶. Moreover, military Court negatively stood out for the practice of granting senseless aberrant privileges also to non-magisterial civilian personnel, by allowing access to state-owned service accommodation. Particularly, it should be highlighted that non-magisterial civilian personnel making up ordinary justice is not entitled to do so. Even more seriously, such a right was denied to a category of disabled employees working for the Ministry of Defence, that are blind telephone operators, as proved by a Parliamentary Question.

²² Executive regulation of the Department of Legal and Justice Affairs adopted by the Italian Data Protection Authority of 5 August 2015, Prot. 22888; Executive regulation of the Department of Legal and Justice Affairs adopted by the Data Protection Authority of 19 April 2016, Prot. 11283; Executive regulation of the Department of Legal and Justice Affairs adopted by the Data Protection Authority of 15 February 2017, Prot. 5507; Executive regulation of the Department of Legal and Justice Affairs adopted by the Data Protection Authority of 20 October 2017, Prot. 33427. Documents available on: <http://independent.academia.edu/ProvvedimentiGarantePrivacyTribunalemilitarediVerona> (last accessed on 10 October 2018).

²³ Joint regulation of the Italian Data Protection Authority of 10 April 2014, No. 187, website document n. 3214369.

²⁴ As regards the lacking rationalisation of such underexploited as much as arguable and delegitimised body like military justice, see: D. Brunelli, *Tribunali militari e spending review: il tempo delle scelte*, in «federalismi.it», 2015, 3.

²⁵ On soldiers' twice-neglected freedom of expression by the judgments of military justice, later annulled by the Supreme Court of Cassation, see: F. Ratto Trabucco, *Il perimetro della libertà di espressione: differenze e similitudini fra lavoratori civili e militari*, in «Il Lavoro nella Pubblica Amministrazione», 2015, 5, 755-790.

²⁶ Supreme Court of Cassation, sect. I, 20 August 2014, No. 36045 and 23 May 2013, No. 22051. See: G. Surano, *Corte di cassazione: paragonare alla Gestapo l'ufficiale della Guardia di Finanza che vessa il personale dipendente non è diffamazione ma esercizio del diritto di critica (una vicenda personale)*, in: http://www.ficiesse.it/home-page/8724/corte-di-cassazione_-paragonare-alla-gestapo-l-e2%80%99ufficiale-della-guardia-di-finanza-che-vessa-il-personale-dipendente-non-e-e2%80%99-diffamazione-ma-esercizio-del-diritto-di-critica_-una-vicenda-personale_-di-giovanni-surano (last accessed on 10 October 2018).

The Minister of Defence, in turn, replied with a contradictory tardive response²⁷. On this occasion, the Minister pictured himself as a cast-iron supporter of military justice. However, during the previous (16th) legislature, he stood up for diametrically opposing views, signing even a constitutional draft law in favour of abolishing criminal military jurisdiction²⁸.

At this juncture, evidence of a small yet influential military magisterial lobby emerges clearly. Such lobby relies on the support of the academic field, especially since many military judges hold prominent positions in some universities of the capital: precisely similar external appointments, unrelated to the juridical sphere, for which sometimes people do not even get any remuneration, allow members of this lobby to interweave a wide range of relationships with all kinds of personalities (politicians, scholars, state managers and officials, entrepreneurs etc.). It is sufficient to point out that many different institutions (not only universities) are crowded with military judges; on the contrary, their presence in military judicial offices is becoming increasingly rare. Military magistrates are often entrusted with important decision-makings in the course of lawsuits of an economic value amounting even to millions, for example sport or financial trials. It is therefore undoubtedly that their main goal consists in gaining more and more influence in order to assert themselves on the one hand, on the other one to preserve the role of military justice, albeit pointless by now. In terms of quantity, there are only about fifty military judges²⁹, still they do everything possible to avoid their “burdensome” repositioning in the broader context of criminal ordinary jurisdiction, which, incidentally, is chronically understaffed and overloaded with judicial proceedings. So, the event of such a repositioning would entail for military magistrates a tangible risk to be overwhelmed with congruous workloads, as it however should be.

The financial Law of 24 December 2007, No. 244, gave the green light, starting from the date of 1 July 2008, to a process of rationalisation which affected, although to a limited extent, military judicial courts. Hence, it is significant to remark the progressive comeback of several military magistrates to the ranks of military justice. This phenomenon can be explained considering their reduced seniority at that time, which forced them, though reluctantly, to fall back on ordinary justice. As a consequence, such magistrates found themselves to cope with as onerous as inadequate workloads with respect to their previous scanty service duties while being part of military justice. At a later time, they applied for the reinstatement in military justice, turning staff holidays into magisterial retirement.

²⁷ Parliamentary Question addressed to the Minister of Defence dated 26 March 2014, No. 4/04189, whose reply is instead dated 19 September 2017.

²⁸ XVI legislature, Senate Act No. 3423, dated 25 July 2012: constitutional draft law “carrying amendments to Articles 102 and 103 of the Constitution as regards the abolition of military Courts and the foundation within ordinary Courts of a specialized section for military crimes”.

²⁹ The explanation of the role they play, updated on 19 February 2018, is available on: <http://portalegiustiziamilitare.difesa.it/default.aspx?id=1061> (last accessed on 10 October 2018).

The attempt to remove bodies of military justice has turned out to be a failure so far. Their judicial activity could be suspended *sine die* and the same could apply to the so-called CNEL (National Council for Economics and Labour)³⁰, even though the Constitution provides for their being in force; as a matter of fact, resorting to constitutional abolition as in the case of compulsory military service would be impossible. Military Courts are envisaged in Art. 103, para. 3 of the Constitution, military service is likewise provided as mandatory in Art. 52, para. 2 of the Constitution. However, nothing prevented legislators from introducing a professional army by resorting to ordinary law, without altering the Constitution in any way³¹. It bears mentioning that the decision was made after the Council had distinguished from the duty to defend Homeland and the one of performing military service³², justifying the suspension in the light of the principle of solidarity, pursuant to art. 2, Cost., whose virtuality transcend the area of the imposed normatively imposed obligations, calling the person to act not only for the imposition of authority, but also for free and spontaneous expression of the deep sociality that characterizes the person himself³³.

Typical features of military justice institutions are poor workload conditions in spite of considerable operating costs³⁴, frequent substantial interruptions later proved to be erroneous as to lawfulness³⁵, poor competency standards producing internal acts of a controversial, i.e. harmful, nature at the expense of subjective rights, like the right to

³⁰ On this subject, see: F. Ratto Trabucco, *Utilità o inutilità del CNEL e sua soppressione (rectius, sospensione) a mezzo legge ordinaria*, in «Rivista AIC», 2018, 1, 1-19.

³¹ Law of 14 November 2000, No. 331, implemented by means of the Legislative Decree of 8 May 2001, No. 215, later modified by Law of 23 August 2004, No. 226, with effect from 1 January 2005, incorporated into the Code of military order; see Legislative Decree of 15 March 2010, No.66.

³² Constitutional Court, 6 May 1985, No. 164.

³³ Constitutional Court, 8 July 2004, No. 228. See: F. Bocchini, *Contributo allo studio della difesa civile della Patria*, in «Giurisprudenza costituzionale», 2014, 1, 759-783.

³⁴ Refer to the statistics published on the occasion of the opening of the 2014, 2015, 2016 and 2017 military judicial years on the e-portal of military justice (<http://portalegiustiziamilitare.difesa.it>). The data shows an infinitesimal number of proceedings, which is, moreover, progressively decreasing compared to the one ascribable to ordinary justice. Indeed, as at 31 December 2013, the military Courts of Naples, Rome and Verona accounted for 200 pending proceedings; the military Court of Appeal accounted instead for 84 proceedings. As at 31 December 2014, the number of first instance proceedings was 195, whereas there were only 65 appeal proceedings. As at 31 December 2015, there were 219 first instance proceedings along with 61 appeal proceedings. As at 31 December 2016, there were 203 first instance proceedings along with only 47 appeal proceedings. Eventually, as at 31 December 2017, only 163 cases of first instance military criminal proceedings were recorded against 60 appeal proceedings.

³⁵ See military judicial statistics outlined above; figures demonstrate that, in 2013, the Supreme Court of Cassation decided on a total of 65 appeals, against the same number of judgments by the military Court of Appeal; 13 of these appeal cases were eventually annulled (10 with committal for trial and 3 without it), that is 20%. In 2014, 29 cases of annulments (18 with committal for trial and 11 without it) were recorded out of a total of 116 appeals, that is 25%. In 2015, there were 14 annulments (7 with committal for trial, just as many without it), out of a total of 60 appeals, that is 23%. In 2016, 10 annulment cases (3 with committal for trial and 7 without it) were recorded out of a total of 68 appeals, that is 15%. Eventually, in 2017, 17 annulment cases (13 with committal for trial and 4 without it) were registered out of a total of 63 appeals, that is 27%.

privacy³⁶, not to mention the presence of a corporate disciplinary regime for military magistrates in relation to ordinary jurisdiction³⁷. Additionally, the constitutional reform Boschi-Renzi, which fell through ruinously after the negative result of the *referendum* held on 4 December 2016, did not even include the abolition of military judicial bodies. It is likely that such a failure was provoked by the self-perpetuating halo gravitating towards the lobby of military judiciary and affecting somehow the executive branch as well³⁸. This was despite many rationalization attempts made by the Government during the 17th legislature³⁹, along with numerous parliamentary questions which, theoretically, should have produced the reduction of military judicial bodies, yet the executive branch did not keep the promise⁴⁰. Eventually, mention should be also made to draft laws which have never been analysed⁴¹.

³⁶ In addition to the above-mentioned provisions issued by the Italian Data Protection Authority, reference should be made to the circular issued by the military Prosecutor of Verona on 17 October 2013, which arguably established that members of each headquarter are compelled to inform the responsible inquiring authority in case of «absence from work with a duration exceeding thirty days, although justified by a legitimate medical certificate.» As the document being discussed gave rise to controversy, it was necessary to amend it by introducing some clarifications. As a consequence, a supplementary note was published on 11 November 2013. Speaking of this, see also the Parliamentary Question drawn up in the Chamber of Deputies on 15 November 2013, No. 4-02546, which was conceived as a reply to the note above mentioned. The Minister of Defence, in turn, replied on 7 April 2014. As regards instead various cases of discriminatory, unlawful processing of civilian employees' personal data by the highest members of the military Court of Verona, see further parliamentary questions of 9 July 2014, No. 4-05466 e 4-05467, 15 July 2014, No. 4-05528, 7 August 2014, No. 5-03469, 17 December 2015, No.5-07239, 22 March 2017, No. 5-10907 and 26 July 2017, No. 5-11986.

³⁷ In this regard, refer to F. Ratto Trabucco, *La responsabilità magistratuale: l'esperienza disciplinare del Consiglio della magistratura militare*, in «Il lavoro nelle Pubbliche Amministrazioni», 2012, 6, 1181-1203, as well as to G. De Vergottini, *Giurisdizione militare: la crisi della specialità*, in «Quaderni costituzionali», 2007, 2, pp. 364-367.

³⁸ See: D. Tisci, E. Taverna, *La strategia dei magistrati militari per estendere le loro competenze*, in <http://www.ficiesse.it>, 2010 (last accessed on 10 October 2018) and G. Bottacchiari, *Codice dell'ordinamento militare, rappresentanza militare, nuovi reati militari: riforme o involuzioni democratiche?*, in *ib.*, 2010 (last accessed on 10 October 2018). P. Rivello, *Spunti di riflessione sul tema della giustizia militare*, in «La giustizia penale», 2015, 3, 184-192. The latter, as a member of military jurisdiction, is in favour of protecting the status quo, though finding himself in a position of conflict of interest. Lastly, see: D. Aliprandi, *Tornatore: «La giustizia militare non va soppressa. Anzi...»*, in <http://ildubbio.news>, 9 March 2018 (last accessed on 10 October 2018); A. Custodero, *Magistratura militare, a rischio chiusura per esiguità procedimenti. Nuovi reati tra le divise*, in <http://www.repubblica.it>, 1^o March 2018 (last accessed on 10 October 2018).

³⁹ The Government put the subject matter of rationalizing military judicial bodies on the agenda five times during the XIII legislature. As a result, the so-called *reductio ad unum* of the military Courts of Naples, Rome and Verona was carried out together with the abolition of both military Court and Office of Supervision: on 9 October 2013 and 17 March 2015, the Senate gave its approval, Nos. 9/01015/002 and 0/1577/21/01, whereas the Chamber of Deputies did so on 24 October 2013, 31 July 2014 and 19 December 2015, Nos. 9/01682-A/028, 9/02486-AR/121 and 9/03444-A/179.

⁴⁰ See also parliamentary questions with relative positive replies by the Minister of Defense concerning the launching of the rationalization plan; Parliamentary Questions of 3 October 2013, No. 5/01121 and 30 April 2014, No. 4/04687. On the contrary, inspection instances dated 24 February 2016, No. 4/05342, 17 March 2016, No. 4/12562, 23 June 2016, No. 3/02950 and 27 July 2016, No. 2/01442, went all unanswered. Moreover, unanswered inspection instances of October 2014, No. 5-03747 and 31 March 2015, No. 5-05206, deal with operating costs of judicial offices according to each belonging section, even in the absence of concrete management needs, considering the limited workload amounts.

⁴¹ Additionally, Act of the Chamber of Deputies No. 2679-*undecies* was filed during the 13th legislature without starting any examination. The document at issue was actually a sort of excerpt of the draft Stability Law of 2015 aiming at the reduction of military judicial bodies (Act of the Chamber of Deputies No. 796 was instead the result of a parliamentary initiative). Constitutional draft laws, deriving from parliamentary initiatives as well, No. 1519 and 2657, together with Acts of the Senate No. 317, 609 and 766 found themselves in a similar situation. In particular, they deal with the abolition of military criminal jurisdiction by amending Art. 103 of the Constitution. In this regard, see M. Colamussi, *De iure condendo*, in «Processo penale e giustizia», 2015, 1, 12-13.

Military judges spend the majority of their free time giving all of themselves as perspicaciously as fruitfully they can for the ultimate goal consisting in preserving their respective judicial offices: three inquiring offices and first instance judging courts in Naples, Rome and Verona, one military Court of Appeal with related Prosecutor's Office in Rome in addition to the military Prosecutor's Office at the Supreme Court of Cassation. Simultaneously, it seems that the most basic requirements in terms of transparency and privacy get implemented without turning a hair, as, by way of example, unequivocally proved by the significant amount of negative judgments the military Court of Verona has "collected" over time. Indeed, both Commission for Access to Administrative Documents and Italian Data Protection Authority expressed themselves negatively regarding access denials to administrative documents and privacy protection policies provided by the Veronese Court. That being said, it is important not to draw generalizations without losing sight of the fact that military magistrates, taken individually, may have both professional qualities and a sound set of competences. Incontrovertible facts suggest, however, the classification of the above-mentioned Court not only as the "black sheep" of Italian Public Administration concerning access to administrative data, but also within judicial offices as a whole, even if only speaking of military ones, and not of these making part of ordinary justice.

The era of transparency from consumer information, right of access to administrative documents and right of civic access, to non-responsibility of civil servants in case of abnormal denials

The times we live in are frequently defined as the "era of transparency". As a matter of fact, the need for transparency embraces not only relationships between public power holders and those subject to their jurisdiction, giving rise to a delicate framework of antinomic conceptual couples such as authority/freedom, but also private law relationships. Accordingly, any relationship of an asymmetrical nature in terms of information transparency automatically falls within the scope of this subject matter. In short, it occurs that the Italian democratic system – under the pressure of European Union instructions – tends to limit the power deriving from informational advantages, which one of the two interested parties may use for its own gain. It follows that the weaker one must be informed of those circumstances with whom it was at first unacquainted. This applies in both cases of administrative law relationships and private law ones. Without going in detail into specific matters concerning private law notions and institutions, the main focus of the present study will be merely put on the Consumer Code by referring to the Legislative Decree of 6 September 2005, No. 206, and to transparency principles set out in the latter.

Indeed, the discussion on the pursuit of transparency within Public Administration the Italian national legislation has devoted to so far cannot be separated from the

ambition of carrying out a transparent engaged governance as a direct result of EU membership. It should be also noted that such European influence proved to be even more stronger than the pursuit of an internal logic based on both respect and implementation of constitutional values.

In the beginning, European institutions focused on the topic of information disparity, channelling in that way the initial impetus into the efficient development of market economy (such hypothesis is even more plausible considering the general nature of measures undertaken in the early years after the foundation of the European Union).

The above-formulated impression seems to be supported by the growing attention that has been given since the 1980s to the need for protecting the weaker uninformed contracting party in common law relationships. The driving objective consists in guaranteeing consumer protection by providing the widest range possible of information, a duty the counterparty (usually entrepreneurs or business owners who find themselves in privileged situations) has to be responsible for. Moreover, the 1980s marked the beginning of a significant increase in terms of regulations aimed at removing or at least diminishing disparity as far as contractual information is concerned.

The next step towards a new functionalization of consumer protection was contemporary to the origins of the concept of transparency within both European and national institutions. In this regard, reference should be made to the Maastricht Treaty of 7 February 1992, for it includes official mentions to both transparency and consumer protection (Articles 153 and 255). Particularly, the Treaty provides an overview on specific measures seeking to broaden the scope of public access to information held by institutions.

On the subject, examples include the issue of providing consumers detailed food information, specifically on country of origin or place of origin of raw materials. In that way, consumers are encouraged to develop a better understanding of the product and its content, avoiding the risk of misleading interpretations. With the decrees issued on February 2018, the obligation to provide food information has also started to affect durum wheat, bran⁴², rice⁴³, as already formulated in a decree dating back to April 2017, yet in that case for dairy products⁴⁴. Similar measures follow no more than the pattern of a set of regulations at first adopted in France, although questionably criticized on the basis of the concern that the obligation to provide food information

⁴² Decree of the Ministry of Agricultural, Food and Forestry Policies, 26 July 2017: «Obligation to provide on food labels detailed information as to country of origin of durum wheat for pasta made from durum wheat semolina», valid from 17 February 2018.

⁴³ Decree of the Ministry of Agricultural, Food and Forestry Policies, 26 July 2017: «Obligation to provide on food labels detailed information as to country of origin of rice», valid from 17 February 2018.

⁴⁴ Decree of the Ministry of Agricultural, Food and Forestry Policies, 9 December 2016: «Obligation to provide on food labels detailed information as to raw materials for milk and dairy products, in pursuance of regulation (UE) No. 1169/2011 on the duty to inform consumers about food content and place of origin», valid from 19 April 2017.

about place of origin would negatively contribute to the fragmentation of the European internal market⁴⁵. This is precisely why lobbies revolving around the production of wheat and processed wheat products decided to put forwards a request, asking for the suspension of effectiveness of the above-mentioned decrees, yet resulting in utter failure. Indeed, the Regional Administrative Court of Lazio gave priority to the public interest of safeguarding consumers and their right to be properly informed about food they consume. What made it possible to achieve a similar outcome was also and especially the remarkable success of an online public consultation in which approximately 26.000 users took part. The topic was the importance Italian consumers usually give to information regarding country of origin and/or place of origin of raw materials⁴⁶. It bears pointing out in this regard that the Italian primary law, since June 2014, specifically envisages the possibility to turn to public consultations in order to evaluate the general perception of the people with respect to food information, i.e. whether it is deemed to be fundamental or not and to which extent omissions of information are considered misleading⁴⁷. Considering the fact that the European Commission keeps avoiding to adopt execution proceedings of the above-mentioned obligations pursuant to Art. 26, para. 8 of Regulation No. 1169/2011, it follows that Italy, as European member state, can legally lay down its own national set of rules⁴⁸, in particular on the subject of arrears, together with pertinent compliance clauses (Art. 7, para. 2 of the above-mentioned decrees).

Leaving aside the issue of consumers' awareness in terms of food information, it cannot be denied that administrative transparency plays a key role from a legal viewpoint, neither it cannot be argued about the need to introduce a general law in order to adjust administrative procedures, as incidentally already expressed, last but not least, by the Council of State. At the same time, it should be also taken into account that juridical categories and notions are always evolving over time, the more especially they find themselves under pressure of both external circumstances and globalization processes.

Italy find itself in a position of subjection with respect to specific boundaries deriving not only from EU membership, but also from international obligations (Art. 117, para. 1, Const.), and precisely such condition of constraint turns out to be particularly relevant in the context being discussed. It is in fact abundantly clear that the internal evolution of informational transparency as a juridical concept has been deeply influenced by a

⁴⁵ See: L.G. Vaqué, *L'indicazione d'origine dei prodotti alimentari: una rivoluzione francese neo-protezionista?*, in «Il Diritto comunitario e degli scambi internazionali», 2016, 4, 629-639.

⁴⁶ Regional Administrative Court of Lazio, sect. II-b, Decree of 22 November 2017, No. 6194.

⁴⁷ Art. 4, para. 4-a, 1. 3 February 2011, No. 4, as introduced by means of Art. 3, para. 3b), Legislative Decree of 24 June 2014, No. 91, reg., later modified by Law of 11 August 2014, No. 116, which, incidentally, includes measures in support of so-called *Made in Italy* products.

⁴⁸ See: C. Tallia, L. Fornabaio, *The new decrees regarding mandatory origin labelling in France and Italy: some guidelines*, in «Diritto agroalimentare», 2017, 1, 109-123.

blend of values and beliefs of both European and international origin, for instance, the penetration into the Italian legal apparatus of institutions typical of the so-called common law system. Another example of a typically Anglo-Saxon institution is the one of civic access, being the newest addition to the Italian legal system, even though it will not be discussed in the present study.

The already mentioned *Freedom of Information Act* (FOA) finds instead its roots in the American legal system, as it is well known for having been introduced in 1996, heralding the possibility to publish documents of the American federal executive. Additionally, the Aarhus Convention of 25 June 1998 established right of civic access to documents concerning environmental matters. It should be highlighted in this regard that civic access pertinently reflects the American benchmark of *freedom of information*, considering that by means of its introduction it was allowed to move towards a new administrative regime based on full accessibility to administrative documents as a right granted to all citizens (so-called *full disclosure*)⁴⁹, whereas the previous one was entirely founded on the limitation of access permit to few entitled persons and, consequently, on the obligation to make administrative documents available for access.

Legislative Decree No. 33/2013 launched a reform process within the legal system aimed at ensuring citizens the widest accessibility as possible to administrative information, specifically concerning organization and activities of public administrations. The ultimate objective consists in achieving effective implementation of both democratic and constitutional principles, such as equality, neutrality, good administration, responsibility, effectiveness and efficiency as regards the use of public funds, as well as in order to put into effect a model of open administration which is available to all citizens. Furthermore, it is explicitly formulated the intention of fighting corruption and maladministration, along with the good purpose of achieving a greater level of informational, statistic and digital coordination as regards specific data pertaining to public administration (state, regional and local administration), as referred to in Art. 117, para. 2, letter *r*, Const.⁵⁰

The above-listed objectives have been effectively put into practice through the publication of several administrative documents on official government websites, so that everyone can directly and immediately gain access to them with no need to authentication nor identification. Non-publication represents a legitimate condition for claiming right of civic access pursuant to Art. 5, Legislative Decree 33/2013, by applying first of all an instance of access, which, incidentally, does not have to be

⁴⁹ See: A. Simonati, *L'accesso civico come strumento di trasparenza amministrativa: luci, ombre e prospettive future (anche per gli Enti locali)*, in «Istituzioni del federalismo», 2016, 3, 725-752.

⁵⁰ Council of State, sect. VI, 20 November 2013, No. 5515.

necessarily motivated. Legislative Decree 97/2016 establishes instead the principle of general civic access, regardless of duties of publication⁵¹.

Access to administrative documents is governed by Articles 22 et seq. of Law 241/1990 and refers to the right interested parties can make use of in order to gain access to given documents and to copy them for their own purposes – as a prerequisite, it is necessary for the instance of access to be valid its stemming from a juridically legitimate situation of a relevant nature with respect to the document access is asked for. It naturally follows that instances of access shall be always motivated.

In the light of the foregoing considerations, it can be eventually stated that the so-called right of civic access turns out to be incompatible with access possibility as formulated in Law 241/1990, since they are mutually exclusive. Thus, civic access, pursuant to Legislative Decree 33/2013, excludes ordinary access, pursuant to Law 241/1990, as the latter does not require the document access is asked for to be necessarily available to the public according the principle of transparency⁵².

All that proves the existence of a great turmoil within the Italian legal system, such that the introduction of right of access alone, as formulated in Law 241/1990, was enough to produce a considerable echo, being perceived as a radical innovation. That being said, it should be reminded that similar laws had been already introduced in other legal branches (like Art. 25, para. 1, Law of 27 December 1985, No. 816, which formulates the right of citizens to gain access to administrative provisions issued by local authorities, leaving to the latter full freedom as far as concrete exercise of such right is concerned).

It was actually the case of a significant first step towards the concretization of a new legal framework, no more exclusively focused on the principle of secrecy, but rather on transparency, which still is the bedrock of the Italian entire administrative apparatus.

On 18 February 2016, the Council of State, through its advisory section for legislative measures⁵³, defined the whole situational picture, as regards transparency and access possibilities, as overall comprehensive. The Council's opinion took shape on the basis of a due analysis of the reform, dated 2005, of general law No. 241/1990 on administrative procedures together with its aftermath, hence the conclusion that all aspects of the relationship administration/administered have been properly regulated

⁵¹ See: M. Alban, *Disciplina dell'accesso civico e generalizzato*, in «Comuni d'Italia», 2017, 1-3, 77-90; E. Furioli, *L'accesso civico "generalizzato", alla luce delle Linee Guida ANAC*, in «GiustAmm.it», 2017, 4, 1-21.

⁵² See: M. Avvisati, *Accesso procedimentale "versus" accesso civico nel dialogo fra le fonti: il caso FOIA*, in «Osservatorio sulle fonti», 2017, 2, 1-13; M. Binda, *Accesso civico e accesso disciplinato dalla legge n. 241 del 1990*, in «Temi romana», 2014, 4, 47-56.

⁵³ The Council provided its opinion through a draft decree aimed at introducing both «Revisions and simplifications in fields such as prevention of corruption, advertisement and transparency in order to improve Law of 6 November 2012, No. 190 and Legislative Decree of 14 March 2013, No. 33, pursuant to Art. 7 of Law of 7 August 2015, No. 124 concerning reorganization of public administrative bodies.

so far. It was as well ascertained that the national legislation not only guarantees wide knowledge and participation in all kind of civic interests, no matter if individual or collective, but also keeps increasingly encouraging its targeted users towards an ever more conscious approach.

Transparency in general, and not only in cases of decision-making processes, is therefore considered to be an essential tool for the enhancement of representative democracy, especially considering the fundamental role it plays for the management of public funds, but also within private law relationships. It is precisely thanks to the principle of transparency that public administration can be run properly and efficiently. Generally speaking, transparency holds an immanent position within the national legal framework, especially for governmental public authorities while carrying out their own tasks, not to mention the fact that it also serves as measurement parameter for balancing the working performances of public law subjects.

Under that approach, the Council of State defined transparency as «catalyst of the leading juridical principles on the basis of the administrative apparatus, such as sound administration, neutrality, so-called principles of substantive law as well as democratic participation, which, incidentally, are all constitutionally protected values. Such principles lay the groundwork for juridical crosscutting institutions whose action is oriented towards the achievement of democratic transparency (it is sufficient to mention Law No. 124 and all participatory mechanisms that have been introduced or reformed by its means)». Reference should be also made in this regard to the statements that the President of the Italian National Anti-Corruption Authority (ANAC) has made on several occasions. The ANAC-OCSE report is likewise noteworthy, being the result of many inspections carried out on contracts awarded for Expo Milano 2015. Indeed, the inspections gave rise to various inquiries and commitments for trial for crimes against public administration, involving politicians (including the incumbent mayor of Milan), public officials and entrepreneurs.

It can eventually be stated that even hermeneutic jurisprudential interpretations of a broader nature, as in the case outlined above, base themselves on the matter of fact that the overall national legal system has undergone a profound change in recent years, ensuring as a result to all parties involved greater transparency as to decision-making processes, greater participatory involvement and greater safeguard of the key principle of sound administration.

When referring to the Italian Public Administration, the Russian word *glasnost* seems to be the most suitable to fully describe it; the term dates back to the 19th century, when it used to designate the public availability of juridical decisions. Later, in the late 1980s, the term used to be instead in vogue as usually addressed to the reforms of the so-called “humane” socialism, i.e. reforms carried out in a spirit of devotion to the

principle of transparency. Likewise, it has been repeatedly proved that in Italy there is no room for specious gross access denials, since every attempt has been systematically rejected by the Commission for Access to Administrative Documents, embodied by the figure of the Administrative Law Judge. Access denials are often attributable to old bureaucrats, “white-collar” officials or even vile fogeys whose lame legal knowledge has little to do in most cases with the principle of meritocracy. Moreover, it frequently occurs that similar individuals hold prominent working positions, although achieved through non-transparent procedures like “politicised” recruitments, as it often happens within public administration. In other words, it is the case of alleged legal experts, who firmly support unlikely opinions of a despicable arrogance, showing in that way no more than their ignorance towards the most basic laws and regulations concerning the legal subject areas of privacy and access to administrative documents. Being part of the administrative workforce, it is no surprise that it is actually quite easy to come across their presence, whether in useful or superfluous public offices at both central and local level. As to their attitude, they enjoy squandering public resources for the purchase of legal databases or for the arrangement of further training measures, such as pointless workshops, although capable of arising the public interest.

It would be therefore at least desirable that the Commission for Access to Administrative Documents and the Administrative Law Judge do not confine their authority to the mere ascertainment of illegitimate conditions underlying cases of specious access denials, but that they also dare to subject perpetrators to pecuniary sanctions, as, after all, independent administrative authorities already do within their respective scope of competence. First of all, a similar scenario could be possibly arise, provided that instances of access denial break both law and jurisprudential established practice as a prerequisite. Secondly, responsible authorities, as a consequence, would have to be entitled to impose pecuniary sanctions with mandatory notification to the Regional Public Prosecutor’s Office of the Court of Auditors. Individuals directly responsible for serious infringements of a lawfully recognized right to every single citizen such as the right of access could be in that way directly punished.

Access denials to administrative documents should be equally handled from a regulatory point of view as cases of breach of duty, as provided for by way of example in Art. 76 of Presidential Decree of 28 December 2000, No. 445, which contains «the Consolidated Law on administrative documents». The decree at issue deals in particular with self-declarations of a certificate and affidavits, being both the bedrocks of the principle of simplification within public administration, allowing citizens to easily submit to competent authorities self-declaration documents instead of making copies of the originals. As a consequence, civil servants responsible for access denials would have to be necessarily sanctioned by the same public office they work for, prior

to adequate disciplinary action taken by accountable managers, i.e. by the Office for Disciplinary Procedures making up every public administrative office.

Access denial should at most represent a rare exception, without however justifying the lack of coherent motivations for its issue. Even when sufficient reasons are provided for by stereotyped incompetent civil servants, they tend to merely consider it as a formal procedure. Similar state employees seem to embody a sort of despicable modern version of ancient Roman censors and this is the reason why they should be definitely expelled from Public Administration, prior to the imposition of suitable disciplinary, criminal as well as pecuniary sanctions. Nevertheless and sadly to say, the typically Italian cultural inclination to indolence is actually responsible for the fact that up to now, only in few cases it has been possible to lay a finger on unqualified individuals working for the administrative apparatus, taking punitive measures against them. The result remains therefore unchanged: access denial to administrative documents for informational purposes is still a common practice, more common than it should be, hence serious infringements to the disadvantage of ordinary citizens and to their lawfully recognized rights. In this connection, it is worth recalling what Benjamin Rush, one of the founding fathers of the Constitution of the United States pioneeringly came to understand. In the late 18th century, precisely in 1786, he expressed himself as follows in his project aimed at establishing public schools in Pennsylvania and at developing public education along with the new republican government in a coordinated manner: «Freedom can exist only in the society of knowledge. Without learning, men are incapable of knowing their rights and where learning is confined to a few people, liberty can be neither equal nor universal»⁵⁴.

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⁵⁴ See B. Rush, *Essays, literary, moral and philosophical*, Philadelphia, Bradford, 1798, 1, as well as F. Rudolph (ed.), *Essays on Education in the Early Republic*, Cambridge, Belknap, 1965, which contains essays and other texts published between 1786 and 1799 by Benjamin Rush, Noah Webster, Robert Coram, Simeon Doggett, Samuel Harrison Smith, Amable-Louis-Rose de Lafitte du Courteil and Samuel Knox. The importance of the above-mentioned works lays precisely in the fact that they represent the very first formal attempt to define responsibilities, possibilities and prospects of the American education system in the initial phase of the American republican era.

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