

C. COLAPIETRO, *The “third generation” of the administrative transparency. From the access to documents to the generalized access, passing for the civic access.*

*Abstract*

The visibility or *transparency* of power is definitely an essential connotation of the administration of the modern constitutional state that, in its early days, was based on the culture of *secrecy* inherent in the nature of the bureaucracy that founded its own power upon it.

There is by now a widespread awareness that *knowledge is power*, because power and knowledge imply each other: true democracy is based on the availability of information, so to a different possession of data corresponds to a different distribution of power.

Public transparency, therefore, involves the actual availability of the information, which must be guaranteed to the citizen in accordance with the powers they enjoy in relation to the temporary holder of public powers. Just the power of knowledge, therefore, rests the close link between transparency and democracy (including the State Administration), as there can be no true democracy without transparency.

Beyond the mere textual data, the general principle of transparency within *agere public*, as well as the more specific principle of administrative transparency, can be certainly be qualified, thanks to the systematic interpretation of the fundamental principles of our form of State, as con-

stitutional principles inherent in our legal system. Nevertheless, for over forty years the administration has remained unrelated to the process of democratization that has affected other branches of government.

What we will call the Italian way to knowability of the administration – which has led, even in our legal system, to the progressive affirmation of the general principle of administrative transparency, still waiting, however, an explicit constitutional anchor – was undertaken by our legislature only with the approval of the administrative procedure law (law of 7 August 1990, no. 241), unanimously recognized as a fundamental turning point in the democratization of relations between government and citizens in terms of participation and, above all, transparency, which has in the right to access to administrative documents one its most important expression.

It is only with the d.lgs. March 14 th 2013, no. 33, the c.d. decree transparency, however, that the principle of the administrative transparency undergoes a real «genetic mutation», it shapes himself as total accessibility to a whole series of information relative to every aspect of the action and the organization of the administrations, with the purpose to realize those «diffused forms of control» (art. 11, paragraph 1, D.lgs. October 27 th 2009, no. 150) for a long time blocked to the traditional access. This «new» transparency, however, does not yet amount to a general duty of publicity, but it manifests through a legal provision of an ample, but punctual series, of obligations

of publication. To guardianship of such right to the knowability of the administrative action, the decree introduces an articulated system of guarantees, whose main tool is represented by a new form of access disciplined by the art. 5, the right of civic access, that can be operated by from whoever, almost in the form of the popular action, to sanction the breach of the administration in relation to the obligations of publicity imposed by the law.

The recent adoption of Legislative Decree no. 25 May 2016, no. 97, better known as “Decree FOIA (Freedom of Information Act),” marks a further step in our system on the path of administrative transparency in Italy. The new legislation has the dual aim of streamlining the disclosure requirements introduced by Legislative Decree no. 14 March 2013, n. 33 and broadening the spectrum of knowability of the administration, through the recognition of a general civic right of access to public information inspired

by the US model. We are thus witnessing the birth of the “third generation” of administrative transparency, now declined as «total accessibility of data and documents held by public authorities», not only aimed at «fostering widespread forms of control over the pursuit of official duties and the use of public resources», but also to ensure greater protection of citizens’ rights and to promote their participation to the conduct of the public administration.

The value of transparency, however, understood today as immanent principle of the public authorities, is likely to produce – through indis-

criminate dissemination, generalized and unlimited in time, of personal data on the web – a weakening, if not a real violation in the fundamental right to privacy, in which, on the one hand, there is the right to privacy, understood as a guarantee of citizens from both public and private interference, and on the other, the right to protection of personal data, a more recent needs yielded by the recent development of technology.