# Italy

# Analysis of the Draft Right to Information Law

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# Introduction

Italy is one of the few countries in Europe which still does not have a proper law granting individuals a right to access information held by public authorities, or a right to information (RTI) law. It has been included in the RTI Rating, prepared by the Centre for Law and Democracy (CLD) and Access Info Europe,[1] but this is based on a general law governing the administration,[2] which includes some provisions on RTI. However, these are so limited in scope that they only garner 57 points out of a possible 150 on the RTI Rating, putting Italy in 97th place out of the 102 countries that have been assessed.

Member of Parliament Anna Ascani has now prepared a dedicated RTI law, under the title "Disposizioni in materia di libertà di informazione, diritto di accesso e trasparenza delle informazioni in possesso delle pubbliche amministrazioni" (hereinafter draft right to information law or draft law), dated 15 April 2015.[3]

CLD welcomes moves to put in place a proper legal framework for RTI in Italy. At the same time, the draft law can only be described as weak. An assessment of it by Access Info Europe pursuant to the RTI Rating only gave it a score of 65 points out of a possible 150, only marginally better than the current set of rules, which would put it in 85th place globally. This is simply not good enough.

The draft law is relatively broad in scope in terms of both information and public authorities covered, although it is limited to individual citizens of Italy. The procedures for making and processing requests are progressive, but too limited in nature to ensure that they are simple and user friendly. The regime of exceptions in the draft law needs to be tightened up substantially, including by ensuring that all exceptions are harm tested and subject to a public interest override. The draft law puts forward some interesting innovations in the area of appeals, which is overall reasonably robust. It is, however, seriously deficient in terms of sanctions and protections, as well as promotional measures.

This Analysis assesses the provisions of the draft law against established international standards in this area as well as better practice among other States. It identifies both strengths and weaknesses, and puts forward recommendations for reform in relation to the latter. It is organised largely along the lines of the main categories in the RTI Rating, namely Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and

[1] The Rating is based on a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional courts and other regional mechanisms. The Rating is continuously updated and now covers over 100 national laws from around the world. Information about the RTI Rating and a full list of country ratings is available at: http://www.RTI-Rating.org.

[2] Law no. 241 of 7 August 1990.

[3] Available in Italian at: http://www.parlamentari.org/blog/foia-pdl-n-3042-presentato-il-15-aprile-2015-769.html. This Analysis is based on an unofficial English translation of the law, available on the CLD website, www.law-democracy.org.

Protections, and Promotional Measures, along with a short section on Proactive Publication. The aim is to assist decision-makers in Italy – including the government, the media civil society organisations, and the parliament – to work to promote the best possible right to information law for Italy.

## 1 1. Right of Access and Scope

The draft law establishes a presumption in favour of access to information, subject only to the exceptions that it provides for. This is clear, for example, from Articles 2(1)(b), 4(1) and 4(4). Article 1 also describes a number of the wider benefits of the right to information, including safeguarding freedoms and rights, promoting an open and accountable administration and underpinning participation in public affairs. The draft law fails, however, to require those tasked with interpreting the law – including officials, oversight bodies and the courts – to do so in the manner that best gives effect to these benefits.

A very serious limitation in the draft law is that, pursuant to Article 2(1)(d), only "individuals", defined as any Italian citizen who has reached the legal adult age of 18 years of age, are granted the right to make requests for information (see also Article 4(1), which states that any "individual has the right to access the information"). This would exclude even Italian legal entities from making requests for information, which is contrary to international standards but would also deprive these entities from using the law to advance their business interests, a key economic benefit of RTI laws. International standards also mandate that the right should extend to everyone, not just citizens, given that it represents a protected human right. It may be noted that the arguments against allowing anyone to make a request – that this might somehow place a burden on public authorities – do not hold water. It is simple enough for a foreigner to find an Italian citizen to make a request, while extensive experience in countries that allow anyone to make a request demonstrates that this does not unduly burden public authorities.

Article 2(c) of the draft law defines "information" as including "all documents, deeds, and data held by [public authorities], regardless of the date on which they were formed". The intention here may be to include all information regardless of the medium in which it is stored (on paper, in a video, emails and so on), but this is not sufficiently clear from the provision. Better practice is to include all recorded information, regardless of the particular format in which it is recorded. Furthermore, it is useful for an RTI law to clarify that applicants may lodge requests for either information or a particular record (document) and, in the former case, that public authorities have an obligation either to find a record containing the information or, by making a reasonable effort, to compile the requisite information from different records.

Article 3 contains a definition of the public authorities ("public administrations") which are covered by the draft law. This appears to be relatively broad in nature, although a few types of public authorities are not covered. It does cover the parliament, but only in respect of its administrative functions, and it covers the Constitutional Court and Italian Magistrates' Governing Council, but not other judicial bodies, and again only in respect of their administrative functions. Given that RTI is a human right, it should bind all organs of the State.

Article 3 refers to "regulatory and supervisory independent authorities; public, economic and non-economic entities; providers of public services; public bodies; legal entities partially owned by the public administrations" as public authorities. It thus covers non-executive public bodies, as well as bodies which are owned by executive bodies or which provide public services. It does not, however, appear to cover private bodies which receive significant public funding or which are controlled, other than via ownership, by other public authorities.

**Recommendations:**

- The law should require those tasked with interpreting it to do so in the manner which best gives effect to the benefits of the right to information which are recognised in Article 1.
- Everyone, including legal entities and foreigners, should have the right to make requests for information.
- The law should define information simply as including all recorded information, regardless of its format. It should also make it clear that applicants may request either a particular record (document) or information, which may then be found in or compiled from existing records.
- The definition of public authorities should include all of the functions of the legislature and all judicial bodies, again in respect of all of their functions. It should also include private bodies which receive significant public funding or which are controlled by public authorities.

## 2 2. Proactive Publication

For the most part, the draft law does not concern itself with the subject of proactive publication. While many RTI laws do include extensive provisions on this, it is possible that the drafters felt that this issue has already been dealt with adequately by other Italian laws or in the widespread practice of Italian public authorities. We were not able to assess the adequacy or otherwise of proactive publication rules and practices in Italy.

Article 7(6) provides that the "Italian National Anticorruption Authority (ANAC) is in charge of reviewing the information in relation to which at least ten (10) requests of access have been formulated at different times from different applicants, in order to define their public interest". If it finds that there is a public interest in the information, it may order the information to be published on the public authority's website, subject to certain exceptions, which are listed in the provision.

This is helpful but it is both unduly limited and also unnecessarily complex and time-consuming from an administrative point of view. First, if ten different applicants request certain information, then it is essentially by definition a matter of public interest, and there seems little point wasting the (presumably limited) time and energy of ANAC in separately assessing this

matter. Indeed, better practice in this area is to provide for proactive publication where there have been two or three requests for the same information, noting that it is far less time-consuming to publish information than to respond to even one request for information. Second, instead of providing for a separate and somewhat specialised list of exceptions where Article 7(6) is engaged, which again requires a second process of assessment (i.e. as to whether or not the information falls within the scope of those exceptions), it would make sense simply to rely on the original assessment of exceptions. In other words, where information is the subject of multiple requests for access, whatever of that information was released in response to those requests should be published proactively.

**Recommendation:**

- Article 7(6) should be amended to provide for the publication of any information that has been disclosed which was the subject of multiple requests (with consideration being given to reducing the number of such requests from ten to just two or three).

## 3 3. Requesting Procedures

Simple and user-friendly requesting procedures are at the heart of a successful RTI system. While the rules in the draft law in this area are generally positive, they are, ultimately, far too brief and limited in nature to ensure simple, rapid and fair processing of requests.

The draft law recognises, in both Articles 4(1) and 7(1), that applicants should not have to provide reasons for their requests, in line with international standards in this area. The procedures for filing and processing requests are set out in Article 7 of the draft law. A strong RTI law should only require applicants to provide the details necessary for identifying and delivering the information, which could be an email address. Instead, Article 7(1) requires applicants to provide their name and address (this is perhaps related to the restriction of the right of access to citizens). Article 7(1) also stipulates that requests may be sent electronically, which is positive, although better practice is to provide for the receipt of requests via multiple means of communication, including in person and via fax.

The draft law fails to impose any obligation on public authorities to provide assistance to applicants who may need it, for example because they are having difficulty describing the information they are seeking or because of illiteracy or disability. The law also fails to require public authorities to provide a receipt to applicants upon registering a request. The law again fails to address situations where the public authority does not hold the information. Better practice in this are is to require the authority to transfer the request where it is aware of another public authority which does hold the information, or to return the request to the applicant where it does not.

Article 7(5) provides that information should be delivered in "open format" if the information is already available in digital format and that, otherwise, if the applicant requests the information in digital format he or she may be charged for the actual costs of translating it into such a format (provision of information in hard copy is also envisaged). While the default rule of openness is progressive, better practice is to allow requesters to stipulate the format in which they would like to receive the information and to require public authorities to provide it in that format (perhaps subject to protection of the integrity of a record or undue disruption to the work of the public authority). For example, an applicant may wish to review a large number of hard copy records at the premises of the public authority to find specific information in those records rather than go through the cost and effort of having all of those records copied (or digitised).

The draft law fails to place a positive obligation on public authorities to respond to requests within a set timeframe. Article 5(1) provides that, where 30 days has elapsed since a request was lodged with a public authority and no response has been provided, the request shall be deemed to have been refused. While this does open up the door for appeals, it is quite different from placing a direct obligation on public authorities to respond within the time limit. Better practice is to require public authorities to respond to requests as soon as possible and in any case within a set period of time, for example of ten working days. Many laws then allow for the time limit to be extended in certain cases, for example where the request requires searching through a large number of records or consulting with other parties, upon providing notice and reasons to the applicant.

Article 7(2) provides that no fee may be lodged for making a request, while Article 7(3) sets out the rules governing fees in cases where information is provided in hard copy. Such fees are limited to the actual costs of "reproducing and dispatching" the information, but only if this exceeds Euro 20 (for all requests made by a single applicant in the same business week). A schedule of such fees must be published on the public authority's website. As noted above, fees may also be charged for the costs associated with translating hard copy information into a digital format.

Overall, this is a progressive regime for fees, but it could be further improved. First, rather than have every public authority set its own fees, it would be preferable to provide for a central fee schedule. This would both avoid a patchwork of fees among different public authorities (which could create public dissatisfaction and suspicion) and also save every public authority from going through the process of setting its own fees. Second, better practice is to provide for a system of fee waivers for requesters who are below a certain level of income, as well as for requests which are in the public interest (for example because the objective of the request is for purposes of general publication).

**Recommendations:**

- Article 7(1) should only require applicants to provide an address for delivery of the information, which might be an email address, along with a description of the information sought. It should also make it clear that requests may be lodged by different

means of communication.

- The law should require public authorities to provide assistance to applicants who need it and to provide applicants with a receipt acknowledging their requests, and should include rules governing cases where the public authority does not hold the information, as described above.
- Article 7(5) should be amended to allow requesters to stipulate the format in which they would like to receive the information, if they do not wish to receive it in a digital format, and to require public authorities to comply with such preferences, except in limited cases.
- The law should place a positive obligation on public authorities to respond to requests as soon as possible and in any case within a set time limit, which may be subject to a (set) period of extension in limited cases.
- Consideration should be given to providing for fees for copying and sending information to be set centrally, as well as for fee waivers for poor requesters and requests which are in the public interest.

## 4 4. Exceptions and Refusals

The main regime of exceptions in the draft law is found in Article 6, along with supplementary rules in Articles 4, 7 and 9. According to Article 6(1)(a), the right of access does not apply, in accordance with Law No. 801 of 24 October 1997, to State secrets where the law expressly provides that the information is secret, while Article 6(1)(b) establishes a similar rule for various secrecy provisions relating to statistical data. Otherwise, it is not clear whether, when it comes into conflict with secrecy rules in other laws, the RTI law would dominate, or the secrecy rules would, or this would stand to be determined according to general rules of legal interpretation.

International standards set out clear and strict standards for limitations on the right to information and laws which do not comply with them are not legitimate. It is most unlikely that all secrecy provisions in Italian law comply with these standards, which is also the case in most countries. As a result, better practice is to include at least general recognition, in a manner which respects international standards, of every legitimate ground for secrecy in the RTI law and then provide that secrecy provisions in other laws which conflict with the rules in the RTI law are of no force or effect. The draft law does not do this.

Otherwise, Articles 6(1)(c) to (f) provide for additional exceptions which are not subject to a harm test (i.e. are limited to cases where disclosure of the information would pose a risk of harm to a legitimate interest). These include information relating to tax proceedings, information from selection processes about the psychological or behavioural data of a third party, information about health or sex life, and information containing personal data (which is then subject to a public interest override). The tax rule does not incorporate a harm test or even identify an interest which would need to be protected. No doubt the other exceptions here

would largely be covered by a legitimate privacy exception, but the fact that only the last one is subject to a public interest override renders them problematical.

Article 6(2), in contrast, includes a chapeau which explicitly refers to the idea of disclosure posing a risk of harm to a protected interest, in line with international standards. If this is interpreted strictly, that would render most of the Article 6(2) provisions legitimate. However, the language of some of these exceptions is confusing and suggests that the harm requirement may not be intended to be applied as strictly as international standards warrant. For example, Article 6(2)(b) refers to the idea of "prejudice" to monetary policy, whereas there is no need to repeat this requirement of harm if the chapeau is to be applied rigorously. Similarly, Article 6(2)(c) refers to the "safety" of property while Article 6(2)(f) refers to hindering profitable activity, both of which are again superfluous if the harm requirement is to be taken seriously.

We have the following additional concerns with these exceptions:

- Article 6(2)(d) refers to the idea of the "private life and confidentiality of individuals, legal entities, groups, enterprises and associations", with particular reference, among other things, to their "industrial and commercial interests". We have two concerns here. First, privacy as an exception in RTI laws should be limited to human beings. Second, the reference to 'confidentiality' in this clause is problematical inasmuch as it is not defined and could be understood as covering anything to which a label of confidentiality had been attached, which is both inappropriate and avoids the harm test. It seems that this provision merges two separate ideas: protection of personal privacy and protection of legitimate commercial interests (against harm).
- Article 6(2)(e) refers again to the idea of confidentiality, in this case of internal and preliminary documents. Although this formally falls under the chapeau of Article 6, and hence incorporates a harm test, in fact there is no particular interest identified in this clause which might be harmed (or protected against harm). These sorts of 'internal' exceptions are problematical in many RTI laws and the approach here appears to follow bad practice from other jurisdictions. Better practice is to identify relevant legitimate interests – such as the free and frank provision of advice inside government or the successful development of policy – and then protect them against harm.

As noted above, Article 7(6) contains its own mini-regime of exceptions, which apply to defeat the proactive publication of otherwise public interest information which has been the subject of multiple requests. As noted above, we recommend doing away with this system and instead dealing with the matter via the main regime of exceptions. In any case, none of the exceptions in Article 7(6) is based on a risk of harm. Furthermore, at least one of the exceptions is drawn too broadly, namely "data regarding the work relationship between the aforesaid employee and the administration". It is legitimate to protect privacy but this certainly does not extend to the whole of the work relationship between public authorities and their employees.

Among the most important features of a good regime of exceptions is a public interest override, whereby information must be released even if this may cause harm to a protected interest if the overall public interest in disclosure outweighs that harm. The factors to be taken into account when applying the public interest override are found in Articles 6(3) and (4) of the draft law,

including control over the use of public resources, safeguarding constitutional rights, promoting accountability and defending legal interests, and rules out refusing access to information simply to protect public authorities against embarrassment. This is a non-exclusive list (i.e. does not rule out other public interests) which is in line with international standards. However, the only exception which refers to a public interest override is the one found at Article 6(1)(f), relating to privacy, so it is not clear when the rules in Article 6(3) actually apply.

Other problems with the regime of exceptions in the draft law are as follows:

- The draft law fails to provide for an overall time limit for exceptions which protect public interests, for example of 15 or 20 years. As a result, information deemed to be confidential for example on grounds of being an internal, or even preliminary document (which has never been finalised), might remain confidential forever. Overall time limits are included in better practice RTI laws in recognition of the fact that the sensitivity of almost all information fades over time. A special procedure could be put in place to safeguard confidentiality beyond the time limit in those rare cases where the information really does remain sensitive.
- The draft law also fails to include a proper severability clause, whereby when only part of a record falls within the scope of the regime of exceptions, the rest of the information will still be disclosed.

**Recommendations:**

- The law should include a clear statement to the effect that, in case of conflict, it overrides secrecy provisions in other laws.
- All exceptions should refer to interests which legitimately need protection and include a harm test so that it is only where disclosure of the information would pose a risk of harm to the legitimate interest that access might be refused.
- The references to specific harms in various provisions in Article 6(2) should be removed and it should be made absolutely clear that the harm test in the chapeau to this provision is intended to be applied rigorously.
- Article 6(2)(d) should be divided into two separate exceptions – one protecting privacy and one protecting legitimate commercial interests – and the scope of each should be clearly and narrowly defined.
- Article 6(2)(e) should be redrafted to refer to legitimate internal interests (which will then be protected against harm).
- The mini-regime of exceptions in Article 7(6) should be removed and the approach towards protecting confidential information when this article is engaged which is recommended above should be used instead.
- All exceptions should be subject to a public interest override.
- The law should include an overall time limit on the duration of exceptions to protect public interests, which may be extended pursuant to a special procedure in exceptional cases where this is warranted.
- There should be a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.

# 5 5. Appeals

The system of appeals is found in Article 5 of the draft law. Article 5(1) provides, where "access is, tacitly or expressly, denied or postponed", for an appeal to the relevant administrative court as well, where such a body has been appointed, to the "territorially competent ombudsman". We have not been able to review the applicable legislation but we assume that the ombudsman is primarily a mediation body. Appeals to the courts in such cases are free.

Article 5(2) also provides for an appeal to the Italian National Anticorruption Authority (ANAC), again where "access is, tacitly or expressly, denied or postponed". ANAC shall make a decision within 30 days and, if it orders disclosure, the public authority must either provide the information or, through a "reasoned deed", confirm its denial of access. In the latter case, if the denial is later deemed to be unlawful by a court, the public authority shall be required to pay a fine of between Euro 500-1000, which shall go into a fund dedicated to training officials on the right to information. Different procedures, involving the Data Protection Authority, apply where the information contains personal data.

We have not been able to review the legislation establishing the ombudsman, ANAC or Data Protection Authority. We note that, to comply with international standards, a number of conditions must be met in relation to oversight bodies. First, they must be independent of the administration or public authorities, the decisions of which they are expected to review. The importance of this is obvious, since bodies which lack independence cannot be expected to come to fair and objective decisions on the merits of complaints. Second, they need certain powers to be able to review complaints effectively. These include the powers to review classified documents, to compel witnesses to appear before them and to inspect the premises of public authorities (the latter is important, among other things, in cases where public authorities falsely claim that they do not hold requested information). Third, they need to have the power to order appropriate remedies for requesters. This includes, most obviously, ordering public authorities to disclose information (which is explicitly granted to the ANAC), but it might also include lowering fees or other measures. Ideally, the oversight body should also be able to order public authorities to make systemic changes, such as training officials or managing records better, in appropriate cases, namely where the public authority has consistently or seriously failed to discharge its obligations under the RTI law.

Otherwise, we note that this is an interesting and innovative approach towards appeals. International standards suggest that information oversight bodies should have the power to issue binding orders to public authorities to disclose information, but the mechanism in the draft law, whereby public authorities can refuse to follow orders of the ANAC but then risk being fined by the courts, might achieve a similar objective.

There are two other ways in which the system of appeals could be improved. First, the draft law only provides for appeals where access to information has been denied or delayed. Better

practice is to broaden the grounds for appeal to include all failures to respect the rules relating to the processing of requests, such as undue delays or charging excessive fees. Second, better practice is also to make it clear that, on an appeal, the public authority bears the burden of proving that it acted in compliance with the rules. This flows both from the fact that the right to information is a human right, so that the State should be required to demonstrate that it has respected the right, and from considerations of fairness, given that public authorities are in a much better position to prove their case, in particular when it rests on the application of an exception (noting that the applicant cannot access the information and so face challenges in proving that it is not sensitive).

**Recommendations:**

- To the extent that the relevant oversight bodies – in particular the ANAC and the Data Protection Authority – do not have the powers and attributes noted above – namely independence, and sufficient investigatory and order powers – the relevant laws should be amended, or provisions should be introduced into the RTI law, to address this.
- The grounds for appeals should include any claimed failure to respect the rules relating to the processing of requests.
- In an appeal, the public authority should bear the burden of proving that it acted in compliance with the rules.

## 6 6. Sanctions and Protections

The draft law contains two rules providing for sanctions for failures to respect its rules. First, as noted above, Article 5(2) envisages fines being imposed on public authorities which have unlawfully rejected orders by the ANAC to disclose information. Second, Article 8 provides that any "unlawful denial or unlawful postponement of the access to the information" shall be the subject of disciplinary liability, and also taken into account in the assessment of "result-based remuneration" and other discretionary benefits.

These are useful but they could be improved. Article 5(2) is engaged only in very special and limited circumstances. Better practice is to provide for legal responsibility for public authorities where they systematically fail to discharge their obligations under the law, whether by imposing sanctions on them or by requiring them to undertake remedial action. In terms of individuals, first, as with appeals, responsibility should apply broadly for all wilful actions which constitute obstruction of access, not just refusals to provide information. Second, while the idea of limiting results-based remuneration for obstruction is an innovating and interesting one, the reference to disciplinary liability is very general in nature. Furthermore, experience in other countries shows that such forms of liability, which are often applied internally by a public authority, are very rarely engaged. Systems which rely on external decision makers, such as the oversight body, are far more likely to be effective.

In addition to sanctions, a strong RTI law should include adequate legal protections for officials who disclose information in good faith pursuant to the law. Officials already face important historical barriers to disclosure (known as the culture of secrecy) and they need to know that they will not be subject to sanction for disclosing information as long as they act in good faith.

**Recommendations:**

- A system for imposing sanctions on public authorities which systematically fail to respect the law should be put in place.
- Consideration should be given to enhancing the system of sanctions for officials by expanding responsibility to cover all acts which obstruct access to information and by identifying an external body to apply these rules.
- The law should provide protection to officials who disclose information in good faith pursuant to the law.

## 7 *7. Promotional Measures*

The draft law includes only very limited promotional measures to support implementation of the right to information. Experience in other countries demonstrates that such measures can play a very important role in ensuring proper implementation of the law. Article 4(3) refers to a "person in charge of transparency", as provided for in another law, which would appear to be similar to what is commonly referred to as an information officer, or official with specific responsibilities for ensuring the proper receipt and processing of requests for information. As noted above, Article 5(2) provides for the creation of a fund to promote "training initiatives for public employees on transparency and anticorruption".

Better practice is additionally to provide for the following promotional measures:

- It is very important to identify a central body which has a general responsibility for promoting and advancing RTI. Otherwise, this issue is unlikely to attract substantial interest or support, and implementation efforts are likely to be sporadic and uncoordinated.
- Awareness raising and other efforts to promote a better understanding of the law and the rights it establishes are important to getting a new RTI system off of the ground. All public authorities should ideally bear some responsibility for this, but it is also useful to give a central body overall responsibility for this function.
- Public authorities cannot provide access to records if they cannot locate them and, if records are not well organised, the whole system of access will be costly and inefficient. Better practice, therefore, is to provide for comprehensive records management systems to improve relevant standards within the public sector.
- Better practice is to require public authorities to create and update lists or registers of the record they hold and to make these public. This helps applicants direct their

requests to the correct public authority and also saves public authorities time and effort (for example by limiting the need to transfer requests).

- The creation of a transparency training fund is welcome, but better practice is also to place a primary obligation on public authorities to ensure that their staff receive proper training in this area. Otherwise, training activities are likely to be somewhat *ad hoc* and to vary considerably among public authorities.

**Recommendation:**

- The various promotional measures noted above should be reflected in the law.