

GOVERNMENT TRANSPARENCY AND THE RIGHT  
OF ACCESS TO INFORMATION: EVOLVING INTERNATIONAL  
AND EUROPEAN STANDARDS AND THEIR IMPLEMENTATION  
IN THE ITALIAN LEGAL SYSTEM

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Abstract

*Government transparency is a common principle within democratic legal systems. In recent decades, it has emerged as a fundamental principle of democratic governance, essential in promoting the rule of law, enabling public engagement, fighting corruption and improving development outcomes. Still, transparency is a complex and dynamic concept; it constantly evolves following political, social and technological developments and it can be reflected in a variety of rules, procedures and implementing instruments. In this framework, public access to government-held information has attained primary importance; it has emerged in international and national practice as a key indicator for transparency and as a human right in and of itself, essential for individuals to hold governments accountable and to give effect to other rights. This contribution outlines the evolution of the right of access to government-held information in international human rights practice, with a view to pinpointing evolving dynamics and emerging issues. In so doing, special attention is devoted to the European context, in particular the European Convention on Human Rights and the European Union. In light of this analysis, the contribution then investigates the Italian normative framework, in order to assess achievements and limits of existing regulations and to examine if and to what extent it guarantees a right of access to information held by public authorities which is in line with international standards. To this end, recent developments are analysed, focusing on Legislative Decree No. 97/2016, the so-called “Italian Freedom of Information Act”.*

Keywords: transparency, right to information, European Union, European Court of Human Rights, Italian Freedom of Information Act

1. INTRODUCTORY REMARKS

Government transparency is a common principle within democratic legal systems; it goes to the heart of the relationship between government and society and, in the last two decades, it has become topical in the political and

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media debate surrounding the crisis of legitimacy that government institutions are facing at different levels. There is a growing awareness that transparency, together with other principles of “good governance”<sup>1</sup> closely related to it – accountability, public participation, rule of law, inclusiveness – is a condition for effective and equitable institutions. Namely, transparency is a prerequisite for the implementation of several other good governance principles: without transparency, it would be difficult to call public sector authorities to account or to involve actors of civil society in decision-making processes.

Still, despite its “popularity”, the meaning of this principle is not easy to nail down. Transparency is a complex and dynamic concept; it constantly evolves following political, social and technological developments and it can be reflected in a variety of rules, procedures and implementing instruments. According to the United Nations Development Programme (UNDP), government transparency “comprises all means of facilitating citizens’ access to information and their understanding of decision-making mechanisms. Transparency is built on the free flow of information: processes, institutions and information should be directly accessible to those concerned and enough information should be provided to understand and monitor them”.<sup>2</sup> Thus transparency embraces elements like the publication of legislation and decisions, the duty to give reasons, access to documents and information, legal clarity, and openness of the decision-making procedures.<sup>3</sup> In this framework, in the last three decades, public access to government-held information has attained primary importance, and has emerged in international and national practice as a key indicator for transparency<sup>4</sup> and as a human right in and of itself, essential for individuals to hold governments accountable and to give effect to other rights (“rights multiplier”).<sup>5</sup>

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<sup>1</sup> The World Bank (WB) set out the concept of “good governance” in its 1992 Report on Governance and Development. The report defined “governance” as “the manner in which power is exercised in the management of a country’s economic and social resources for development” and concluded that good governance is essential for sustainable development. “The essence of good governance was described as predictable, open and enlightened policy, together with a bureaucracy imbued with a professional ethos and an executive arm of government accountable for its actions”: see IFAD, *Good Governance: An Overview*, UN Doc. EB 99/67/INF.4, 26 (1999), para. 4.

<sup>2</sup> UNDP, *Mainstreaming Anti-Corruption in Development*. Anti-Corruption Practice Note, 2008, p. 37.

<sup>3</sup> See PRECHAL and DE LEEUW, “Dimensions of Transparency: The Building Blocks for a New legal Principle?”, *Review of European Administrative Law*, 2007, p. 51 ff.

<sup>4</sup> See UNDP, *Building Transparency, Accountability and Anti-Corruption into the Post-2015 Development Framework*, 2014.

<sup>5</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/68/362 (2013), para. 19, and Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/17/27 (2011), para. 22.

Access to information has been at the core of intense evolving dynamics in several international regulatory frameworks:<sup>6</sup> development policies,<sup>7</sup> anticorruption rules,<sup>8</sup> environmental regulations,<sup>9</sup> and human rights law. The growing acknowledgment of it as an essential tool to promote democratic governance and to improve development outcomes<sup>10</sup> led, in 2015, to its incorporation into the Sustainable Development Goals (SDGs), adopted by the United Nations General Assembly. Goal 16 on Peace, Justice and Strong Institutions as well as, implicitly, other goals and targets recognise it as a necessary instrument for promoting the rule of law, fighting corruption, developing accountable and transparent institutions and enabling public engagement.<sup>11</sup> United Nations (UN) and regional human rights bodies have played a crucial role in this process, by identifying access to government held information as “a benchmark of democratic development”<sup>12</sup>

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<sup>6</sup> These evolving dynamics affect the international legal order from a dual perspective. From the first perspective, which this contribution focuses on, evolving international policies and regulations encourage and support States in the adoption of internal rules and instruments aimed at increasing transparency. In addition, the quest for enhanced transparency has arisen in relation to activities and decision-making procedures of international organisations. See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/72/350 (2017). See also BENVENISTI, “Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?”, *EJIL*, 2018, p. 9 ff.

<sup>7</sup> See, *ex multis*, WB annual reports on Access to Information and the recent Organisation for Economic Co-operation and Development (OECD) Recommendation of the Council on Open Government, C(2017)140, and all materials available on the WB website: <<http://www.worldbank.org/en/access-to-information>>, the UNDP website: <<http://www.undp.org/content/undp/en/home/accountability/transparency.html>>, and the OECD website: <<http://www.oecd.org/>>.

<sup>8</sup> See the provisions on access to information in the United Nations Convention against Corruption, 31 October 2003, entered into force 14 December 2005; the African Union Convention on Preventing and Combating Corruption, 1 July 2003, entered into force 5 August 2006; and the Southern African Development Community (SADC) Protocol against Corruption, 14 August 2001, entered into force 6 August 2003.

<sup>9</sup> The importance of public access to information held by governments had an early and remarkable acknowledgement in the environmental domain; see all the materials available on the website of the UN Special Rapporteur on Human Rights and the Environment: <[www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx](http://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx)>. See also FRANCONI, “International Human Rights in an Environmental Horizon”, *EJIL*, 2010, p. 41 ff.

<sup>10</sup> According to the UNDP, “[t]he characteristics of good governance are essential pillars of democratic governance, which requires efficient institutions and an economic and political environment that renders public services effective and makes economic growth possible. At the same time, democratic governance for human development must also be concerned with whether institutions and rules are fair and accountable, whether they protect human rights and political freedoms, and whether all people have a say in how they operate”. See UNDP, *Mainstreaming Anti-Corruption*, *cit. supra* note 2, p. 6.

<sup>11</sup> Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015). Target 16.10 reads: “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.

<sup>12</sup> Report of the Special Rapporteur on the right to freedom of opinion and expression, UN Doc. E/CN.4/2005/64 (2004), para. 38.

and by progressively outlining and shaping it as a “fundamental human right”,<sup>13</sup> which should be given effect at the national level through comprehensive legislation and adequate instruments.

Over the past twenty years, an increasing number of countries have been introducing and enforcing legal provisions on this issue. According to the non-governmental organisation “Article 19”, 117 out of 193 UN member States have adopted laws which set out legal rules on access to information held by public bodies, known as Right to Information (RTI), Freedom of Information (FOI) or Access to Information (ATI) Acts.<sup>14</sup> Similarly, the UN Secretary-General, in his 2018 Report on progress towards the SDGs, emphasised that the legal framework for access to information has improved globally, especially at the domestic level, although implementation often remains a challenge.<sup>15</sup>

In line with international developments, in recent decades, the Italian legal system has experienced an important change of perspective: numerous measures have been adopted to implement the principle of transparency and to address the culture of secrecy permeating the public sector. Italy is a party to several binding international instruments in the context of which access to government-held information has been progressively recognised as an essential governance tool and as an individual right: first and foremost human rights instruments, which this contribution focuses on, like the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Further, as a member of the European Union (EU), it is subject to the relevant EU regulations. Accordingly, Italy is bound by principles and rules set out in these instruments, as they evolve in the international practice of the competent bodies. However, as explained below, the process of implementation of the evolving international standards on the right of access to information within the Italian legal system has been slow and inconsistent. In this framework, Legislative Decree No. 97/2016,<sup>16</sup> the so-called “Italian Freedom of Information Act” (Italian FOIA) has been an important step forward, having “revised and simplified” (once again) national rules concerning “prevention of corruption, publicity and transparency”. According to its promoters, this legislation was expected to bring about a radical change in relations between government and civil society, also through the implementing measures to be adopted after its entry into force.

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<sup>13</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.

<sup>14</sup> See “Progress on the right to information around the world”, available at: <<https://www.Article19.org/resources/infographic-progress-on-the-right-to-information-around-the-world/>>, and the report “Open development: Access to Information and the Sustainable Development Goals” (2017) available at: <<https://www.article19.org/resources/open-development-access-to-information-and-the-sustainable-development-goals/>>.

<sup>15</sup> Progress towards the Sustainable Development Goals, UN Doc. E/2018/64 (2018), para. 132.

<sup>16</sup> Legislative Decree No. 97 of 17 May 2016, in force 23 June 2016 (hereafter D.Lgs. 97/2016).

The objective of this contribution is to outline the evolution of the right of access to government-held information in international human rights practice<sup>17</sup> (Section 2), with a view to pinpointing evolving dynamics and emerging issues. In so doing, special attention is devoted to the European context, in particular the European Convention on Human Rights (Section 3) and the European Union (Section 3.1). In light of this analysis, the contribution then investigates the Italian normative framework, in order to assess achievements and limits of existing regulations and to examine if and to what extent it guarantees a right of access to information held by public authorities which is in line with international standards (Section 4).

## 2. GOVERNMENT TRANSPARENCY AND THE RIGHT OF ACCESS TO INFORMATION IN INTERNATIONAL HUMAN RIGHTS PRACTICE

“The importance of access to government-held information for democracy and public participation in the governance of the country as well as the positive effect on accountability”<sup>18</sup> has been a relevant subject of the human rights debate since the mid-nineties. The UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression (hereafter UN Special Rapporteurs) have played a crucial role in calling the international community’s attention to this issue. Given that “access to information is basic to the democratic way of life” and that freedom of expression “will be bereft of all effectiveness if the people have no access to information”,<sup>19</sup> they have progressively outlined the right to access information as an essential element of the right to freedom of expression, as it is established by the Universal Declaration of Human Rights (Article 19) and the International Covenant on Civil and Political Rights (ICCPR, Article 19(2)).<sup>20</sup> In its traditional meaning, this freedom requires States’ abstention from interfering with the individual’s desire to receive and

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<sup>17</sup> Phrases such as “right of access to information” and “right to information” are utilised interchangeably in this paper as occurs in several recent international documents; nonetheless, the first wording still is the most widely used, in particular in older official documents.

<sup>18</sup> Promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussain, UN Doc. E/CN.4/1995/32 (1994), para. 35. In previous years, first steps had been made in different contexts, in particular within the Council of Europe (CoE), see Resolution No. 428, 23 January 1970, and the Declaration on the Freedom of Expression and Information, 29 April 1982.

<sup>19</sup> 1994 Report of the Special Rapporteur, *cit. supra* note 18, para. 35.

<sup>20</sup> International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976. According to Article 19(2), “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds [...]”. The right to freedom of expression is also enshrined in Art. 13 of the American Convention of Human Rights (ACHR), Art. 10 of the European Convention on Human Rights (ECHR), Art. 11 of the Charter of Fundamental Rights of the European Union (CFR), and Art. 9 of the African Charter on Human and Peoples’ Rights (ACHPR).

disseminate ideas and information.<sup>21</sup> However, besides this “weak” version of the freedom, a stronger one has emerged; according to it, “the right to *seek and receive* information”, as a component of freedom of expression, “imposes a positive obligation on states to ensure access to information, particularly with regard to information held by government [...]”.<sup>22</sup>

The process of acknowledgement of access to information as a “right in and of itself” and as “one of the rights upon which free and democratic societies depend”<sup>23</sup> has been wide and articulated. UN Special Rapporteurs have elaborated on this issue in several reports and documents,<sup>24</sup> including two joint Declarations with the Special Rapporteurs of the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS) and the African Commission on Human and Peoples’ Rights (AComHPR).<sup>25</sup> Correspondingly, a number of Recommendations and Declarations on this topic have been adopted

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<sup>21</sup> This interpretation is confirmed by General Comment No. 10 on Article 19 that does not even mention the issue of access to information held by government bodies. See CCPR General Comment No. 10: Article 19 (Freedom of Opinion), UN Doc. HRI/GEN/1/rev.9 (Vol. 1) (2008), p. 181. See MENDEL, *Freedom of Information: A Comparative Legal Survey*, Paris, 2009.

<sup>22</sup> Promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussain, UN Doc. E/CN.4/1998/40 (1998), para. 14 (emphasis added). The Commission on Human Rights (CHR) endorsed the Special Rapporteur’s opinion in Resolution 1998/42, UN Doc. E/CN.4/RES/1998/42 (1998), para. 14. See also Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain, UN Doc. E/CN.4/1999/64 (1999), para. 12.

<sup>23</sup> 2013 Report of the Special Rapporteur, *cit. supra* note 5, para. 18.

<sup>24</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, UN Doc. E/CN.4/2000/63 (2000), paras. 42-44; The right to freedom of opinion and expression. Report of the Special Rapporteur, Ambeyi Ligabo, UN Doc. E/CN.4/2004/62 (2004), paras. 34-64; The right to freedom of opinion and expression. Report of the Special Rapporteur, Ambeyi Ligabo, UN Doc. E/CN.4/2005/64 (2004), paras. 36-44; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, UN Doc. A/HRC/7/14 (2008), paras. 21-31; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue, UN Doc. A/HRC/14/23 (2010), paras. 30-39; 2013 Report of the Special Rapporteur, *cit. supra* note 5, paras. 18-23 and 48-69; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/71/373 (2016); Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/32/38 (2016); Report of the Special Rapporteur of the Human Rights Council on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/72/350 (2017).

<sup>25</sup> 2004 Joint Declaration, *cit. supra* note 13, p. 2; and Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression, 19 December 2006.

in the context of regional human rights systems, in Europe,<sup>26</sup> in America<sup>27</sup> and in Africa.<sup>28</sup>

A turning point in this process was the judgment of the Inter-American Court of Human Rights (IACtHR), in 2006, in the case *Claude Reyes v. Chile*<sup>29</sup>. The case was brought by members of a Chilean environmental NGO, who had been denied access to information on environmental impacts of a proposed logging project, without appropriate justification, both from the competent national authority and from the Court of Appeal of Santiago de Chile. The Court analysed the claimant's allegations under Articles 13, 8 and 25 of the ACHR<sup>30</sup>. In its judgment, it referred to the "individual and social dimensions" of the right to freedom of expression embodied in Article 13 of the ACHR and affirmed, for the first time, that this provision "protects the right of all individuals to request access to State-held information", unless there is a specific justification for refusal.<sup>31</sup> The Court based its conclusions on "regional consensus" among the States members of the OAS on the role that access to government-held information plays as "an essential requisite for the exercise of democracy".<sup>32</sup> In this perspective, it outlined the right of access to information as an instrument against discretionary exercise of government power, which is recognised to all individuals in the public interest.<sup>33</sup> To support its conclusions, the Court also referred to relevant international practice in other contexts and made reference to the UN Convention against Corruption, a number of recommendations adopted within the Council of Europe, Principle 10 of the Rio Declaration on Environment and Development and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>34</sup>

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<sup>26</sup> In 2002, the CoE adopted the Recommendation on Access to Official Documents, Rec (2002) 2, stating that "Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities".

<sup>27</sup> In 2000, the Inter-American Commission on Human Rights adopted the Declaration of Principles on Freedom of Expression, October 2000; Art. 4 States that "Access to information held by the State is a fundamental right of every individual". See also the Resolution on Access to Public Information: Strengthening Democracy, AG/RES. 1932 (XXXIII-O/03), 10 June 2003, and the following Resolutions on this issue available at: <[http://www.oas.org/en/sla/dil/access\\_to\\_information\\_references.asp](http://www.oas.org/en/sla/dil/access_to_information_references.asp)>.

<sup>28</sup> In 2002, the African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) 02, 23 October 2002. According to Art. IV, "Everyone has the right to access information held by public bodies", available at: <<http://www.achpr.org/mechanisms/freedom-of-expression/>>.

<sup>29</sup> IACtHR, *Claude-Reyes et al. v. Chile*, Judgment of 19 September 2006. See ANTON and SHELTON, *Environmental Protection and Human Rights*, Cambridge, 2011, pp. 356-359; PAVONI, *Interesse pubblico e diritti individuali nella giurisprudenza ambientale della Corte europea dei diritti umani*, Napoli, 2013, pp. 89-95.

<sup>30</sup> Article 13 (Freedom of thought and expression); Article 8 (Right to a fair trial); Article 25 (Right to judicial protection).

<sup>31</sup> *Claude-Reyes et al. v. Chile*, *cit. supra* note 29, para. 77.

<sup>32</sup> *Ibid.*, para. 79.

<sup>33</sup> *Ibid.*, para. 87.

<sup>34</sup> *Ibid.*, para. 81.

Judicial recognition of the individual right to access information held by governments added further impetus to the ongoing process, resulting in the adoption of different international instruments intended to foster and support the adoption of national rules aimed at guaranteeing this right. Examples of this are the model laws and the guidelines on access to information adopted in regional contexts,<sup>35</sup> as well as binding instruments, such as the Council of Europe Convention on Access to Official Documents, of 2008,<sup>36</sup> or the recently adopted Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.<sup>37</sup>

Along these lines, a relevant advance was the change in the interpretation of Article 19 of ICCPR by the Human Rights Committee (HR Committee), followed shortly afterwards by the adoption of the new General Comment on this provision. For a considerable period of time, the HR Committee had outlined the right of access to public interest information as a corollary of media freedom, thus recognising it only to media actors.<sup>38</sup> In 2011, for the first time, it extended to every individual the right to access State-held information embodied in Article 19(2) of the Covenant, recognising that public associations and private individuals too may have “watchdog” functions on matters of legitimate public concern.<sup>39</sup> Accordingly, the new General Comment No. 34 expressly provides that Article 19 “embraces a right of access to information held by public bodies”<sup>40</sup> and devotes two paragraphs to its analysis. In parallel with the work of the HR Committee and the special procedures, the Human Rights Council and the General Assembly also articulated the importance of the right to access information held by public bodies. In 2016, the Council called upon all States “to ensure that information held by public authorities [...] is proactively disclosed and not unnecessarily

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<sup>35</sup> See, for instance, the OAS, Model Inter-American Law on Access to Public Information, AG/RES. 2607 (XL-O/10), 8 June 2010, and the Guide for Implementation of the Model Inter-American Law on Access to Information, CP/CAJP-2841/10, 23 April 2010, available at: <<http://www.oas.org/en/iachr/expression/index.asp>>. See also the Model Law on Access to Information for Africa of the African Commission on Human and Peoples’ Rights, 23 February 2013, and the Guidelines on access to information and elections in Africa, November 2017, available at: <<http://www.achpr.org/mechanisms/freedom-of-expression/>>.

<sup>36</sup> CoE, Convention on Access to Official Documents (No. 205), 27 November 2008, not yet in force. Although it is not yet in force, it was the first binding international instrument offering a general protection to the right of access to documents.

<sup>37</sup> The Regional agreement was adopted at Escazú, Costa Rica, on 4 March 2018, under the auspices of the UN Economic Commission for Latin America and the Caribbean (ECLAC). It is not yet in force.

<sup>38</sup> *Ex multis*, HRC, *Gauthier v. Canada*, Communication 633/1995, views adopted on 7 April 1999, para. 13.4.

<sup>39</sup> HRC, *Toktakunov v. Kyrgyzstan*, Communication 1470/2006, views adopted on 28 March 2011, para. 6.3. The Committee recalled that the right of access to information, like the right to freedom of expression, “includes two dimensions, individual and social [...]”, para. 7.4.

<sup>40</sup> General Comment No. 34. Article 19: Freedom of opinion and expression, UN Doc. CCPR/C/GC/34, (2011), in particular paras. 18 and 19. See O’FLAHERTY, “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment n. 34”, *Human Rights Law Review*, 2012, p. 627 ff.

classified or otherwise withheld from the public [and] to adopt transparent, clear and expedient laws and policies that provide for the effective disclosure of information held by public authorities and a general right to request and receive information”.<sup>41</sup>

It is important to point out that the right of access to information has many aspects. It embraces both the right of the media to access information and the general right of the public to have access to public interest information from several sources, in addition to the right of individuals to request and receive information concerning themselves that may affect their individual rights. As pointed out by the HR Committee and the UN Special Rapporteurs, by virtue of its complex nature, the right of access to information has also emerged as a component of other rights,<sup>42</sup> including the right to privacy, the right to a fair trial, the rights of minorities and the right to the truth. This contribution focuses on the public interest dimension of the right to information, namely on the general right of the public (individuals or legal persons and their group or associations) to have access to information held by governments. This right has stemmed from the “social dimension” of the right to freedom of expression, as a result of its interaction with principles of democratic governance as transparency, accountability and public participation.<sup>43</sup> These principles, indeed, imply and require a different relationship between government and society, which takes account of new actors and dynamics of today’s “information society” and which is supported by new legal instruments aimed at protecting civil society’s real and evolving needs and goals.

### 2.1. *International standards developed by UN human rights bodies*

Several principles and standards have been developed by UN human rights bodies to define a legally enforceable right of the public to access information held by governments.<sup>44</sup> To give effect to this right, States “should make every effort to ensure easy, prompt, effective and practical access”<sup>45</sup> to information

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<sup>41</sup> Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, UN Doc. A/HRC/RES/31/32 (2016), para. 13. See also Human rights and the environment, UN Doc. A/HRC/RES/34/20 (2017).

<sup>42</sup> General Comment No. 34, *cit. supra* note 40, para. 18; 2013 Report of the Special Rapporteur, *cit. supra* note 5, para. 19. See MCGONAGLE and DONDEERS (eds.), *The United Nations and Freedom of Expression and Information. Critical Perspectives*, Cambridge, 2015.

<sup>43</sup> See *supra* note 10. On the interaction between good governance and human rights, see the resolution, adopted by the HRC, The role of good governance in the promotion and protection of human rights, UN Doc. A/HRC/RES/37/6 (2018). See also BENVENISTI, “Ensuring Access to Information: International Law’s Contribution to Global Justice”, University of Cambridge Faculty of Law Research Paper No. 17/2018, available at: <<https://ssrn.com/abstract=3106885> or <http://dx.doi.org/10.2139/ssrn.3106885>>.

<sup>44</sup> For details on the principles analysed below, see the reports and declarations cited *supra* notes 22, 24 and 25, and the General Comment No. 34, *cit. supra* note 40.

<sup>45</sup> General Comment No. 34, *cit. supra* note 40, para. 19.

in their possession. This includes the duty to establish clear rules, such as by means of freedom of information legislation, and to enact the necessary procedures and instruments. Namely, public authorities are required to play a double role. On the one hand, they have to ensure access to information upon request (reactive disclosure). To this aim, States should remove all procedural formalities that unreasonably restrict access, such as restrictions on the scope of accessible information,<sup>46</sup> unreasonable fees or time limits and, most importantly, conditions for access.<sup>47</sup> On the other hand, public authorities are required “to proactively put in the public domain information of public interest”<sup>48</sup> that can contribute to public debate, even in the absence of a request (proactive disclosure). Such information shall be actively disseminated in a manner that ensures that it is accessible and understandable and that includes, at least, general information on public bodies’ functions, activities and budgets, but also information on key civic issues.<sup>49</sup>

The underlying idea is that “public bodies” hold information not for themselves but on behalf of the public; as a consequence, information should be subject to the principle of “maximum disclosure”<sup>50</sup> and confidentiality is acceptable only in exceptional circumstances when it is essential for the effectiveness of their work. In this perspective, the concept of “public bodies” comprises all bodies performing public functions (i.e. providing public services and managing public funds), including autonomous bodies and agencies as well as other entities.

The principle of maximum disclosure implies a presumption of disclosure, which may be overcome only through limited exceptions, in accordance with the conditions laid down in human rights instruments. Thus, restrictions on access must be unambiguously defined by law and must conform to the strict test of necessity and proportionality with a view to protecting an overriding public or private interest from a “substantial” harm.<sup>51</sup> In short, “the relation between

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<sup>46</sup> The concept of “information” should include “records held by a public body regardless of the form in which the information is stored, its source and the date of production”: see *ibid.*, para. 18.

<sup>47</sup> Comparative studies on national experiences show that one of the obstacles that frequently hinder the right of access is the requirement for those who request information to demonstrate a direct and specific legal interest. This has also been the case in Italy for a considerable time: see *infra* Section 4.

<sup>48</sup> General Comment No. 34, *cit. supra* note 40, para. 19; 2013 Report of the Special Rapporteur, *cit. supra* note 5, para. 28; 2004 Joint Declaration, *cit. supra* note 25, p. 2; 2006 Joint Declaration, *cit. supra* note 25, p. 2; 2000 Report of the Special Rapporteur, *cit. supra* note 24, para. 44.

<sup>49</sup> See ESKENS, HELBERGER and MOELLER, “Challenged by News Personalization: Five Perspectives on the Right to Receive Information”, *Journal of Media Law*, 2017, p. 259 ff.

<sup>50</sup> 2013 Report of the Special Rapporteur, *cit. supra* note 5, para. 76; 2004 Joint Declaration, *cit. supra* note 25, p. 2; 1998 Report of the Special Rapporteur, *cit. supra* note 22, para. 14.

<sup>51</sup> According to Art. 19(3) ICCPR, two limited areas of restrictions on the right to freedom of expression are permitted, concerning either “respect of the rights or reputations of others” or “the protection of national security or of public order or of public health or morals”. In particular, national security is often used to justify excluding information in the public interest from disclosure, with many governments overclassifying vast amounts of information and documents and others providing limited transparency in the process and substance of classification.

right and restriction and between norm and exception must not be reversed”.<sup>52</sup> Detailed regulation of restrictions on the right of access to information is one of the most critical issues for its effectiveness; existing practice indicates that a wide and discretionary use of exceptions may put the right in jeopardy.<sup>53</sup> Standards developed in international practice are strict: non-disclosure of information must be justified on a case-by-case basis, providing written justification with clear indication of the grounds for refusal, and independent appeals mechanisms should be established against refusals or in case of failure to respond to requests.<sup>54</sup>

Effective operationalisation of these standards requires a series of coordinated supportive actions: independent monitoring of the implementation of access-to-information law, improvement of the management and technical capacity (Information and Communications Technologies – ICTs),<sup>55</sup> training of public officials, and awareness-raising of the public are identified as best practices.

### 3. TRANSPARENCY AND THE RIGHT TO ACCESS INFORMATION IN THE EUROPEAN CONTEXT: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Against this background, it is interesting to focus attention on the European context, in particular on the role played by the two main European courts, the European Court of Human Rights (ECtHR), which has taken a conservative stance, and the Court of Justice of the EU (CJEU), which has progressively recognised the right of the public to access government held information.

The ECtHR has shown resistance to a broad interpretation of the right to freedom of expression embraced in Article 10 of the ECHR. In light of the different wording of this provision, that does not contain the verb *to seek*,<sup>56</sup> the Court has repeatedly argued that the notion of “freedom to *receive* information” prohibits a government from restricting a person from receiving information that others are willing to impart to him, but it does not embody an obligation on the government

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See, in particular, 2013 Report of the Special Rapporteur, *cit. supra* note 5, paras. 56-69 ; 2004 Joint Declaration, *cit. supra* note 25, pp. 2-3; 1999 Report of the Special Rapporteur, *cit. supra* note 22, paras. 18-24; 2017 Report of the Special Rapporteur, *cit. supra* note 24, para. 11.

<sup>52</sup> General Comment No. 34, *cit. supra* note 40, para. 21.

<sup>53</sup> Experts’ assessments suggest that about half of the countries that have adopted freedom of information legislation and policies fall short of having clear legal provisions for exceptions to that right. See Progress towards the Sustainable Development Goals, *cit. supra* note 15, para. 20.

<sup>54</sup> In essence, the burden of demonstrating “a direct and immediate connection between the information to be disclosed and the alleged threat to a protected interest” shall lie with the public authorities, 2013 Report of the Special Rapporteur, *cit. supra* note 5, para 53.

<sup>55</sup> ICTs have dramatically simplified the process of making information available to the public but pose new legal and management challenges. See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/66/290 (2011), focusing on Internet and freedom of expression; JOYCE, “Internet Freedom and Human Rights”, EJIL, 2015, p. 493 ff.

<sup>56</sup> In this respect, this provision differs from Art. 19 ICCPR and Art. 13 ACHR.

to disclose information.<sup>57</sup> More clearly, it has affirmed that Article 10 “cannot be construed as imposing on a State [...] positive obligations to collect and disseminate information on its own motion”<sup>58</sup> and that “it is difficult to derive from the Convention a general right of access to administrative data and documents”.<sup>59</sup> Thus, for a long time, the Court has not gone beyond the recognition of a limited right of access to government-held information where it is necessary to protect other Convention rights. An example of this approach is the obligation of States to secure a right of access to information in relation to environmental issues, developed under the right to private and family life (Article 8) and the right to life (Article 2).<sup>60</sup> Several times the Court has emphasised the importance of this procedural right in order to enable individuals potentially affected by environmental damage to assess the risks to which they are exposed. It has affirmed that, in this context, States’ positive obligations may include not only enabling access to information upon request but also a duty to actively provide it.<sup>61</sup> Nonetheless, the right to information is outlined exclusively as a procedural component of other human rights; therefore, only those who are “victims” of a violation of such rights are entitled to invoke it. In practice, positive obligations to provide information result from the risk to applicants’ private life, health or life, not from the general interest to transparency or to democratic (environmental) governance.<sup>62</sup> This makes evident the substantial difference between a focus on the rights of victims and the public interest perspective that lies behind the autonomous right of access to information acknowledged by human rights bodies at the global and regional levels.

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<sup>57</sup> *Leander v. Sweden*, Application No. 9248/81, Judgment 26 March 1987, para. 74 (emphasis added). See MENDEL, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, available at: <rm.coe.int/16806f5bb3>; VOORHOOF, “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights”, *European Constitutional Law Review*, 2007, p. 114 ff.

<sup>58</sup> *Guerra and Others v. Italy*, Application No. 14967/89, Judgment of 19 February 1998, para. 53; see also *Sirbu and Others v. Moldova*, Applications No. 73562/01 and 5 others, Judgment of 16 June 2004, para 18.

<sup>59</sup> *Loiseau v. France*, Application No. 46809/99, Decision of 18 November 2003, para 7.

<sup>60</sup> See CoE, “Manual on Human Rights and the Environment”, 2nd ed., 2012, available at: <[https://www.echr.coe.int/LibraryDocs/DH\\_DEV\\_Manual\\_Environment\\_Eng.pdf](https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf)>.

<sup>61</sup> States’ positive duties require that effective and accessible procedures are established to obtain relevant information (*McGinley and Egan v. UK*, Applications No. 21825/93 and 23414/94, Judgment of 9 June 1998, paras. 97 and 101) but may also entail a duty to inform (*Guerra and Others*, *cit. supra* note 58, para. 60; *LCB v. UK*, Application No. 23413/94, Judgment of 9 June 1998, para. 212); even in case of scientific uncertainty about the nature and the extent of the risk (*Vilness and Others v. Norway*, Application No. 52806/09, Judgment of 5 December 2013, para. 244).

<sup>62</sup> See PAVONI, *cit. supra* note 29, Chapter 3; STEYN and SLARKS, “Positive Obligations to Provide Access to Information under the European Convention on Human Rights”, *Judicial Review*, 2012, p. 308 ff.; BOYLE, “Human Rights and the Environment: Where Next?”, *EJIL*, 2012, p. 613 ff., p. 625; ROSSI, “La partecipazione del pubblico in campo ambientale: linee evolutive e recenti sviluppi nel diritto internazionale”, in CATALDI and PAPA (eds.), *Ambiente, diritti ed identità culturale*, Napoli, 2006, p. 189 ff.

It is only in recent years that the Court has advanced towards “a broader interpretation of the notion of ‘freedom to receive information’ and thereby towards the recognition of a right of access to information”.<sup>63</sup> The Court has established, firstly, that the public has a right to “receive” information of general interest,<sup>64</sup>; and secondly, like the HR Committee before it, that other actors involved in matters of public interest (NGOs, academic researchers, activists)<sup>65</sup> may exercise a role “as a public watchdog” of similar importance to that afforded to the press, providing accurate and reliable information to the public. In such circumstances, these actors warrant a higher level of protection: as with the press, public authorities have an obligation not to impede information of public interest that is in their exclusive possession being accessed and disseminated in order to contribute to public debate. Noteworthy here is the Court’s ruling in *Youth Initiative for Human Rights v. Serbia*. The applicant was a human rights NGO, whose request to the Serbian intelligence agency for information on how many people had been subjected to electronic surveillance by that agency, in 2005, had been rejected.<sup>66</sup> Pointing to its previous decisions, the Court emphasised that the applicant NGO “was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate”.<sup>67</sup> It recognised more explicitly than ever before that “the notion of ‘freedom to receive information’ embraces a right of access to information”<sup>68</sup> and found, unanimously, that Article 10 of ECHR had been violated. Such an explicit recognition gave the impression that the Court was finally ready to follow the line

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<sup>63</sup> See *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, Judgment of 14 April 2009, para. 35; *OVESSG v. Austria*, Application No. 39534/07, Judgment of 28 November 2013, para. 41. See also *Sdruženi Jihočeské Matky v. Czech Republic*, Application No. 19101/03, Decision of 10 July 2006, para. 1.1; *Kenedi v. Hungary*, Application No. 31475/05, Judgment of 26 May 2009, paras. 42-45. See HINS and VOORHOOF, “The Right to Freedom of Expression and Information Under the European Human Rights System: Towards a More Transparent Democratic Society”, EUI Working Paper 2014/12, available at: <[http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS\\_2014\\_12.pdf](http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf)>.

<sup>64</sup> *Guseva v. Bulgaria*, Application No. 6987/07, Judgment of 17 February 2015, para. 36; *OVESSG v. Austria*, *cit. supra* note 63, para. 41.

<sup>65</sup> See the following judgments concerning NGOs (*Társaság a Szabadságjogokért v. Hungary*, *cit. supra* note 63; *Animal Defenders International v. the United Kingdom*, Application No. 48876/08, Grand Chamber, Judgment of 22 April 2013; *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06, Judgment of 25 June 2013; *OVESSG v. Austria*, *cit. supra* note 63); activists (*Guseva v. Bulgaria*, *cit. supra* note 64) and academic researchers (*Kenedi v. Hungary*, Application No. 31475/05, Judgment of 26 May 2009; and *Gilberg v. Sweden*, Application No. 41723/06, Grand Chamber, Judgment of 3 April 2012).

<sup>66</sup> *Youth Initiative for Human Rights v. Serbia*, *cit. supra* note 65. The Serbian intelligence agency denied access, relying on the Freedom of Information Act of 2004. The applicant complained to the Information Commissioner, who found that the agency had broken the law and ordered it to make the requested information available. The agency’s appeal was dismissed but, in September 2008, the agency notified the applicant that it did not hold the information requested. The ECtHR observed that the obstinate reluctance of the Serbian intelligence agency to comply with the order of the Information Commissioner had been in defiance of domestic law and was tantamount to arbitrariness.

<sup>67</sup> *Ibid.*, para. 24.

<sup>68</sup> *Ibid.*, para. 20.

already taken by the IACtHR and the HR Committee and to acknowledge that Article 10 comprises a self-standing right to access information.

It took three more years for the Grand Chamber to decide, in 2016, to clarify “whether and to what extent a right of access to State-held information as such” can be viewed as falling within the scope of Article 10.<sup>69</sup> To this end, in *Magyar v. Hungary*, the Court extensively discussed its case law on the matter, made a detailed examination of the *travaux préparatoires* of the Convention and reviewed internal and international practice, observing the evolving convergence of human rights standards.<sup>70</sup> Nonetheless, ultimately, it preferred the legal certainty of keeping close to its “standard jurisprudential position”<sup>71</sup> and stopped short of acknowledging access to information as a fully-fledged right under the Convention. The Grand Chamber recognised only a limited right to access information, which may arise in two categories of cases: where disclosure of information has been imposed by an enforceable judicial order; and in circumstances where access to information is “instrumental” for the individual’s exercise of the freedom to receive and impart information and its denial constitutes an interference with that right. As a matter of fact, the right of access to information was outlined as a precondition for “practical and effective” protection of freedom of expression.<sup>72</sup> In this perspective, the Court set down four “threshold criteria” to be applied to determine on a case-by-case basis the applicability of Article 10: the purpose of the information request, that must be necessary for the exercise of the right to freedom of expression; the nature of the information sought, that must meet a public-interest test; the role of the applicant as a public watchdog and the fact that information is ready and available.<sup>73</sup> In *Magyar v. Hungary*, the Court was satisfied that these criteria had been met. The case concerned the refusal of two police departments to disclose information requested by a Hungarian human rights NGO, in the context of a survey regarding the efficiency of the system of public defence. The information on the appointment of public defenders was of a highly public-interest nature. There was no reason to doubt that the survey contained information which the applicant undertook to impart to the public and which the public had a right to receive and the Court was satisfied that it was necessary for the applicant’s fulfilment of that task to have access to the requested information. Finally, the information was ready and available. There had thus been an interference with a right protected under Article 10, which was applicable in the case. Further, the interference was not justified by the legitimate aim of protecting public defenders’ personal data, as claimed by the Government.<sup>74</sup>

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<sup>69</sup> *Magyar Helsinki Bizottság v. Hungary*, Application No.18030/11, Grand Chamber, Judgment of 8 November 2016, para. 126.

<sup>70</sup> *Ibid.*, paras. 118-148.

<sup>71</sup> *Ibid.*, para. 127.

<sup>72</sup> *Ibid.*, para. 161.

<sup>73</sup> *Ibid.*, paras. 157-170. The ECtHR recalled its conclusions in the following case *Bubon v. Russia*, Application No. 63898/09, Judgment of 7 February 2017, para. 38.

<sup>74</sup> According to the Court, although the information requested concerned personal data, it did not involve information outside the public domain. Thus, the ECtHR concluded a violation of Article 10.

In substance, the Court refused to take for granted the assumptions that lie behind the evolution of the right of access to government-held information in international practice: “freedom of expression will be bereft of all effectiveness if the people have no access to information” and “access to information is basic to the democratic way of life”.<sup>75</sup> The ECtHR required that the positive effect of the right of access to information on public debate and the proper functioning of democratic society is assessed each time, and, accordingly, it did not outline in Article 10 an unconditional individual right but narrowed the scope of the right from a subjective and an objective perspective. On the one hand, only persons seeking access to information with a view to informing the public in the capacity of a public watchdog are entitled to access State-held information under Article 10.<sup>76</sup> On the other hand, the right of access is limited to information on matters of a public interest nature, whereas what may constitute a subject of public interest “will depend on the circumstances of each case”.<sup>77</sup> Such an approach seems to be disputable both in principle and in practice. As pointed out by Judges Sajó and Vučinić in their concurring opinion in the *Youth Initiative* case, “there can be no robust democracy without transparency, which should be served and used by all citizens”.<sup>78</sup> This is all the more true in the world of the internet, where the difference between journalists or NGOs activists and other members of the public is increasingly blurred. Further, despite the efforts of the Court in defining and explaining the “threshold criteria”, their application in practice seems far from unambiguous, and risks seriously undermining the effectiveness of the right. As a result, the level of protection afforded to the right of the public to access to government held information in the context of the ECHR falls short of the standards set out by global human rights bodies and guaranteed in other regional human rights contexts, such as the ACHR.

### 3.1. *Transparency and the right to access information in the European Union*

In the context of the EU, the legal framework on access to information held by public authorities was originally introduced with the Maastricht Treaty, eventually developed by the Amsterdam Treaty and Regulation 1049/2001 and improved with the Lisbon Treaty. This progress has been boosted by the case law of

<sup>75</sup> 1994 Report of the Special Rapporteur, *cit. supra* note 18.

<sup>76</sup> The assessment of the role of the information seeker is evidently a critical issue; it is confirmed by continuous changes in the Court case law as regards the range of actors that “may” play a watchdog function. In *Magyar*, *cit. supra* note 69, the ECtHR also included “bloggers and popular users of the social media” (para. 168).

<sup>77</sup> *Magyar Helsinki Bizottság v. Hungary*, *cit. supra* note 69, para. 162. This preliminary evaluation is not in line with the assumption that public bodies hold information on behalf of the public, thus, the right of access to information embraces all information in the possession of the State. See *supra* Section 2.1 and note 50.

<sup>78</sup> *Youth Initiative for Human Rights v. Serbia*, *cit. supra* note 65, concurring opinion of Judges Sajó and Vučinić, para. 1.1.

the Court of Justice of the European Union (CJEU), which has established itself as a driving force in the progressive recognition of access rights. Even before the right of access was embodied in the Treaties,<sup>79</sup> the Court had linked it to the democratic nature of the EU and the accountability of its institutions to European citizens. In other words, the Court has identified access to documents held by EU institutions as a crucial element of the legal principles of openness and transparency which, as domains of action of the EU were expanded, have emerged as essential in the pursuit of democratic legitimacy.<sup>80</sup> Over two decades, the right to access documents held by EU institutions has upgraded “from a situation of a mere favour being granted to the individual by the institutions in the exercise of their discretionary power”<sup>81</sup> to a general principle enshrined in Article 15(3) of the Treaty on the Functioning of the EU (TFEU) and an individual right embodied in Article 42 of the Charter of Fundamental Rights of EU (CFR).<sup>82</sup> With the entry into force of the Lisbon Treaty, the access regulation has been placed at the top of the hierarchy of EU sources of law and it is part of a new legal framework.<sup>83</sup> The rationale underlying this right (and its evolution) is evident from its inclusion in the “Citizens’ rights” (Chapter V of CFR) and is the main reason

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<sup>79</sup> The Amsterdam Treaty enshrined right of access to documents into the Treaty framework (Art. 255 TEC), providing the legal basis for Regulation 1049/2001.

<sup>80</sup> The Court of Justice firmly placed the debate on transparency and access regulation in the area of legitimacy and democracy: “a lack of information and debate is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole”. See Case C-39/05 P and 52/05P, *Sweden and Turco v. Council*, ECR, 2008, I-04723, paras. 34 and 59; see also, *ex multis*, recently, Case C-57/P, *ClientEarth v. Commission*, 4 September 2018, para. 75. See SPHAIU, “Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of European Union”, *Utrecht Journal of International and European Law*, 2015, p. 5 ff.

<sup>81</sup> Case C-64/05 P, *Sweden v. Commission and others*, ECR, 2007, I-11389, Opinion of Advocate General Maduro, para. 40.

<sup>82</sup> According to Art. 15(3) TFEU, “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph [...]”. Art. 42 of the Charter of Fundamental Rights of EU on “Right of access to documents” reads: “Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has a right of access to European Parliament, Council and Commission documents”. See ROSSI and VINAGRE E SILVA, *Public Access to Documents in the EU*, Oxford/Portland, 2017; LABAYLE, “Openness, Transparency and Access to Documents and Information in the European Union”, 2013, available at: <<https://publications.europa.eu/en/publication-detail/-/publication/23426608-30d6-4016-8bdc-be9a44d62a13>>; CURTIN and LEINO-SANDBERG, “Openness, Transparency and the Right of Access to Documents in the EU: In-Depth Analysis for the PETI Committee”, 2016, available at: <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL\\_IDA\(2016\)556973\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf)>.

<sup>83</sup> See Art. 1(2) TEU; Art. 10(3) TEU; Art. 11(1)-(2) TFEU; Art. 15(1) TFEU; Art. 298(1) TFEU. In brief, transparency is crucial to protect the democratic nature of the Union and the right of access is a fundamental tool for transparency. See LABAYLE, *cit. supra* note 82, para. 1.1.3; and SPHAIU, *cit. supra* note 80, p. 5-6.

for its explicit acknowledgement in the Charter, independently from freedom of expression, which is unique among international bills of human rights.<sup>84</sup>

Against this evolving context, the right of access to documents of EU institutions has been at the heart of controversies and political battles for years, and it continues to be. The CJEU has played a crucial (although sometimes ambiguous) role in maintaining a minimum level of protection for access rights since before the entry into force of Regulation 1049/2001, facing attempts of the Council and the Commission to curb as far as possible the right to access documents in their possession. For almost twenty years, Regulation 1049/2001 has been the cornerstone access regulation; it is based on the principle of “widest possible access” (Article 1(a)) to documents of the European Parliament, the Commission and the Council. According to this instrument, EU citizens are entitled to access all documents<sup>85</sup> held by the three main EU institutions, in all areas of activity of the EU, without stating any reasons justifying their request. Moreover, it provides duties of active dissemination of documents, by means of public registers. The interpretation of the text of the Regulation, in particular of the list of exceptions to documents’ accessibility, has led to the development of an ample body of case-law, that has shaped to an important extent the content and the scope of this right.<sup>86</sup>

The post-Lisbon framework is complex and, again, the CJEU has played a prominent role. The changes in the legal basis of Regulation 1049<sup>87</sup> gave rise to a demand for revision of the Regulation in order to fully take into account the requirements for greater transparency enshrined in the Lisbon Treaty and stated in the case law of the CJEU. The importance of the recasting process also arises from the text of Article 15(3) TFEU. According to the second subparagraph of this Article, “general principles and limits” governing the right of access to documents shall be determined by means of regulations. It is thus doubtful that this

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<sup>84</sup> Still, it is also the reason for the narrow scope of application *ratione personae* compared to international standards: both Art. 15(3) TFEU and Art. 42 CFR, indeed, refer only to EU citizens and residents.

<sup>85</sup> The EUCJ has made clear that the term “documents” must be construed in a broad sense, so as to cover access to the information contained in the EU documents. See, recently Case T-718/15, *PTC Therapeutics International v. EMA*, 5 February 2018, para. 33.

<sup>86</sup> As already mentioned, the interpretation and application of exceptions constitutes a crucial issue to ensure effectiveness of the right of access. In this perspective, the Court has gradually clarified the scope and the nature of the exceptions provided by Regulation 1049/01 and it has called for transparency of legislative processes (even for those still ongoing), of administrative procedures, but also of infringement procedures and international negotiations, in order to reduce the negotiation space where institutions are free from public scrutiny. See, *ex multis*, recently, Case C-562/14 P, *Sweden v. Commission*, 11 May 2017, paras. 45 and 56; Case T-540/15, *De Capitani v. European Parliament*, 22 March 2018, paras. 62-75; *PTC Therapeutics International v. EMA*, *cit. supra* note 85, para. 82; Case C-57/P, *ClientEarth v. Commission*, *cit. supra* note 80, para. 124 - 128. For an extensive analysis, see HEREMAS, “Public Access to Documents: Jurisprudence between Principle and Practice (Between Jurisprudence and Recast)”, Egmond Paper No. 50, September 2011, available at: <aei.pitt.edu/33461/1/ep50.pdf>.

<sup>87</sup> Art. 15(3) TFEU replaced Art. 255 TEC. Among other things, it modified the institutional scope of the citizens’ right of access to documents, since it refers to documents of all “the Union’s institutions, bodies, offices and agencies”.

provision may be invoked as a directly effective norm.<sup>88</sup> Further, pursuant to Article 52(2) of the CFR, the right of access embodied in Article 42, like all the rights derived from Union citizenship, is exercised under the conditions and within the limits defined by the Treaties. Yet, to date, the negotiations between the European Commission and the Parliament have been unsuccessful.<sup>89</sup> As a result, after almost ten years, the recasting process is at a political stalemate and the Court is at the forefront in interpreting the modified legal framework.

In its recent case law, the CJEU pointed out the need to take into account the “broad interpretation of the principle of access to documents of the EU institutions [...] borne out by Article 15(1) TFEU, [...] the second Paragraph of Article 1 TEU and Article 298 TFEU, and by the enshrining of the right of access to documents in Article 42 of the CFR”.<sup>90</sup> At the same time, however, the Court has been cautious (indeed, reluctant) to rely on Article 11 of the CFR, and in general on the right to freedom of expression, as a legal basis that could help define the content and the scope of the right of access to documents held by public authorities in the EU legal system. Still, Article 11 guarantees to “everyone”, not only to EU citizens and residents, the right to freedom of expression, that “shall include freedom [...] to receive and impart information”. Further, according to Article 51 of the CFR, its provisions are addressed to all the institutions and bodies of the Union as well as to member States “when they are implementing Union law”, and, unlike Article 42, it is not subject to conditions and limits deriving from the Treaties.

As regards access to documents of EU institutions, when the applicants have alleged *inter alia* an infringement of Article 11 CFR, the Court has been circumspect about even analysing the refusal of a request of access under the lens of this provision.<sup>91</sup> Further, when it has, it has so far been unwilling to acknowledge an infringement of this right. In *Besselink v. Council*, it simply observed that the exercise of the right to freedom of expression may be limited without there being an interference by public authorities,<sup>92</sup> thus interpreting the right to receive information as imposing only a negative obligation to refrain from interferences. In other

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<sup>88</sup> European Parliament (EP), “Report on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament”, A7-0426/2011, 29 November 2011, p. 67 ff.

<sup>89</sup> Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2008) 229 final, 30 April 2008.

<sup>90</sup> Case C-213/15 P, *Commission v. Breyer et al.*, 18 July 2017, para. 52. See also Case C-57/P, *ClientEarth v. Commission*, *cit. supra* note 80, para. 74.

<sup>91</sup> See Case T-331/11, *Besselink v. Council*, 12 September 2013, para. 47, “even on the assumption that the refusal of the applicant’s request in the present case should also be analyzed from the aspect of freedom of expression and information enshrined in Article 11 [...]”. The applicant required annulment of the Council Decision refusing access in full to a document containing a draft Council decision authorising the Commission to negotiate the Accession Agreement of the EU to the ECHR.

<sup>92</sup> *Ibid.*, para. 48. In the case at hand, the Court considered that there were no interference by the authorities of the EU with applicant’s freedom to receive information. It annulled the contested decision in part, but on other grounds.

cases, it recalled Article 10 of the ECHR and the relevant case law of the ECtHR, but it concluded that they were not applicable in the case under review.<sup>93</sup> An interesting case on this aspect is *Association Justice and Environment v. EC*.<sup>94</sup> The applicant NGO alleged infringement of Article 15 TFEU, Regulation 1049/2001, Regulation 1367/2006<sup>95</sup> and the Aarhus Convention, seeking the annulment of European Commission decisions refusing access to documents concerning an infringement procedure against the Czech Republic and regarding the application of the air quality Directive (2008/50/EC). Namely, the environmental NGO invoked freedom of expression and pleaded for the introduction of some shift of interpretation in the applicable EU law in the light of the Charter of Fundamental Rights, the ECHR, the ICCPR and the Aarhus Convention. The Court first stated that the EU has not acceded to the ICCPR and that the ECHR is not (yet) a legal instrument formally incorporated in EU law; then, it recalled Article 52(3) of the CFR, highlighting that the need to ensure the necessary consistency with rights contained in the ECHR cannot affect the autonomy of EU law and of the CJEU. Finally, it analysed the relevant case law of the ECtHR, to conclude that it could not be applied by analogy to the case and thus the arguments based on the CFR, the ECHR and the ICCPR had to be rejected.<sup>96</sup>

Similarly, in preliminary rulings, the CJEU has been reluctant to analyse the questions referred to it in light of Article 11 CFR. As an example, in the case *Google v. AEPD*, concerning the interpretation of the Data Protection Directive, the advocate general included the rights to freedom of expression and information, enshrined in Article 11 CFR and Article 10 ECHR, among the fundamental rights in issue, referring to the “fundamental right to information”.<sup>97</sup> In its judgment, the Court, despite including in its reasoning considerations concerning the “general interest in freedom of information”, did not mention these provisions.

The CJEU’s reluctance to deal with broader developments in human rights law as regards the right of access to information is in line with what has been called its “self-referential, formulaic and often-minimalist judicial style”.<sup>98</sup> This attitude of the CJEU has been pointed out also by the UN High Commissioner

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<sup>93</sup> Case T-115/13, *Dennekamp v. EP*, 15 July 2015, paras. 85-87. In this case, the Court stated that there had not been infringement of Articles 11 and 42 of the CFR but the information requested (and refused by the EP) had to be disclosed but on another basis. See also Case T-590/10, *Gabi Thesis, Bloomberg v. ECB*, 29 November 2012 (appeal pending C-28/13 P), paras. 72-82.

<sup>94</sup> Case T-727/15, *Association Justice and Environment v. European Commission*, 23 January 2017, para. 33.

<sup>95</sup> Regulation 1367/2006 of 6 September 2006, on the application of the provisions of the Aarhus Convention to Union institutions and bodies.

<sup>96</sup> *Association Justice and Environment v. European Commission*, *cit. supra* note 94, paras. 68-74. In the case at hand, the CJEU rejected all the applicant’s arguments and dismissed the action in its entirety.

<sup>97</sup> Case C-131/12, *Google v. Agencia Española de Protección de Datos (AEPD)*, 13 May 2014, paras. 120-122.

<sup>98</sup> DE BURCA, “After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?”, *Maastricht Journal of European and Comparative Law*, 2013, p. 168 ff.

for Human Rights, who has emphasised the importance that the EU ensure that its own internal human rights regime conforms to UN standards, to which all its member States have committed themselves.<sup>99</sup> Furthermore, this approach is inconsistent with the provisions of the Charter that reflect the need not to isolate its interpretation from the wider body of international human rights law.<sup>100</sup> In particular, Article 53, clarifying the “level of protection” afforded by the Charter, refers to international law and international agreements to which the Union or all the Member States are party<sup>101</sup> and confirms the predominant role of the ECHR. It has been observed that the provisions of the CFR concerning the relations between the Charter and other international instruments are inspired by the principle that the more favorable provision applies.<sup>102</sup> This makes even more questionable the approach adopted thus far by the CJEU, but also brings out the complexity of the issues that the individual right to access information held by public bodies raises in the EU human rights system, taking into consideration, on the one hand, the peculiarity of this right in the EU legal system, and on the other, the different level of protection afforded in the context of the ICCPR and the ECHR.

#### 4. THE RIGHT TO ACCESS GOVERNMENT HELD INFORMATION IN THE ITALIAN LEGAL SYSTEM

Article 21 of the Italian Constitution stipulates that “Everyone has the right to freely express thoughts in speech, writing, and by other communication [...]”, but it does not make any reference to the right to receive or seek information. Nonetheless, since the beginning, the *Corte Costituzionale* has highlighted the role of this provision as a “cornerstone of democratic order”<sup>103</sup> and, backed by academic opinion, has affirmed that it implicitly protects freedom of information, intended both in its active dimension, “right to inform”, and in its passive dimension, “right to be informed”.<sup>104</sup> Namely, in this regard, the Court has acknowledged the existence of a “general interest to information”<sup>105</sup> and, subsequently,

<sup>99</sup> European Regional Office of the UN High Commissioner for Human Rights, “The EU and International Human Rights Law, 2011, available at: <[https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)>, p. 8.

<sup>100</sup> GAJA, “The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights”, *European Papers*, 2016, p. 791 ff., pp. 796-797; ROSAS, “The Charter and Universal Human Rights Instruments”, in PEERS et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014, p- 1685 ff., p. 1699.

<sup>101</sup> See DE WITTE, “Article 53”, in PEERS et al. (eds.) *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2014, p. 1523 ff., p. 1532.

<sup>102</sup> GAJA, *cit. supra* note 100, pp. 800-801.

<sup>103</sup> *Corte Costituzionale*, 17 April 1969, No. 84.

<sup>104</sup> See BARILE and GRASSI, “Informazione (Libertà di)”, *Novissimo Digesto Italiano*, 1983, Vol. IV, p. 196 ff.; CHIOLA, “Informazione (Diritto alla)”, *Enciclopedia Giuridica*, 1989, Vol. XVI, p. 1 ff.; FOIS, “Informazione e diritti costituzionali”, *Il diritto dell’informazione e dell’informatica*, 2000, p. 249 ff.

<sup>105</sup> *Corte Costituzionale*, 9 June 1972, No. 105, para. 4; see also *Corte Costituzionale*, 9 July 1974, No. 225, and *Corte Costituzionale*, 24 May 1977, No. 94, para 3.

of a “right of citizens to information”,<sup>106</sup> that is outlined as the passive side of freedom of expression and is aimed at responding to the general need-to-know of citizens and at guaranteeing the public debate in a democratic society.<sup>107</sup>

Similarly to the human rights bodies analysed in previous paragraphs, in linking this right to the “process of information and formation of public opinion”, the Court and the Italian legislature for a considerable time focused attention mainly on the role of the media, developing a broad array of regulations and case law intended to ensure a pluralist and independent information system. However, the possibility to deduce from Article 21 an enforceable individual right to information has been the subject of an articulated academic debate, concerning the content, the legal basis and the nature of the protection afforded by this provision. The position expressed by scholars varies significantly. Some scholars are against the recognition, based on Article 21, of a right to information that goes beyond the mere freedom to receive information without any interference.<sup>108</sup> Other scholars outlined the right to information as a “general interest” or a “social right”, which may constitute the legal basis for the adoption of measures aimed at guaranteeing its effectiveness, including legislation on plurality of information sources as well as specific obligations of public bodies to inform citizens.<sup>109</sup> Another interpretation believes that a broader right to information, intended as the “right to seek information”, finds its roots in the constitutional system taken as a whole.<sup>110</sup> This “constitutional principle” entails freedom to engage in any activity aimed at accessing available information sources and may result in a variety of individual subjective situations.

In effect, despite the different positions described above, the majority of scholars argue that the “right of citizens to information”, as it has been acknowledged by the Constitutional Court, cannot be considered as an individually enforceable right. Such “constitutional freedom”, “general interest”, “social right”,

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<sup>106</sup> *Corte Costituzionale*, 13 July 1988, No. 826, para. 19; *Corte Costituzionale*, 5 December 1994, No. 420, para. 14.3.

<sup>107</sup> The Court has clarified that the “right to information” needs to be “defined and qualified” with regard to constitutional basic principles that require that democracy is based on free public opinion and is developed through all citizens’ participation in shaping the general will, cf. *Corte Costituzionale*, 24 March 1993, No. 112, para. 7. According to the Court, it follows that the right to information “is qualified and characterized by pluralism of information sources that citizens may use, by objectivity and impartiality of information provided and by completeness, accuracy and continuity of information activity” (author’s translation). See also *Corte Costituzionale*, 13 November 2000, No. 502, para. 3; *Corte Costituzionale*, 24 April 2002, No. 155, para. 2; *Corte Costituzionale*, 29 October 2003, No. 324, para. 4.

<sup>108</sup> According to these scholars, the impossibility of supporting a general right to be informed does not mean that specific rights to be informed cannot be provided for by Constitution or by law, in particular as regards public bodies.

<sup>109</sup> See BARILE and GRASSI, *cit. supra* note 104, pp. 206-207.

<sup>110</sup> The roots of this right to information are identified in the principles of equality, public participation and development of the individual embodied in the first part of the Constitution as well as in all the constitutional freedoms that entail a choice and, thus, the possibility to acquire information (e.g., Arts. 14, 16, 18, 39, 49, 33 and 34).

“constitutional value” needs to be “defined and qualified”<sup>111</sup> and it may give rise to enforceable individual rights only if other subjects (private or public) are burdened with a corresponding obligation to disclose information. This very general right to information constitutes the legal framework to address the right of the public to access government-held information, that is to say, the “right of citizens to information” in their relationship with public bodies. The classification of the right of access to government-held information as a species of the genus of the constitutional “right to information” is confirmed by the case law of administrative courts as well as by the Constitutional Court itself.<sup>112</sup> Further, it is supported by scholars who argued that the right to information implicitly embodied in the Constitution is implemented, *inter alia*, through regulations concerning information disclosure by public bodies<sup>113</sup> and who pointed out that the relationship between citizens and government is an area where the right of citizens to information should be subject to a more pervasive regulation. In this specific area, however, the Italian Constitution is silent. There is not even an explicit mention of the principle of transparency in Article 97, concerning the exercise of government power, which only refers to “proper functioning” and “impartiality” of public administration.<sup>114</sup> Furthermore, the process of acknowledgment of the right to government-held information by the Italian legislature has been slow and byzantine, despite having been spurred on by developments in the international legal order. The regime of access rights has evolved through numerous and often inconsistent regulatory measures, through the proliferation of a number of specific disclosure obligations and of corresponding limited and isolated information rights that reflect the reluctance of the Italian law-maker to acknowledge the principle of maximum disclosure that underlies the autonomous and unconditional right of access to government-held information, as has emerged in international practice.

For a long time, the cornerstone of transparency and access to information regulations in Italy has been Law No. 241/1990, the “law on administrative transparency”.<sup>115</sup> In a context where secrecy was still the rule, this law introduced the right of individuals to access documents necessary to protect their personal interests. The exercise of this right requires the demonstration of “a direct, concrete and present interest, corresponding to a legally protected situ-

<sup>111</sup> *Corte Costituzionale*, 24 March 1993, No. 112, *cit. supra* note 107.

<sup>112</sup> SARCONI, “Alcune considerazioni in merito al diritto all’informazione pubblica”, *Rivista trimestrale di scienza dell’amministrazione*, 2004, p. 63 ff., paras. 2 and 5.

<sup>113</sup> See BARILE and GRASSI, *cit. supra* note 104, p. 208; SANDULLI, “Il procedimento”, in CASSESE (ed.), *Trattato di Diritto Amministrativo*, Milano, 2003, Vol. II, p. 927 ff., p. 1083.

<sup>114</sup> The attempt to include in this provision an explicit reference to transparency has failed, following the referendum of 4 December 2016 that rejected the constitutional reform. Nonetheless, the constitutional roots of the principle of transparency are widely recognised; see DONATI, “Il principio di trasparenza in Costituzione”, in MERLONI (ed.), *La trasparenza amministrativa*, Milano, 2008, p. 83 ff.

<sup>115</sup> Law No. 241 of 7 August 1990.

ation connected to the document”,<sup>116</sup> accordingly, requests for access “aimed at a blanket control over the functioning of public administrations”<sup>117</sup> are explicitly excluded. An unconditional right of access was recognised to “every citizen” only for environmental information<sup>118</sup> and for administrative acts of local authorities,<sup>119</sup> since, in these cases, citizens have a “special” common interest. In the following years, in line with developments in international development strategies and policies, a significant contribution came from legislation aimed at enhancing efficiency of government action and at fighting against corruption.<sup>120</sup> The so-called “Legge Brunetta”, in 2009, introduced a definition of transparency, as “full accessibility of data and documents held by public bodies”. Today, this concept is acknowledged as a general principle governing administrative activity but its full implementation has taken many years. Indeed, at first, “full accessibility” was realised through the substantial extension of obligations of proactive disclosure of information, that reached its peak with the reform enacted with Legislative Decree No. 33/2013.<sup>121</sup> The growth and the overlapping of proactive disclosure obligations resulted in a bureaucratisation of information and communications activities, thus, in the availability of a huge amount of fragmented and often inaccurate information that made it difficult for the public to exercise the widespread control that the legislature in theory wanted to promote. In addition, the Italian legislature had not simultaneously broadened the other dimension of accessibility, access to information upon request. As a matter of fact, the “right of civic access”, introduced by Legislative Decree No. 33/2013, is recognised unconditionally to everyone but can only be invoked to obtain the disclosure of information that public authorities have failed to publish despite an obligation to do so. Evidently, notwithstanding the statements of principle, the envisaged “full accessibility” had not been realised. It was still for the legislature to decide what information should be disclosed; secrecy was still the rule. In the absence of an obligation of active disclosure, the right of access was still regulated by Law No. 241/1990, with all the subjective and objective limitations set out therein.

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<sup>116</sup> *Ibid.*, Art. 22(1)(a), author’s translation. The narrow interpretation of the concept of “documents” restricts this right also from the perspective of accessible information.

<sup>117</sup> *Ibid.*, Art. 24(3).

<sup>118</sup> Law No. 349 of 8 July 1986, Art. 14 recognised for the first time a limited right of access to environmental information. A broader right was introduced by Legislative Decree No. 39 of 24 February 1997, subsequently replaced by Legislative Decree No. 195 of 19 August 2005, implementing Directive 2003/4/CE.

<sup>119</sup> Legislative Decree No. 267 of 18 August 2000, Art. 10.

<sup>120</sup> Law No. 15 of 4 March 2009 (Legge Brunetta); Legislative Decree No. 150 of 27 October 2009; Law No. 190 of 6 November 2012; Law Decree No. 90 of 24 June 2014. See MANGANARO, “Evoluzione del principio di trasparenza amministrativa” in *Scritti in memoria di Roberto Marrama*, Napoli, 2010, p. 3 ff.

<sup>121</sup> Legislative Decree No. 33 of 14 March 2013. See FIDELBO, “L’accesso civico generalizzato: i rischi di ineffettività della libertà di accedere ai dati e ai documenti delle pubbliche amministrazioni nell’ordinamento dell’Unione europea e nel diritto interno”, *Rivista italiana di diritto pubblico comunitario*, 2018, p. 223 ff.

This situation has been pointed out by scholars and observers, including the Anti-Corruption National Authority (ANAC),<sup>122</sup> and, most importantly, by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his 2014 Report on Italy. The Special Rapporteur expressed concerns with regard to access to information, noting the lack of consistency of the various norms and the lack of framework legislation on access to information held by all public institutions.<sup>123</sup> He recommended that the Parliament “enact a full access to information law applicable to all public institutions, which would guarantee access to public information [...] with the fewest restrictions possible”.<sup>124</sup>

In this context, “also with view to meeting international standards”,<sup>125</sup> Legislative Decree No. 97/2016, the “Italian Freedom of Information Act” (FOIA), modified Legislative Decree No. 33/2013, which now provides that “everyone has the right of access to data and documents held by public authorities other than those subject to publication”.<sup>126</sup> Finally, the extension of the subjective and objective scope of the right to access government-held information upon request has reversed the relationship between secrecy and disclosure, between norm and exception.<sup>127</sup> The principle of “full accessibility”, corresponding to the international principle of “maximum disclosure”, has been made effective, with a view to “protecting citizens’ rights, promoting public participation and fostering widespread control over the pursuance of institutional functions and the use of public resources”.<sup>128</sup> These objectives clearly reflect the complex role gained by access to government-held information as an instrument for democratic governance, in line with international practice. Namely, while the explanatory and technical reports accompanying the draft decree focused mainly on access to information as an instrument to fight corruption and to enhance government effectiveness,<sup>129</sup> the human rights perspective strongly emerged in the social and media debate. Civil society actors, which drove and sustained the approval of FOIA, firmly urged compliance with international human rights standards and prompted changes to the draft decree.<sup>130</sup> Thus, beyond the intentions originally declared by the legis-

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<sup>122</sup> ANAC, “Relazione Annuale 2014”, pp. 16-17.

<sup>123</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. Addendum: Mission to Italy from 11 to 18 November 2013, UN Doc. A/HRC/26/30/Add.3 (2014).

<sup>124</sup> *Ibid.*, para. 87.

<sup>125</sup> Explanatory Report on Legislative Decree No. 97/2016, available at: <<http://www.camera.it/leg17/682?atto=267&tipoAtto=Atto&leg=17&tab=2>>.

<sup>126</sup> “New” Legislative Decree No. 33/2013, as amended by Legislative Decree No. 97/2016, Art. 5(2).

<sup>127</sup> The *Consiglio di Stato* in its opinion on the draft Legislative Decree No. 97/2016 affirmed that the new right of access marks the transition “from the need to right to know” and that it represents for the national legal system a sort of “copernican revolution”: see *Parere n. 515*, 24 February 2016, para. 11.2.

<sup>128</sup> Legislative Decree No. 33/2013, Art. 1(1).

<sup>129</sup> See documents available on the Parliament website: <<http://www.camera.it/leg17/682?atto=267&tipoAtto=Atto&leg=17&tab=2>>.

<sup>130</sup> For instance, one of the issues has been the admissibility of implied denials of access in the absence of a reply from the authority which receives the request. See *inter alia* documents

lature in supporting documents, Legislative Decree No. 97/2016 has represented a crucial step towards the implementation of international standards on the right to access government-held information. The Italian normative framework now acknowledges a general and unconditional right of individuals to access government held information, guaranteed in both its dimensions.<sup>131</sup> This right is rooted in the Italian Constitution but it would have not developed without nourishment of international human rights practice that turned accessibility of government-held information from a governance instrument into an individually enforceable right. The new “right of generalised access”<sup>132</sup> introduced by FOIA is not subject to any personal status or condition; it is free of charge and may be exercised without procedural formalities, in line with provisions of the “Digital Administration Code”;<sup>133</sup> refusals or limitations of access require written justification on a case-by-case basis and may be challenged before administrative and jurisdictional bodies.<sup>134</sup> Further, the broad scope of public authorities subject to obligations of proactive and reactive disclosure has been clarified and proactive disclosure obligations have been rationalised.<sup>135</sup>

Nonetheless, the right of generalised access and the resulting normative framework are not free from drawbacks. A first major issue is the consistency of the normative framework currently in force. The right of generalised access co-exists with several other access rights: the right of access to documents (Law No. 241/1990), the right of access to acts of local authorities (Legislative Decree No. 267/2000), the right of access to environmental information (Legislative Decree No. 195/2005) and the right of civic access (Legislative Decree No. 33/2013). Differences and interactions between these rights are sometimes ambiguous and are the subject of analysis and debate;<sup>136</sup> it seems that one or more rights of access

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available at: <<http://www.foia4italy.it>>; <<https://blog.dirittodisapere.it>>; and <<https://www.transparency.it/>>.

<sup>131</sup> On the one hand, active dissemination of information allows the public to have a general view on government action, to draw issues of significant public interest to the public’s attention and to stimulate public debate; on the other hand, reactive disclosure allows a deeper scrutiny, through the accessibility of all information required for the assessment of the government’s work and performance.

<sup>132</sup> See ANAC, “Linee guida recanti indicazioni operative ai fini della definizione delle esclusioni e dei limiti all’accesso civico di cui all’art. 5 co. 2 del D.Lgs. 33/2013”, Delibera No. 1309 of 28 December 2016, para. 1 (“Definitions”).

<sup>133</sup> Legislative Decree No. 82 of 7 March 2005.

<sup>134</sup> See also the “Digital Ombudsman” recently introduced by Legislative Decree No. 217 of 13 December 2017, that modified Digital Administration Code.

<sup>135</sup> The new information and communication technologies challenge the foundational premise of the accountability school that “the more communication, the better”. It is widely recognised that too much information is equal to no information.

<sup>136</sup> Great attention has been devoted to the relationship between the right of generalised access and the right of access to documents; mostly because of the predominant role the latter has played so far. Nonetheless, it has become clear that the rationale and the objectives behind these rights are very different, thus, the scope of access they allow varies “in extension” and “in depth”. See ANAC, *cit. supra* note 132, para. 2.3; and several judgments of administrative Courts, *inter alia*, *TAR Roma (Sezione I)*, 31 January 2018, No. 1126; *TAR Milano (Sezione IV)*, 9 March 2018, No. 669.

may become redundant, while the role of others needs to be clarified. An example is the right of access to environmental information, embodied in Legislative Decree No. 195/2005. Since it is intended to provide a special level of protection to a priority public good – the environment – this right has an exceptionally wide scope, even compared to the ‘new’ right of generalised access.<sup>137</sup> Nonetheless, in its Guidelines on FOIA, the Ministry for Public Administration affirmed that regulation concerning the right of generalised access provides the highest level of protection, so that it must be applied to requests of access, unless otherwise specified by the applicant.<sup>138</sup> It is easy to imagine how difficult it may be for any member of the public to orient himself in such a complex regulatory environment, if even offices of the Ministry do not have a clear idea on differences and interactions between existing rights of access.

Another critical point is the regime of exceptions to the right of generalised access, which are vaguely defined and risk leaving space for discretionary decisions by public authorities, compromising the effectiveness of the new right.<sup>139</sup> The provision concerning this issue (Article 5-*bis* of Legislative Decree No. 33/2013) merely lists the public and private interests that may justify the denial of access in case of a “concrete prejudice” and then refers to “cases of state secrecy and other cases of denial of access or disclosure provided for by law”. It needs scarcely to be said that the mere reference to generic public interests to be protected is one of the “inappropriate exceptions” noted by the UN Special Rapporteur in one of its reports.<sup>140</sup> It seems that the Italian legislature decided not to deal with this complex issue, which would have required an in-depth analysis and an accurate systematisation of existing rules. It entrusted this task to ANAC, providing for the adoption of guidelines, which were approved in December 2016. The operational guidelines contain very helpful indications concerning, in general, the new right of access, but they are essentially “an exercise of interpretation”<sup>141</sup> and postpone the detailed clarification of the exceptions regime to an updated version to be adopted.<sup>142</sup>

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<sup>137</sup> Suffice it to mention the information subject to proactive disclosure obligations or the duty of public authorities to elaborate environmental information in their possession upon request. See, *ex multis*, *TAR L'Aquila (Sezione I)*, 8 October 2015, No. 679; *TAR Roma (Sezione I)*, 7 March 2017, No. 3206.

<sup>138</sup> Dipartimento della Funzione Pubblica, “Attuazione delle norme sull’accesso civico generalizzato (c.d. FOIA)”, Circolare of 30 May 2017, No. 2. Notably, the guidelines explicitly mention, as an example, environmental information.

<sup>139</sup> The *Consiglio di Stato* expressed this concern in *Parere n. 515*, *cit. supra* note 127, para. 11.14.

<sup>140</sup> 2013 Report of the Special Rapporteur, *cit. supra* note 5, para. 83. It is well established in human rights practice that laws imposing restrictions or limitations must be accessible, clear and unambiguous. In particular, any restriction must be sufficiently clear and specific enough and publicly accessible so as not to confer an excessive degree of discretion to those charged with the law’s execution.

<sup>141</sup> CASSESE, “Evoluzione della normativa sulla trasparenza”, *SINAPPSI*, 2018, p. 5 ff., p. 7.

<sup>142</sup> Statement by the President of ANAC of 3 May 2017.

A further issue is the role of ANAC. The Agency has played a crucial role in supporting public authorities towards understanding and implementing the new right of access. Nonetheless, it has been pointed out that the choice of the Anti-Corruption Agency misrepresents the wider scope and objectives of regulations concerning transparency and the right to access government held information.<sup>143</sup> In addition, other authorities have public functions and responsibilities in the field of access to government-held information, first and foremost the Commission on access to documents within the Presidency of the Council of Ministers.<sup>144</sup> It is evident that a coordinated approach, led by a single independent authority, entrusted with guiding, supporting and monitoring the development and the implementation of the whole access regime, would foster and enhance the ongoing process.<sup>145</sup>

This is all the more true, considering the need to deal with the complex international practice concerning the individual right to government-held information, and the different standards currently developed in the context of the UN, CoE and EU. ANAC Guidelines and the Government website dedicated to FOIA<sup>146</sup> make an effort to frame the new right of generalised access in the supranational legal context, but they only contain a few references to the ECHR and the EU legal system, while no mention at all is made of UN bodies' practice. It is important to point out that, not only has Italy committed itself to principles and rules developed in all these contexts, but that they can provide useful guidance to address changes underway in the national legal system. Even though a crucial step forward has been taken with the acknowledgement of a general and unconditional right of access to government-held information, it is essential to go further, providing the necessary regulatory, institutional and operational instruments. This means taking action to rationalise and clarify the current legal framework, establish an adequate institutional framework, and invest resources in supporting actions like training of public officials, strengthening public awareness and increasing technical capacity for information management. Without these measures, the public right to information risks remaining a paper-right, incapable of triggering those processes of social and political innovation that are its rationale.

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<sup>143</sup> See CASSESE, *cit. supra* note 141, p. 7.

<sup>144</sup> The Commission is entitled to monitor and support the implementation of the right of access to administrative documents provided for by Law No. 241/1990. See for further information: <<http://www.commissioneaccesso.it/it/>>.

<sup>145</sup> The "establishment of a specialised institution" was also suggested by the UN Special Rapporteur in his Report on the Mission to Italy, *cit. supra* note 123, para. 87.

<sup>146</sup> Available at: <<http://www.foia.gov.it/corte-di-giustizia-ue/>>.

