NEJVYŠŠÍ SPRAVNI SOUD

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Supreme administrative courts and evolution of the right to publicity, privacy and information.

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Answers to Questionnaire: Italy

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Supreme Administrative Courts and evolution of the right to publicity, privacy and information

(Questionnaire)

1. **Briefly describe the administrative institutional backing of free access to information and of the protection of personal data. If and wherever these agendas are institutionally linked, provide a brief description of such relations.**

In Italy, the competent authorities governing the right to access and protection of personal data are: the Commission of access to administrative documents and the Personal data protection authority.

The Commission of access to administrative documents is governed by Law no. 241 of 1990 in its Article 27. The role of this Commission is to:

- ensure the execution of the "publicity" and "disclosure" principle for Public Administration activities.
- prepare an annual report focusing on the transparency of Public Administration activities; this report shall be sent to the Parliament and Chairman of the Council of Ministers;
- propose to the government changes or amendments, if any, to texts of laws and regulations, which are required for the implementation and complete application of the right to access administrative documents and acts.

The Commission also has "para/extra"jurisdictional functions. This is only for activities related to the central or peripheral administration of the State.

A citizen who files an application to access administrative documents to administration and who does not acquire them may, through alternate means, seek the help of an administrative court or the Commission of access to administrative documents for obtaining these documents.

Similar“extra/para” jurisdictional functions are recognised by the municipal, provincial and regional civil defence counsel in the local administrations.

The Personal Data Protection Authority is an independent authority established in 1996, which ensures that the processing of personal data conforms to the relevant laws and regulations

Article 25, paragraph 4 of Law no. 241 of 1990 establishes a connection between the two institutions. According to the statutes of this article, when the application to access the acts is denied for reasons of protection of personal data, the Commission must request for opinions and considerations of the Personal Data Protection Authority before giving a ruling on the citizen's application.

2. **Describe in general terms the regular administrative and court procedure in a typical disputable case of free access to information. Also describe the procedural role of your supreme administrative court.**

Only the directly involved entity may submit an application to the administration controlling the access to personal acts and documents. Duly substantiated reasons must be given for this application for access to documents. In case of refusal of access to the records, the directly involved entity can submit an appeal before an administrative court or an independent administrative authority (Commission for access, Commission for administrations of the State, civil defence counsel, commission for local administrations) within 30 days.

The administrative court officiates a special procedure; this procedure takes place in the Council Chamber and ends with a simple judgement.

3. Describe the procedural role of your supreme administrative court in the area of protection of personal data.

In this regard, the authority lies with the judicial court that has exclusive jurisdiction on this subject, deliberates and gives a ruling on the decisions of the Personal data protection authority. The administrative court is responsible for the right to privacy only in an

indirect manner, especially for controversies that concern denial of access to administrative acts and documents.

The denial of access to personal documents can be justified by the need to safeguard and protect the personal and private nature of the third-party entities; a part of the information concerning them is present in the administrative document in question.

The relation between the right to access documents and privacy is regulated by granting a special place to the right of access to information, in relation to the right of defence.

However, the right to privacy has an almost intangible character especially when highly sensitive data and equally sensitive legal issues are at stake. This particularly involves issues pertaining to racial and ethnic origins, religious and philosophical convictions, political opinions and membership of political parties, unions and associations, etc. of religious nature.

The access to these highly sensitive documents is granted only if it guarantees the indispensable requirement of protecting the legal interests of the person in question. Hence, the right to access the administrative documents may be authorised only for the purpose of securing a sensitive legal situation (information on sexuality or health).

However, the rights of the applicant must also be as sacrosanct and sensitive as the laws that protect the right to access.

4. Provide a general overview of the historical development of access to information rights in your jurisdiction while focusing on the most important legislative and judicial milestones. Also, please try to generally describe the main driving forces behind the development of these rights.

In the administrative procedure, the right of access to administrative documents was introduced by Law no. 241 of 1990. Prior to this date, the relation between Public Administration and citizens was governed by confidentiality.

The access to the administrative documents governed by Law no. 241/1990 is an access that is “instrumental” in nature. It can neither be recognised by any citizen nor give rise to any extensive and generalised control of the activity of the administration; on the

contrary, the right of access to administrative documents can be held only if it benefits the protection of a legally pertinent situation (Article 22 of Law no. 241/1990 in its original version).

In concrete terms, this benefit refers to the specific requirements of the applicant and, as such, a genuine benefit that can neither be considered as conformist nor be reduced to mere curiosity, and it should mainly be related to the applicant as the holder of a subjective position that is legally pertinent and for which the legal system reckons that it merits protection.

An extension of the right of access to administrative acts is provided for environment, where, during the transposition of community directives, firstly by the legislative decree no. 39/1997 followed by the legislative decree no. 195 of 19 August 2005, it has been ensured, for reasons of greater transparency, that environmental information would be systematically and progressively disseminated and made available to the public, especially by means of telecommunication and IT tools, in easily accessible forms and formats, by promoting the use of information and communication technology for this purpose.

Several laws after law no. 241 already state the transparency and publicity requirements that are placed on the fringes of administrative action.

But it is with the legislative decree no. 150/1999, Article 11, that transparency undergoes a “genetic mutation” and is re-organised as “total accessibility” to a series of data that tend to include the action and organisation of the administrations (allocation of resources, organisational structures, changes in the management and the results of activities), depending on the service of users and transparency for the community. This qualified and generalised position vis-à-vis public information for all citizens is clearly intended, contrary to what is stated for access, “to promote the generalised forms of control of compliance with the principles of good and impartial administration” (Article 11, Paragraph 1).

The juridification of this domain of transparency is reflected in the publicity of a series of information, which confirms the distinction, as far as positive law is concerned, between

access and transparency, to the extent that the former, as a position qualified by a connecting criterion between the applicant, access and data for which access is sought, evidently has no space to operate where this data is public and accessible to the entire community. With this perspective, transparency, although always relating to the double aspect of organisation and "asset" of the administration and therefore to the administrative procedure, acquires its purpose of existence equally, and perhaps especially, outside the procedural phase and plan in the strict sense of the term.

The process initiated by the legislative decree no. 150/2009 has been completed with the legislative decree no. 33 of 2013. Not only does this process involve a range of detailed penalties in case of non-fulfilment by the administrations of obligations of publicity imposed on them, but it also introduces a completely new recourse by recognising every person's civil right of access to information and data (whether or not it is contained in legal acts in the strict sense) for which the obligation of publicity has not been fulfilled: a right of access, thus, free from conditions of admissibility of the access granted under law no. 241 of 1990, enforceable without any formality, without the need to justify the application, without having to prove the usefulness of the act that we understand in relation to the defence requirements of the applicant, but based on the only condition of non-execution by the administration as regards the obligations of publicity.

Although this does not concern a legal system that may be linked to the American *Freedom of information act,* we find ourselves in presence of a strong innovative system that is capable of "compelling" the administrations to ensure the publicity prescribed by the law. In other words, while it is true that in our system, not everyone has the right to access any information regardless of whether it is held by the administration, it is also true that unlike the American model, the obligation of publicity already exists in the system described and does not depend on the request of a party. All the more so since the penalty mechanisms, from the point of view of responsibilities, are not linked to a request.

As we have observed in the regulation introduced by the legislative decree no. 33/2013, the obligations of publication include a "situation that clashes with a subjective right to be informed, which is granted to "anyone", i.e. to the citizens to the extent that they (without any need to prove the distinct benefit that justifies this application) (Article 3). The obligations of publication correspond not to a *need to know* (knowledge required for the fulfilment of a benefit or a particular requirement), but a *right to know.*

Hence, this refers to a right that is assisted by an implementation mechanism (in case of non-execution of the obligation of publication) that may be implemented by anyone, almost in the form of popular action.

As for extending the application, the civil access is recognised with respect to all documents, information and data that must be published under the "regulations in force" (Article 5, Paragraph 3) and thus also beyond the provisions of the legislative decree no. 33 of 14 March 2013. For example, all documents that must be published are provided on the display board. In order to have access to this information, it is no longer required to show "direct, concrete and actual benefit, corresponding to a situation that is legally protected and related to the document", as mentioned in the general rules for the right of access provided for by the Law 241/1990, from the moment when the civil access fulfils the conditions appropriately because it is not subject to any specific reason and subjective admissibility. Admittedly, this is not exactly like the American FOIA (that applies to all information held by the administrations, and not just the information that is subject to publication), but it is a step in that direction, which in any event resolves the (serious) paradox of having to show a distinct benefit, till today, for having access to a document that was already subject to publication (and consequently, under such an operation, that may be known as it is by anyone).

5. Give basic subjective observation as regards the role and importance of free access to information in political system of your country. In particular, focus on how the importance of freedom of information is perceived by general public and by non-governmental sector.

The transparency in the information regarding public affairs is recognised by the policy in specific and by public opinion in general, firstly as a value that cannot be compromised upon and secondly as a major tool for preventing and fighting against illegality and corruption.

It is important to highlight that considerable efforts have been taken since the approval of the anti-corruption law (Law no. 190/2012), a law that, apart from the institution of the anti-corruption authority (ANC), introduced the obligation for public administration to disclose and publicise the information related to its activities.

6. Give a subjective general observation of whether and how free access to information rights is in practice abused or misused by the petitioners.

One can also note that sometimes the rights of access to reserved documents are used in an improper manner, without any real legal benefit and sometimes as a pretext to obtain the right to monitor activities and information of the public administration to acquire reserved information pertaining to natural or legal persons.

These practices accompanied by several continuous requests can and often does weigh down the actions of the public service. This without a doubt will have repercussions on the right to "privacy" of the public administrations that, as a result, violate the principle of proportionality and requirement.

7. Give a list and brief explanation of security, law enforcement and/or defence institutions in your country that can benefit from the exceptions laid down in Art. 7(e), Art. 8(4) and 8(5) of the Directive 95/46/EC.

In the Code pertaining to the personal data protection, specific rules are mentioned for certain public subjects, (excluding the public and economic entities):

Article 18 mentions that it is only for reasons and tasks related to his status as a public official and within the limits authorised by the code that personal data may be processed.
Except for health institutions, the public officials, without violating the laws, may or may not require consent of the subject concerned (Art. 18 Para. 4) and may process sensitive and judicial data related to the subject even in the absence of an ad hoc regulation or law (Art. 19 Para 1).
With regard to the disclosure of data, the public officials are authorised to communicate this information to other public officials, even in the absence of provisions of law authorising it, if this disclosure or communication facilitates their exercise of institutional functions (Art. 19 Paragraph 2). This procedure is not possible for private entities, whether or not it is stated by a law or a regulation (Art. 19 Paragraph 3).
In short, the code clearly specifies that:

- the public officers may act even in the absence of law provisions;
- these public officers do not require the consent of the entity concerned by this data;
- however as far as sensitive data and data with legal relevance is concerned, the public entities are required to verify the actual indispensability of the data processing and if need be, issue an ad-hoc regulation.

Title IV of the second part of the code is reserved for processing of data in the public domain. This part of the code underlines the fact that the processing of personal data by institutional entities is linked to the scope of the public interest that the question entails.
The code also specifically examines the processing of data in the health domain and with the judicial framework, through police forces for reasons of security and defence of the State.

8. Subjectively identify the emerging actual problems that arise from processing of personal data by the aforementioned security, law enforcement and/or defence institutions. Provide specific examples where appropriate.

In Italy, controversies regarding personal data fall under the jurisdiction of the judicial court. The reduced and almost insignificant number of cases referred to an administrative court is not indicative and does not result in any considerations even if they are critical.