Administrative Transparency in Portugal

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The Portuguese legal order foresees a broad duty to disclose instrumental and non-instrumental administrative information, i.e. both information related to ongoing administrative procedures and information that should be made available to all citizens. After a short investigation to determine the underlying constitutional values of (the right to) administrative transparency, this article scrutinizes the regime of access to administrative information in Portugal. Apart from its objective and personal scopes, determining its bearers and its addressees, this paper focuses on both the administrative procedure, on the one hand, and administrative and judicial guarantees, on the other.

1 THE CONSTITUTIONAL VALUE(S) OF ADMINISTRATIVE TRANSPARENCY

The Portuguese Constitution entrenches two fundamental rights to information[1]: the right to instrumental and the right to non-instrumental information. These two rights, which have been formulated in very generous terms,[2] have different profiles: the first being the right of access to procedural information (i.e. information that concerns the individual who requests access to a file in the context of a concrete, ongoing or already finished, administrative procedure) and the second the right of access according to the principle of the 'open file' (i.e. a right of access to every existing file regardless of any direct and personal interest to consult it). Not only the rights holders are different in both cases (an individual with an interest of some sort in the first

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1 For an introductory and comparative account of constitutional models of access to public information, *see* T. Bull & H. Corder, *Ancient and Modern: Access to Information and Constitutional Governance*, in *Routledge Handbook of Constitutional Law* 219–229 (M. Tushnet et al. eds., Oxon & New York 2013).

2 M. Rebelo de Sousa, *Lições de direito administrativo*, I, 434–435 (3d ed., Lisbon 1999).

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case, everyone in the second), but the existence (or not) of an administrative procedure separates them too.[3]

Introduced in the first constitutional amendment (1982), instrumental transparency is stated in Article 268(1):

> Citizens shall possess the right to be informed by the Administration whenever they so request as to the progress of the processes in which they are directly interested […].

Differently, non-instrumental transparency, which was added to the constitutional text in its second amendment (1989), is foreseen in Article 268(2):

> Without prejudice to the law governing matters of internal and external security, criminal investigation and personal privacy, citizens shall also possess the right of access to administrative files and records.

Even if both are mostly treated as self-standing constitutional fundamental rights – and, conversely, autonomous transparency duties – the truth is that there are intricate connections between them.[4]

The regime for the disclosure of instrumental information is a due process clause, aimed at the protection of individual rights affected or that will be potentially affected by acts of the administration. It is hence configured as a subjective legal guarantee that protects the individual as 'the patient of the administrative decision' and allows her to gather the relevant data to react against decisions that adversely impact on her legal sphere.[5]

In turn, determining the best fit for the legal framework of non-instrumental information is not straightforward. As Law n. 65/93, of 26 August, was approved shortly after the Code of Administrative Procedure (*Código do procedimento administrativo*), hereinafter 'CPA', entered into force (1992), it seems that its purpose was precisely to proceduralize this field of administrative activity and approve clear rules for the disclosure of administrative information. But this was embedded, as it might be expected and the applicable regime entirely confirms it, in the pursuit of administrative/political democracy. After all, not only is there a public interest objectively rooted in administrative transparency,[6] but it is itself a demand and a requirement of a democratic and pluralistic community based on the rule of law.

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[3] M. Aroso de Almeida, *Artigo 268.º*, in *Constituição portuguesa anotada*, III, 599, 602 (J. Miranda et al. eds., Coimbra 2007); M. Aroso de Almeida, *Os direitos fundamentais dos administrados após a revisão constitucional de 1989*, 6 Direito e Justiça 297–298 (1992). There are other examples of non-instrumental information in the Constitution, namely in Art. 35(1) and 48(2).

[4] J. M. Sérvulo Correia, *O direito à informação e os direitos de participação dos particulares no procedimento e, em especial, na formação da decisão administrativa*, 9/10 Legislação 135, 139, 141 (1994), claims that the connection between both legal positions is so intense that they form a single right.

[5] A. Barbosa de Melo, *As garantias administrativas na Dinamarca e o princípio do arquivo aberto*, 57 Boletim da Faculdade de Direito da Universidade de Coimbra 268–270 (1981).

[6] J. J. Gomes Canotilho, *Anotação aos Acórdãos do Tribunal Constitucional n.os 176/92 e 177/92*, 125 Revista de Legislação e Jurisprudência 253 (1992–1993).

Connected to the idea of 'fair procedure',[7] it is a means to materialize administrative democracy by directly controlling the administration and enhancing the representative system of government.[8] To this extent, it can be said that non-instrumental transparency is ancillary to political rights and the freedom of press.[9]

At the same time, transparency, in whichever form, becomes the main factor for participatory optimization and the effective institutional condition of participation.[10] Indeed, if there can be information without participation, it is not possible to have (meaningful) participation without information. The revelation of information will raise public awareness and equip citizens with indispensable information, otherwise unknown and only held by the authorities, for their partaking in the relevant decision-making processes.[11]

From another perspective, and to a certain extent counter-intuitively, both types of transparency are also instruments of the principle of impartiality.[12] Indeed, the positive side of this principle mandates that all the relevant information for decisions be gathered. By allowing information to be requested by private parties, their analyses of the existing documentation may prevent and repair errors in the administrative decisions and allows for more potentially pertinent data to be adduced.[13]

As it will become clear throughout the following analysis, the regime of each of these two rights is shaped according to the different finality of each right.[14]

2 ACCESS TO ADMINISTRATIVE INFORMATION

2.1 Introductory remarks

At the level of ordinary laws,[15] transparency in the context of an ongoing administrative procedure (also called 'instrumental or procedural information') is

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7 J. Loureiro, *O procedimento administrativo entre a eficiência e a garantia dos particulares* 256 (Coimbra 1995).

8 Barbosa de Melo, *As garantias administrativas*, *supra* n. 5, at 268–270, 289. *See also* D. Duarte, *Procedimentalização, participação e fundamentação* 154 (Coimbra 1996); Aroso de Almeida, *Os direitos fundamentais, supra* n. 3, at 301–302; Gomes Canotilho, *Anotação, supra* n. 6, at 252; J. Miranda, *O acesso à informação administrativa não procedimental das entidades privadas*, in *Estudos em homenagem ao Professor Doutor Sérvulo Correia* II, 458 (Lisbon 2010).

9 Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 143.

10 Duarte, *supra* n. 8, at 148; Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 133, 143.

11 P. Machete, *A audiência dos interessados no procedimento administrativo* 398–401 (Lisbon 1995).

12 M. Esteves de Oliveira, *Direito administrativo* I, 334 (Coimbra 1980).

13 On the positive requirements of the principle of impartiality, Duarte, *supra* n. 8, at 375–478.

14 Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 143.

15 The transparency policy was first implemented by Decree-Law n. 267/85, of 16 July, which approved the Law for Procedure in Administrative Courts and introduced a specific judicial mechanism to obtain a court order to consult files or issue certificates (*see* Arts 82–85). *See* S. David, *Das intimações* 55, 70–81 (Coimbra 2005); C. Cadilha, *Intimações*, 16 Cadernos de Justiça Administrativa 62–68 (1999); R. Carvalho, *O direito à informação administrativa procedimental* 294–308 (Porto 1999).

regulated in the CPA.[16] Differently, the regime for transparency outside that context (dubbed 'non-instrumental or non-procedural information') is primarily contained in Law n. 46/2007, of 24 August 2007, which approved the Access to Administrative Documents and its Re-use Act (*Lei do acesso e da reutilização dos documentos administrativos*), henceforth referred to as 'LARDA'.[17]

Apart from these horizontal regimes, there are also sector-specific laws, namely[18]: Law n. 12/2005, of 26 January, which approved a special regime for personal genetic information and health information, and Law n. 19/2006, of 12 June, which approved a special regime for environmental information.[19]

2.2 Personal scope

2.2[a] *The Entities Bound by the Duty to Disclose Administrative Information*

For the most part of its personal scope of application, there is an overlap between both types of transparency.[20] Indeed, both are binding upon the State bodies that 'form part of the Public Administration' or 'materially perform administrative functions'. They are applicable to 'public institutes, public associations and public foundations' too, as well as 'other entities that perform administrative functions or public powers' (thereby including all independent administrative authorities). This is also valid both to bodies which belong to the autonomous regions of Madeira and the Azores (if they form part of the Public Administration or materially perform administrative functions) and to bodies which belong to local authorities (and to their associations and federations). Transparency binds these bodies in the exact same manner it binds central administrative bodies.[21]

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16 Arts 82–85 of the CPA.

17 Art. 17(2) of the CPA and Art. 2(4) of LARDA. This statute transposed Directive 2003/98/EC of the European Parliament and of the Council, of 17 Nov. 2003, on the re-use of public sector information, to the Portuguese legal order. *See* A. Sousa Pinheiro, *Privacy e protecção de dados pessoais* 744–745 (Lisbon 2015). After the submission of this paper, a new bill modifying the regime of access to administrative information was approved: Law n. 26/2016, of 26 Aug. The new regime, which is already in force, is not substantially different from the one analysed in the text.

18 There are plenty of other atypical rights to information, with different dogmatic profiles, contained in several unsorted regimes. For a sample of these, P. Gonçalves, *O direito de acesso à informação detida por empresas do sector público*, 81 Cadernos de Justiça Administrativa 5–8 (2010); David, *Das intimações*, *supra* n. 15, at 59–60.

19 This statute transposed Directive n. 2003/4/EC, of the European Parliament and of the Council, of 28 Jan. 2003, to the Portuguese legal order. On its regime, C. Amado Gomes, *O direito à informação ambiental*, 109 Revista do Ministério Público 5–21 (2007). This regime was also revoked by Law n. 26/2016, of 26 August.

20 Considering that the personal scope of the two types of transparency should be the same, and proposing an actualistic interpretation of the CPA in accordance with LARDA, Miranda, *O acesso à informação*, *supra* n. 8, at 456–458.

21 Art. 4(a), (b), (c) and (g) of LARDA, and Article 2(4) of the CPA.

There are restrictions to the transparency regimes of some documents, but these are not carved out institutionally – i.e. by creating exceptions or special regimes for some administrations – but according to the subject matter.[22]

As for State-owned, regional, and local companies[23] – regardless of whether they have public or private legal nature – the instrumental transparency regime is only applicable to them to the extent that there actually is an ongoing administrative procedure, which requires the exercise of *ius imperii* powers in that particular case.[24]

In terms of non-instrumental transparency, however, there has been a shift in the applicable regime. Indeed, when the previous Access to Administrative Documents Act was in force, there was only a residual clause according to which it was applicable to 'other entities that exercise *ius imperii*'.[25] It was therefore contended whether State-owned companies were included in its scope of application only when they exercised public powers and/or delivered public services or general economic interest goods,[26] or also whenever they acted under the *aegis* of private law.[27] The new LARDA has explicitly clarified this issue and determines that State-owned companies[28] have to abide by it at all times.

The reason why this is complicated lies in the existence of two types of State-owned companies: (1) 'corporate public entities', which are incorporated by law and have public legal personality[29], and (2) public commercial companies, which

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22 *See*, e.g. Article 6 of LARDA.

23 For State-owned companies, Decree-Law n. 133/2013, of 3 Oct.; there is a specific regime for hospitals, approved by Decree-Law n. 233/2005, of 29 Dec. For regional companies, Regional Legislative Decree n. 7/2008/A, of 24 Mar., and Regional Legislative Decree n. 13/2010/M, of 5 Aug. For local services and local companies, Law n. 50/2012, of 31 Aug. Henceforth, reference will only be made to 'State-owned companies'.

24 Art. 2(1) and (3) of the CPA – M. Esteves de Oliveira et al., *Código do procedimento administrativo comentado* 73 (2d ed., Coimbra 1997); differently, D. Soares Farinho, *O âmbito de aplicação do novo Código do procedimento administrativo*, in *Comentários ao novo Código do procedimento administrativo* 147–148 (C. Amado Gomes et al. Eds., Lisbon 2015).

25 Art. 3, *in fine*, of Law n. 65/93, of 26 Aug. For an extensive analysis, M. Assis Raimundo, *As empresas públicas nos tribunais administrativos* 204–243 (Coimbra 2007).

26 Among others, P. Gonçalves, *Entidades privadas com poderes públicos* 293–294, 1049 (Coimbra 2005); J. R. Gonçalves, *Acesso à informação das entidades públicas* 40–42, 140 ff. (Coimbra 2002); R. Carvalho, *Lei de acesso aos documentos da administração anotada* 24 (Porto 2000).

27 This was CADA's (below) official position, even if not unanimous:. CADA Opinions n. 164/2001, 215/2002, 21/2003, 12/2005, 44/2005, 81/2005, or 137/2005. This was the administrative courts' jurisprudence from 2002 onwards too – *see* Judgment of the Administrative Court of Appeals of 4 Apr. 2002. *See* Assis Raimundo, *As empresas públicas*, *supra* n. 25, at 221–243.

28 *See*, e.g. Art. 4(1)(d) and (f) of LARDA. For other transparency duties impending over State-owned companies, *see* Arts 44, 45, and 53 of Decree-Law n. 133/2013, of 3 Oct.

29 Arts 56–61 of Decree-Law n. 133/2013, of 3 Oct. Examples of existing 'corporate public entities' include bodies that provide services in the fields of the arts, transportation, and healthcare – i.e. typical public services. In spite of the clarity of the law in adopting a purely institutional criterion, J. Caupers, *Sobre o conceito de documento* administrativo, 75 Cadernos de Justiça Administrativa 9 (2009), holds that only when 'corporate public entities' perform activities which are incompatible with the market logic

are incorporated under corporate law, have private legal personality and over which public bodies exert a 'dominant influence'.[30] In the case of the latter, they are under private law as a rule and only marginally public law.[31] If some among them also cater for collective needs,[32] some others play in the market alongside and in competition with other (purely) private actors[33] who are not encumbered with the same duties to disclose information.[34] It is hence easy to understand why this is problematic: it creates a competitive disadvantage for public commercial companies who compete with other economic agents in the same markets, who will be able to access otherwise internal data of the former.

One may disagree with the merits of the legislative solution, and there might be some good arguments for that, but there seem to be no grounds to claim it is unconstitutional. Especially because there are also sound reasons to defend it: namely that, regardless of the fact that public commercial companies are private legal persons, they are created by the State *lato sensu*, based on a legal authorization that stems from a norm of competence and with public financial resources and assets – rather than based on liberty and individual autonomy.[35]

The Constitutional Court has already ruled on this matter and has (rightfully) decided that no constitutional norm prohibits the submission of the whole of the activity of public commercial companies to the non-instrumental transparency regime.[36] A minority of justices dissented with the argument that it would violate the constitutional principles of efficiency and of competition.[37] The problem,

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are they subjected to transparency duties, thereby adopting the criteria for the qualification of 'public bodies' for EU public procurement matters (*see infra*) *contra legem*.

30 Art. 9 of Decree-Law n. 133/2013, of 3 Oct., lists the factors that determine a 'dominant influence'. These factors were established as rebuttable presumptions of 'dominant influence' in Art. 2(b) of Commission Directive 2006/111/EC of 16 Nov. 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. But the above-mentioned decree-law, which transposed it to the Portuguese legal order, transformed it into conclusive presumptions – C. J. Fausto de Quadros, *Serviço público e direito comunitário*, in *Os caminhos da privatização da administração pública* 296–297 (Coimbra 2001).

31 Art. 14(1) of Decree-Law n. 133/2013, of 3 Oct.

32 For example, public commercial companies in the fields, e.g. of transportation, water provision, or postal services – also typical public services.

33 The biggest Portuguese bank in terms of market share – *Caixa Geral de Depósitos, SA* – is a public commercial company, as well as the airline *TAP – Transportes Aéreos Portugueses, SA*, for example.

34 On this duality, Gonçalves, *O direito de acesso à informação*, *supra* n. 18, at 3-4.

35 Apart from the Constitutional Court Judgment mentioned in the following footnote, Miranda, *O acesso à informação*, *supra* n. 8, at 444–450; Gonçalves, *O direito de acesso à informação*, *supra* n. 18, at 10–11.

36 Constitutional Court Judgment n. 496/2010.

37 *See* the Dissenting Vote of Justice C. Cadilha, joined by Justice G. Galvão. Caupers, *Sobre o conceito*, *supra* n. 29, at 9–10, considers that public commercial companies are a form of 'business administration' and, for that reason, always act within a market logic, not being submitted to information disclosure duties.

however, is that these principles, in the fashion they are enshrined in the Constitution, lack sufficient normative density to allow rendering legal norms void and null.[38] In addition, the dissenting justices also adduced the definition of 'administrative document' as an argument, noting the usage of the adjective *administrative* and the exclusion of 'documents which are not drawn up as a result of administrative activities'.[39] The issue is that the use of such adjective bears no autonomous meaning: the legislator provided a full definition of 'administrative document'. On the other hand, the exclusion refers to the negative demarcation of the concept, which not only is defined beforehand, but also contains an example of what the legislator means: documents 'concerning meetings of the Council of Ministers and Secretaries of State, and the preparation thereof', i.e. political documents.

A different institutional category – a residual one, when compared to that of State-owned companies – is composed by the entities which are considered to be 'public bodies' for European Union public procurement matters.[40] For this category, instrumental transparency is applicable only if and when they have authority prerogatives in a specific case, whereas non-instrumental transparency is fully applicable, regardless of the subject matter.[41]

Finally, the applicable regime to all other existing bodies of private nature which may cooperate with the public administration – such as public services concession companies,[42] voluntary agencies,[43] or sports federations[44] – is similar for both instrumental and non-instrumental transparency: they are only bound to it to the extent that they perform material administrative functions or that they hold *ius imperii*

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38 The text of Arts 81(c) and 80(c) of the Constitution is so vague that it is self-explanatory.

39 Art. 3(1)(a) and (2)(b) of LARDA.

40 *See* originally Art. 1(b) of Council Directive 92/50/EEC, of 18 June 1992, relating to the coordination of procedures for the award of public service contracts. On this, E. Chiti, *Organismo di diritto pubblico*, in *Dizionario di diritto pubblico* IV, 4014–4019 (S. Cassese ed., Milan 2006); S. Arrowsmith, *The Law of Public Utilities and Procurement* (2d ed., London 2005)256–274; among Portuguese scholars, J. Amaral e Almeida, *Os «organismos de direito público» e o respectivo regime de contratação*, in *Estudos em homenagem ao Professor Doutor Marcello Caetano* I 633–657 (J. Miranda ed., Coimbra 2006).

41 Art. 4(2) of LARDA – Miranda, *O acesso à informação*, *supra* n. 8, at 452–455. Gonçalves, *O direito de acesso à informação*, *supra* n. 18, at 8[18], holds the view that these entities should only be subject to the non-instrumental transparency regime functionally, i.e. when related to the exercise of public powers and/or administrative functions

42 Miranda, *O acesso à informação*, *supra* n. 8, at 455–456.

43 The case of voluntary agencies is not completely straightforwardly applicable. It seems to be unanimous that whenever they exercise public authority, the CPA is automatically applicable – Esteves de Oliveira et al., *Código*, *supra* n. 24, at 73–74; Rebelo de Sousa, *Lições*, I, *supra* n. 2, at 431; L. Lopes, *As instituições particulares de solidariedade social* 485–495 (Coimbra 2009). Where non-instrumental transparency is concerned, Art. 4(1)(g) of LARDA, leaves no room for doubt. *See* Soares Farinho, *O âmbito de aplicação*, *supra* n. 24, at 149, and L. Lopes, *As instituições particulares*, 434–448.

44 Caupers, *Sobre o conceito*, *supra* n. 29, at 9. For an exhaustive list, Gonçalves, *Entidades privadas*, *supra* n. 26, at 787–894, 922–928.

powers in a particular situation.[45] In this case, therefore, the scope of application of the transparency regimes is defined functionally, rather than institutionally.[46]

2.2[b] *The Beneficiaries of the Right to Administrative Information*

The main beneficiaries of instrumental transparency are those directly interested in the relevant procedure.[47] In other words: those whose legal sphere might be affected, whether they are parties in the procedure, other individuals who may be harmed by the institution of the administrative procedure itself or by its final decision,[48] or third parties.[49]

Other individuals who have any legitimate interest worthy of legal protection[50] in the procedure may also request information about its course or outcome. Even though the constitutional norm only makes reference to a 'direct interest'[51] and hence does not seem to include them *prima facie*, the Constitutional Court has read it broadly, together with the right to effective judicial protection.[52] This is because recourse to any form of judicial review could be seriously impaired, or even become totally useless, without an ancillary right of access to the pertinent procedural information. Moreover, as the right of access to non-instrumental information is open to everyone, denying the access to procedural information to the holders of mere legitimate interests would result in it having a narrower scope of beneficiaries. Given the subjective nature of the latter, and the fact that it would maximize the transparency objectives of the former, this would be inadmissible.[53] The result is a

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45 Art. 2(1) of the CPA, as well as Art. 4(1)(g) of LARDA; Miranda, *O acesso à informação*, *supra* n. 8, at 450–452.

46 Gonçalves, *O direito de acesso à informação*, *supra* n. 18, at 8[18].

47 Arts 82(1) and 83(1) of the CPA, as well as Art. 3(2) of Decree-Law n. 135/99, of 22 Apr. *See* Esteves de Oliveira et al., *Código*, *supra* n. 24, at 328; Rebelo de Sousa, *Lições*, I, *supra* n. 2, at 434. Differently, A. Brandão da Veiga, *Acesso à informação*, 61, offers a more restrictive interpretation: only the applicant and/or the (potential) addressees of the administrative act have legitimacy to request information about the ongoing procedure. *See* J. J. Gomes Canotilho / V. Moreira, *Constituição da república portuguesa anotada*, II, 822 (4th ed., Coimbra 2010); Machete, *A audiência dos interessados*, *supra* n. 11, at 404.

48 On this category, *see* Constitutional Court Judgments n. 393/94 (which deemed the confidentiality of the minutes of selection boards of tendering procedures to be unconstitutional) and 80/95 (which declared the unconstitutionality of the reports on military members).

49 Specifically on the issue of whether third parties are included, F. Paes Marques, *As relações jurídicas administrativas multipolares* 377–379 (Coimbra 2011); Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 62–72. *See also* Constitutional Court Judgment n. 2/2013.

50 On the concept of legitimate interest worthy of legal protection in administrative law, P. Otero, *Manual de direito administrativo*, I, 240–244 (Coimbra 2013); Paes Marques, *As relações jurídicas*, *supra* n. 49, at 298–306; P. Machete, *Estado de direito democrático e administração paritária* 484–540 (Coimbra 2007); J. M. Sérvulo Correia, *Direito do contencioso administrativo*, I, 632–670, 717–735 (Lisbon 2005); M. Aroso de Almeida, *Anulação de actos administrativos e relações jurídicas emergentes* 44–55, 139–164 (Coimbra 2002); V. Pereira da Silva, *Em busca do acto administrativo perdido* 212–297 (Coimbra 1996).

51 Art. 268(1) of the Constitution.

52 Arts 20(1), 268(4) and (5) of the Constitution.

53 Gomes Canotilho, *Anotação*, *supra* n. 6, at 255.

broad 'constitutional right of access of the holders of any legitimate interest worthy of legal protection to information which is part of administrative procedures which may allow her to use administrative or judicial means for whichever relevant ends'.[54] In this case, however, the law requires additional (formal) requirements: the request must be made in written form, unlike in the case of 'direct interest', and it is subject to analysis and approval by the governing body of the service to which it is addressed.[55] It should be noted, as it will be seen *infra*, that this does not mean that the information is granted automatically in the remaining cases, but merely that in this case the competence to approve it belongs to the governing body of the service.

To the extent that public legal persons have procedural capacity – e.g. when they act without *ius imperii* powers and need to go through an authorization procedure – they can use instrumental transparency.[56]

Non-instrumental transparency is open to everyone,[57] 'without the need to state any interest',[58] i.e. the request for information does not even have to provide reasons.

The only open question is whether public legal persons (and/or administrative organs) are encompassed in its subjective scope, especially when it comes to relations between or among different organs from the same public legal person and between or among distinct public legal persons.[59] In this matter, the rule is that public bodies should resort to administrative assistance[60] for procedural information, whereas for non-procedural information they follow LARDA's general regime.[61] The only specificity in the latter case is that CADA (see below) should assess the risks of interconnection of data.[62]

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54 Constitutional Court Judgments n. 176/92, 177/92, 234/92, 237/92, 254/99, and 2/2013.

55 Art. 85 of the CPA – Paes Marques, *As relações jurídicas*, *supra* n. 49, at 380–382; C. Sarmento e Castro, *Direito à informação procedimental: os interesses e os interessados*, 31 Cadernos de Justiça Administrativa 44–45 (2002); Rebelo de Sousa, *Lições*, I, *supra* n. 2, at 434–435; Carvalho, *O direito à informação*, *supra* n. 15, at 202–208; Esteves de Oliveira et al., *Código*^{2}, *supra* n. 24, at 1997, 328.

56 Esteves de Oliveira et al., *Código*, *supra* n. 24, at 265; Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 77.

57 The Constitution, in Art. 268(2), seems to reserve this right to citizens. LARDA, by using the word 'everyone', extended the personal scope of this right, therein including even non-resident aliens.

58 Art. 5 of LARDA, as well as Art. 17 of the CPA. *See* Aroso de Almeida, *Os direitos fundamentais*, *supra* n. 3, at 298–303.

59 On the concept of 'inter-administrative relation', A. Leitão, *Contratos interadministrativos* 27–45 (Coimbra 2011).

60 Art. 66 of the CPA, which was only included therein in its latest amendment (2015). The request then follows LARDA's regime, according to Art. 66(2) of the CPA. In general, *see* R. Tavares Lanceiro, *O auxílio administrativo*, in *Comentários ao novo Código do procedimento administrativo* 315–341 (C. Amado Gomes et al. eds., Lisbon 2015).

61 *See*, e.g. CADA Opinions n. 196/2006 and 45/2007, which allowed the president of a parish to request information, under LARDA, to a public institute. For other references, Tavares Lanceiro, *O auxílio administrativo*, *supra* n. 60, at 322–323; S. Pratas, *Lei do acesso e da reutilização dos documentos administrativos anotada* 170–171 (Lisbon 2008). *See* per contra: Gonçalves, *Acesso à informação*, *supra* n. 26, at 18–19; Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 77.

62 *See* Art. 27(1)(d) of LARDA.

2.3 Objective scope

The duty to disclose administrative information is first and foremost marked by the very concept of 'information': any statement known or produced by the public administration.

One of the supports in which the information might be held or provided to the public is that of the 'administrative document': 'any information medium in written, visual, aural, electronic or other material form, which is in the possession, or is held on behalf, of the bodies and entities' included in the subjective scope of application of LARDA.[63]

Both for instrumental and for non-instrumental transparency, access to administrative documents shall occur by one of the following means, at the applicant's option: (1) consultation in the departments or services that hold the documents in question, (2) reproduction, (3) the issuance of a certificate, or (4) receiving written or oral information as to the administrative documents' existence and content.[64] It is up to the applicant to choose which form suits her needs – a reason why even documents that might have been published in the internet still have to be provided to the applicant upon his request.[65] Moreover, the breadth of the information to be provided by the administration is determined by the applicant's needs and request: it may encompass all that is useful for the latter to assess the opportunity and the lawfulness of the relevant administrative activities.[66]

The determination of the objective scope of the right to disclose information is first marked by a general imposition to disclose all the information required by the applicants.[67] However, this is merely a prima facie duty, because it still has to be balanced and weighed against other relevant constitutional goods. In other words: the norms that establish the duty to provide the information waive the possibility of actually regulating the situation themselves in a definitive way and open up to the concrete weight of every counterbalancing public or private

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63 Art. 3(1)(a) of LARDA. The only further precision to restrict the concept that the legislator makes is to exclude both personal and political documents therefrom – Art. 3(2) of LARDA. On these two categories, Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 83–86. *See also* Arts 6 and 13 of the Rules of Procedure of the Council of Ministers, approved by the Resolution of the Council of Ministers n. 198/2008, of 30 Dec. *See*, Esteves de Oliveira et al., *Código*, *supra* n. 24, at 54–55.

64 Arts 5, 11(1), (4), (5), and 14(1)(a) of LARDA, as well as Arts 82–84 of the CPA, and Art 21 of Decree-Law n. 135/99, of 22 Apr. It is a duty of *dare* in the case of (4), a duty of *facere* in the case of (2) and (3), and a duty of *patti* in the case of (1) – Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 240.

65 However, documents published in the official journal satisfy the obligation of publicity and therefore are not encompassed by that obligation – CADA Opinions n. 357/2007 and 94/2009. Differently, Pratas, *Lei do acesso*, *supra* n. 61, at 280.

66 Constitutional Court Judgment n. 176/92.

67 Stating that publicity must be the rule and confidentiality the exception, Aroso de Almeida, *Os direitos fundamentais*, *supra* n. 3, at 308.

interest, on a case-by-case basis, to be assessed by the competent administrative body.[68]

The Constitution itself states that the right to information under the principle of non-instrumental transparency should be understood 'without prejudice to the law governing matters of internal and external security, criminal investigation and personal privacy'; the same does not happen for instrumental transparency, which is constitutionally entrenched without mentioning any exceptions. It seems unambiguous, in any case, that the right to procedural information may also be restricted.[69] This is not due to a supposed close connection between the two rights that would result in the exceptions to the former being also applicable to the latter, as the Constitutional Court has argued,[70] but because (fundamental) rights have the nature of principles and are therefore subject to a mandate of optimization with other constitutional principles.[71] On the other hand, and for the same reason, the interests contained in Article 268(2) do not constitute a *numerus clausus* of motives that allow the restriction of that right. In other words: the constitutional right to procedural information may also be weighed against other constitutional goods.[72] Nonetheless, and unlike what the Constitutional Court has decided,[73] it should not suffice that a statute broadly determines that 'information related to foreign investment operations must not be publicly available without prior written authorisation of its participants'.[74] This confidentiality clause completely reverts the principle according to which transparency should be the rule without leaving any room for weighing the concrete interests of the administration's private

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68 Considering that decisions are made on a case-by-case basis, according to the result of the balancing of different constitutional rights or goods, J. E. Figueiredo Dias, *Direito à informação, protecção da intimidade e autoridades administrativas independentes*, in *Estudos em homenagem ao Prof. Doutor Rogério Soares* 639 (Coimbra 2001); Aroso de Almeida, *Os direitos fundamentais*, *supra* n. 3, at 315–316. Underlining that balancing takes place even in the case of Art. 83 of the CPA, Paes Marques, *As relações jurídicas*, *supra* n. 49, at 281–282. To this extent, it is very doubtful to claim that the act to disclose information is non-discretionary, as do both David, *Das intimações*, *supra* n. 15, at 190–192, and Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 240–241.

69 Similarly, J. Miranda, *O direito de informação dos administrados*, 120:3/4 O Direito 461–462 (1988); A. Rodrigues Queiró, *Anotação ao Acórdão do Supremo Tribunal Administrativo (1.ª Secção) de 22 de Janeiro de 1981*, 114 Revista de Legislação e Jurisprudência 308–309 (1981–1982).

70 Constitutional Court Judgments n. 176/92 and n. 177/92. Considering this argument 'methodologically untenable', *see* the harsh criticism of Gomes Canotilho, *Anotação*, *supra* n. 6, at 254. *See also* P. Machete, *A audiência dos interessados*, *supra* n. 11, at 404–405[847].

71 On (fundamental) rights prima facie and balancing, J. Reis Novais, *As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição* 322–353, 693–725 (Coimbra 2003); D. Duarte, *A norma de legalidade procedimental administrativa* 727–754, 761–797(Coimbra 2006). The Constitutional Court has adopted this line of reasoning in its Judgment n. 254/99.

72 Constitutional Court Judgments n. 254/99 and 2/2003.

73 Constitutional Court Judgment n. 136/95.

74 Art. 13 of Decree-Law n. 321/95, of 28 Nov., which was revoked and replaced by Art. 5(6) of Decree-Law n. 203/2003, of 9 Oct.

co-contracting party, if any. Instead, the statute should have typified some of the investors' interests that might be balanceable with the right to information.[75]

At the ordinary law level, the reasons that are specifically spelled out *in abstracto* as requiring case-by-case balancing by the administrative body are carved out according to the content of the information. Contrarily to what one might expect, they only overlap partially. The common ones for instrumental and non-instrumental information are: (1) the classified nature of the document, (2) the confidentiality of judicial proceedings[76], (3) its nominative nature, when the applicant is a third party, and (4) the fact that it reveals commercial or industrial secrets or the internal life of a company.[77] Pertaining only to the set of reasons that may be used to counterbalance access to non-instrumental information is the preparatory nature of the documents to a decision.[78]

Whereas the first two common sets of reasons are based on public interests, the latter two are grounded on privacy (*lato sensu*) reasons.

It should be noted that even when listing these reasons, the law, giving concrete shape to the prong of necessity of the principle of proportionality, ascertains that 'administrative documents which are subject to restricted access shall be the object of partial communication whenever it is possible to expunge the information concerning the reserved matter'.[79]

Among the relevant public interest reasons, documents classified as 'secret of State'[80] are to be mentioned. The classification of documents as 'secret of State' is made through an autonomous procedure laid out in the law, by a competent organ, and its classification de jure (and not only de facto) is an indispensable requirement for them to be included in this exception.[81] This means that each case is decided on its own and that there is no necessary connection stating that certain subject matters have an automatic classification: regardless of how grave the concerns of risk or harm are in a particular situation, the law requires its evaluation according to the 'concrete circumstances' of the case.[82] The prong of necessity of the principle of proportionality

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75 J. M. Sérvulo Correia, *A jurisprudência constitucional portuguesa e o direito administrativo*, in *XXV anos de jurisprudência constitucional portuguesa* 117 (Coimbra 2009).

76 Art. 6(4) of LARDA also refers to the connection that the documents might have with a disciplinary proceeding.

77 *See*, respectively: for (a), Arts 83(1) and 84(2) of the CPA and 6(1) of LARDA; for (b), Art. 6(2) of LARDA, Art. 20(3) of the Constitution, and Art. 86 of the Code of Criminal Procedure; for (c), Arts 83(2) of the CPA and 6(5) of LARDA; and for (d), Arts 83(1) and 84(2) of the CPA, and 6(6) of LARDA.

78 Art. 6(3) of LARDA.

79 Art. 6(7) of LARDA.

80 Art. 2(1) of Organic Law n. 2/2014, of 6 Aug.

81 CADA Opinions n. 109/2006 and 176/2006.

82 Art. 2(3) of Organic Law n. 2/2014, of 6 Aug.

also plays a role here: on the one hand, it is an *ultima ratio* mechanism, only to be used when there is no other less restrictive (of the right to information) way to achieve the objectives it aims at. On the other hand, the classification is valid only for such time as is strictly necessary.[83]

Both for instrumental information and non-instrumental information, the criteria to balance the right of access with the public interest exceptions depends on the exception at stake. Classified documents have restricted access according to the terms of their classification, and therefore there is no balancing to be made – the balancing is made earlier, when the documents are classified as containing 'secret of State'. The same can be said of the confidentiality of judicial proceedings[84] and of the documents connected with disciplinary proceedings[85]: in these cases, the absence of balancing stems from a rule that prohibits access in those cases under certain circumstances. Differently, access to preparatory decisions may – and *may* only – 'be delayed until the decision in question is taken, the file is archived, or one year has passed since they were drawn up'; even though the law does not provide an established balancing test, the administrative authorities must provide the specific reason why they consider it is inconvenient to release the documents requested.[86] This means that, contrasting with the strict and clear lack of balancing regarding the other cases, the law adopted a more lenient standard towards decisions that restrict access to preparatory documents.

An analysis of the administrative case-law regarding the review over the application of the public interest exceptions reveals rather rigorous judicial standards. If the document is classified, part of disciplinary or judicial proceedings, non-disclosure is firmly enforced, no exceptions being granted. The same can be said of the review of acts that restrict access to preparatory decisions.[87]

It is now time to focus on privacy reasons.

The first point to note is that any relevant restrictions related to privacy concerns are only in force for third party requests. One has full right of access to one's own file. There was a statutory exception, though: the interested party in obtaining information about her own health (in particular her clinical file) could be denied access to it 'in exceptional circumstances duly justified and in which it was

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[83] Arts 1(4) and 4 of Law n. 6/94, of 7 Apr. *See* Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 98–110; Gonçalves, *Acesso à informação*, *supra* n. 26, at 51–55; Carvalho, *Lei de acesso*, *supra* n. 26, at 30–33.

[84] Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 103–107; Gonçalves, *Acesso à informação*, *supra* n. 26, at 55–59; Carvalho, *Lei de acesso*, *supra* n. 26, at 33–35.

[85] Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 107–110.

[86] Art. 14(1)(c) of LARDA.

[87] For example, in Case 00319/08.2BEPNF, of 16 Oct. 2008, the Administrative Court of Appeals for the North decided that the denial of access to documents by alleging that they were connected with an ongoing administrative procedure, without any further specification, was generic and, as such, inconclusive for judicial review, deeming it as unlawful for not having provided sufficient reasons.

unequivocally demonstrated that it might be harmful for her'.[88] Apart from its unconstitutionality,[89] this norm seems now to have been revoked.[90]

The right to privacy is a self-standing fundamental right entrenched in the Constitution.[91] Within the regulation of access to information, the protection of privacy is first and foremost materialized in the concept of 'nominative document': 'an administrative document which contains an assessment or value judgment, or information covered by the reservation on the intimacy of private life, about an identified or identifiable natural person'.[92]

In this area, however, there is an institutional overlap that poses specific problems. The Commission for the Access to Administrative Documents, abbreviated as CADA (*Comissão de Acesso aos Documentos Administrativos*), has to ensure compliance with LARDA.[93] The National Commission for Data Protection, abridged as CNPD (*Comissão Nacional de Protecção de Dados*),[94] is charged with data protection.[95] The terms of the relationship between CNPD and CADA were not clear for a long time, especially when the holders of personal data were entities within the personal scope of application of CADA, as both entities had divergent jurisprudence: there was a positive conflict of jurisdiction since both CNPD and CADA always considered themselves to be competent.[96] More recently, the approval of LARDA seems to have settled the most pressing issues by making CADA competent in such cases.[97]

Regarding instrumental transparency, third parties have access to 'nominative documents', provided that the personal data that are not public are excluded therefrom.[98]

Differently, in the case of non-instrumental transparency, third parties shall only be granted access to 'nominative documents' 'if they are in possession of written authorisation from the person to whom the data refers, or if they

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88 Art. 3(2) of Law 12/2005, of 26 Jan.

89 Similarly, Sousa Pinheiro, *Privacy*, *supra* n. 17, at 748–753, 759–761. C. Barbosa, *Questões jurídicas do acesso ao processo clínico*, 13 Lex medicinae 115 (2010), considered that the only data to which the patients could be denied access were the personal notes of the physician contained in the file.

90 Arts 2(3) and 7 of LARDA; *see* Barbosa, *Questões jurídicas*, *supra* n. 89, at 116–119.

91 Art. 26(1) of the Constitution.

92 Art. 3(1)(b) of LARDA. The CPA does not provide an autonomous definition. On 'nominative documents', Sousa Pinheiro, *Privacy*, *supra* n. 17, at 745–748; Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 127–133; Pratas, *Lei do acesso*, *supra* n. 61, at 61–72; Gonçalves, *Acesso à informação*, *supra* n. 26, at 61–128.

93 Arts 25–32 of LARDA. For more developments on CADA, *see infra*.

94 CNPD is foreseen in Art. 35(2) of the Constitution and was first established in 1991 by Law n. 10/91, of 29 Apr. It is an 'independent administrative body' – for references, J. L. Cardoso, *Autoridades administrativas independentes e Constituição* 315–330 (Coimbra 2002).

95 Art. 4(1) of Law n. 67/98, of 26 Oct.

96 CADA Opinion n. 118/2002.

97 Still, *see* Sousa Pinheiro, *Privacy*, *supra* n. 17, at 753–758.

98 Art. 83(2) of the CPA.

demonstrate a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality'.[99] Bearing in mind the principle of proportionality and the fact that there is no obligation to provide extracts of documents only if 'this involves a disproportionate effort which goes beyond the simple handling thereof',[100] it seems – *a contrario sensu* – that it is possible to obtain the document once personal data are omitted.

There is no doubt that the public administration can balance non-instrumental transparency with the right to privacy: the consultation of 'nominative documents' requires either 'written authorisation from the person to whom the data refers' or the demonstration of a 'direct, personal and legitimate interest which is sufficiently important under the principle of proportionality'.[101] This regime poses complex issues, as it might lead to a mere interest of a third party, however justified, trumping over one's privacy[102] when the Constitution determines that 'third-party access to personal data shall be prohibited, save in exceptional cases provided for by law'.[103] The burden of proof thus lies on the applicant's side and the rule is that privacy should be protected unless there are compelling reasons otherwise and to the extent they exist.[104]

As for instrumental transparency, the law seems to be less protective of privacy prima facie, as it only states that 'nominative documents' related to third parties should be disclosed as long as all 'personal data which are not public' are excluded therefrom. Regardless, the interest assessment is still present as a pre-condition of the request: all those who request access to instrumental information must show a 'direct interest'.[105] The conclusion is therefore that here, too, there is room for interpretive or discretionary choices, especially in the weighing of the 'interest' of the applicant.

The threshold for the release of documents that contain trade or industrial secrets[106] or undisclosed information about the internal life of a company[107] – which

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[99] Art. 6(5) of LARDA.
[100] Art. 11(5) of LARDA.
[101] Art. 6(5) of LARDA.
[102] Sousa Pinheiro, *Privacy*, *supra* n. 17, at 754–756.
[103] Art. 35(4) of the Constitution. *See* Sousa Pinheiro, *Privacy*, *supra* n. 17, at 757.
[104] CADA Opinion n. 59/2003. As an example of a well-reasoned decision, *see* Case 04527/08, of 22 Jan. 2009, of the Administrative Court of Appeals for the South.
[105] *See*, respectively, Arts 83(2) and 82(1) of the CPA.
[106] On these concepts, *see* Arts 318, combined with 317, and 331, of the Industrial Property Code, which was copied from Art. 39(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights. *See* J. Remédio Marques, *Biotecnologia(s) e propriedade intelectual*, II, 475–501 (Coimbra 2007); D. Moura Vicente, *Segredo comercial e acesso à informação administrativa*, in *Estudos em homenagem ao Prof. Doutor Sérvulo Correia* 296–297 (J. Miranda ed., Lisbon 2010); Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 110–122, 133–141; J. de Oliveira Ascensão, *Concorrência desleal* 469–472 (Coimbra 2002).
[107] Constitutional Court Judgments n. 254/99 and 2/2013.

also requires either the 'written authorisation from the company in question' or the demonstration of 'a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality' – is generally lower.[108] As it protects competition and efficiency within the market (and, in a reflex manner, consumers' rights) and the agents' economic and scientific freedoms, it is less fundamental than privacy.[109] The company's interests should be carefully balanced with the public interests in transparency (e.g. not up-to-date documents do not require the same level of protection that up-to-date documents do) in a more equal basis.[110] This is true both for instrumental and non-instrumental information.[111]

2.4 Legal regime

Administrative documents are primarily made available on demand, except to their addressees, to whom they must be notified.[112] As a rule, administrative documents are only published when it is required by law, which happens very seldom.[113] Their availability to the public, be it over the internet or by any other means, generally depends on the internal practice of the body or authorities.[114]

Instrumental transparency should be provided by the organ which is competent to decide the procedure[115] within ten working days.[116] If the deadline expires without any answer from the administrative body, the interested party has standing to request an 'injunction for disclosure of administrative information'.[117]

Non-instrumental transparency should also be provided within the same deadline, except in cases of high 'volume or complexity of the information', in which the time period may be extended to a maximum of two months. Still, even in the latter case, the applicant shall be informed of the extension within ten working days.[118] Alternatively, the body to which the application was made may also expound any doubts which it has about the decision it has to make to CADA,

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[108] Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 110–122; Gonçalves, *Acesso à informação*, *supra* n. 26, at 129–161.

[109] For the appraisal of the relevant (corporate and public) interests in both sides, Moura Vicente, *Segredo comercial*, *supra* n. 106, at 291–292; de Oliveira Ascensão, *Concorrência desleal*, *supra* n. 106, at 460.

[110] CADA Opinion n. 44/2002.

[111] Art. 6(6) of LARDA, and Arts 83(1) and 84(2) of the CPA.

[112] Art. 268(3) of the Constitution and Arts 110–114 of the CPA. *See* P. Gonçalves, *Notificação dos actos administrativos*, in *Ab uno ad omnes* (J. Antunes Varela et al. eds., Coimbra 1998).

[113] Arts 158–159 of the CPA.

[114] For other duties of publicity, *see* Art. 10 of LARDA, and Arts 7 and 47–49 of Decree-Law n. 135/99, of 22 Apr.

[115] Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 249–250.

[116] Arts 82(3) and 84(1) of the CPA.

[117] Arts 104–108 of the Code of Procedure in Administrative Courts (*Código de processo nos tribunais administrativos*), hereinafter referred to as 'CPTA' – for details, *see infra*.

[118] Art. 14(1) and (4) of LARDA.

so that the latter issues a formal, yet non-binding, opinion on the subject in forty days.[119]

If the deadline to grant the information expires without any answer, interested parties can either or both challenge the silence before CADA[120] and file a request for an 'injunction for disclosure of administrative information'.

Unlike in general administrative procedures, the requesting party is not consulted before the final decision is taken. Third parties whose details are contained in the information or documents requested are not consulted prior to the release of such information or document to a requester, nor can they prevent the disclosure.

Access might be lawfully refused for lack of any subjective or objective conditions for the disclosure of information (in case of instrumental information) or the application of one of exceptions mentioned above (in either type of information).[121]

In either circumstance, administrative authorities are obliged to communicate in writing the reasons for any total or partial denial of access to the desired document, together with a description of the available administrative and judicial guarantees against it.[122] The reasons provided must encompass the legal as well as the factual grounds that led to it, in a clear, coherent and complete way.[123]

In the case of instrumental information, it is yet to be determined what the consequence is of the unlawfulness of a refusal to access information in itself and whether it has any consequence for the final act of the procedure in which it is implanted.

It is submitted that, apart from being invalid itself, the failure to provide information will invalidate its final decision because it is part of a procedure *in itinere*,[124] and that the type of invalidity of the act that rejects to grant access will be the same as, or graver than, the final decision. The reason for this correspondence is that it would be inconsistent if the type of invalidity was 'weaker' than that of the interlocutory act – e.g. if there was no deadline to argue the invalidity of the refusal, but a deadline to do so for the final act.[125]

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[119] Arts 14(1)(e) and (2), 15(4), and 27(1)(c) of LARDA; Gonçalves, *Acesso à informação*, *supra* n. 26, at 87–90, 200–205.

[120] Art. 15 of LARDA (for details, *see infra*).

[121] Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 246–249; Carvalho, *O direito à informação*, *supra* n. 15, at 318–320.

[122] Art. 14(1)(c) of LARDA. *See* C. Reis, *Acesso dos particulares aos documentos da administração*, 11 Cadernos do Mercado de Valores Mobiliários 183–206 (2001).

[123] Art. 153 of the CPA. *See* Brandão da Veiga, *Acesso à informação*, *supra* n. 47, at 241; Esteves de Oliveira et al., *Código*, *supra* n. 24, at 341.

[124] Considering it does not invalidate the final decision of the procedure, Machete, *A audiência dos interessados*, *supra* n. 11, at 411[852].

[125] Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 142; Duarte, *Procedimentalização*, *supra* n. 8, at 157; Miranda, *O direito de informação*, *supra* n. 69, at 462. Differently, but not providing reasons, Esteves de Oliveira et al., *Código*, *supra* n. 24, at 329–330.

Both the intermediate and the final act will be null and void (*nulo*) in case there was no access at all and the applicant whose right was infringed bears a 'direct interest', due to the violation of the core of her fundamental right of access to procedural information.[126] Conversely, in case of mere defective performance of the duty to provide the information or of an applicant without a direct connection to the procedure, there is only the possibility of requesting the annulment of the act (*anulabilidade*).[127] Still, bearing in mind the main objective of this right – render the citizens' participation timely and conscientious – it is possible to overcome the invalidity of the final act if it is clear at the end of the procedure that one such objective was not impaired by the lack of access to the information.[128]

2.5 Administrative review

The refusal of access to administrative information is always subject to administrative review. Applicants may complain to an administrative reviewing body about the lack of a timely response, the denial of an application, or any other decision which restricts access to administrative documents and/or information. This request for administrative review is not compulsory[129] nor does it exclude subsequent judicial review. There is, however, an incentive for parties to use it before judicial review: in the case of instrumental information, it suspends the time period for judicial submission of an 'injunction for disclosure of administrative information',[130] and in the case of non-instrumental information, it interrupts the time period for judicial submission of the same type of request.[131]

The specific applicable regime varies, once again, according to whether it is a matter of instrumental or non-instrumental transparency.

For instrumental information, the reviewing body is the same body if a complaint (*reclamação*) is filed or a higher office if an administrative appeal (*recurso hierárquico*) is filed. The deadline to file these requests is respectively of fifteen days

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126 Art. 161(2)(d) of the CPA, in connection with Art. 268(1) of the Constitution – Rebelo de Sousa, *Lições*, I, *supra* n. 2, at 439. *See also* Duarte, *Procedimentalização*, *supra* n. 8, at 156–157[168]; Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 142. Differently, *see* Machete, *A audiência dos interessados*, *supra* n. 11, at 412.

127 Art. 163(1) of the CPA – Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 142.

128 Art. 163(5)(b) and (c) of the CPA – Sérvulo Correia, *O direito à informação*, *supra* n. 4, at 142; Carvalho, *O direito à informação*, *supra* n. 15, at 276–277; David, *Das intimações*, *supra* n. 15, at 67–68. Generally on the conversion of essential formalities in non-essential formalities, P. Moniz Lopes, *Princípio da boa fé e decisão administrativa* 421–434 (Coimbra 2011).

129 If the request of information was denied because the information is classified as 'secret of State', any (administrative or judicial) review procedure must be preceded by an opinion issued by the Secret of State Oversight Entity, established by Organic Law n. 3/2014, 6 Aug. – Art. 15 of Organic Law n. 2/2014, 6 Aug.

130 Art. 59(4) of the CPTA.

131 Art. 15(2) of LARDA.

and of twenty days.[132] The deadline for the reviewing body to take a decision is of 30 days; when additional *démarches* by the reviewing body are required, the deadline can be increased up to a maximum of ninety days.[133] These procedures are the same that are applicable in general administrative law; they are therefore not particularly aimed at addressing the lack of responses, denials of applications, or any other decisions which restrict access to administrative documents and/or information.

For non-instrumental information, the reviewing body is CADA,[134] which has an independent pre-litigation advisory activity.[135] If there is no reason to dismiss the complaint *ad limine*,[136] CADA must invite the body to which the application was presented to respond to the complaint within ten days before any decision is made, though. From that point on, it has forty days to draw up the applicable situation assessment report and send it with its due conclusions to all the interested parties. Once it has received the report referred to by the previous paragraph, the body to which the application was made shall communicate its duly justified final decision to the applicant within ten days, failing which there shall be deemed to be an absence of decision. An interested party may then judicially contest either the decision or the absence of decision referred to by filing an 'injunction for disclosure of administrative information'.[137] CADA therefore acts as the recipient of an indirect or mediate complaint (*reclamação*) to and about the *ad quem* body, who will have to decide, for the second time, the same request.[138]

As it has become notorious so far, CADA constitutes the centre of the institutional regulatory framework of administrative transparency supervision. Its tasks are, however, restricted to the field of non-instrumental information.[139]

Characterized as an 'independent administrative body',[140] it is organically autonomous from the Government. CADA has eleven members who are designated by different authorities, some upon proposal from yet other different (private

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132 Art. 191(3) of the CPA and Art. 105 of the CPTA, *ex vi* Art. 193(2) of the CPA.

133 Arts 192(2) and 198(1) and (2) of the CPA.

134 Arts 27(1)(b) and 15 of LARDA. Complainants may also ask the Ombudsman to review the case – Art. 3 of Law n. 9/91, of 9 Apr.

135 Cardoso, *Autoridades administrativas*, *supra* n. 94, at 227.

136 Namely because CADA is not competent for the matter, the deadline has already elapsed, or because the request it is manifestly unfounded – Arts 15(3) and 31(2)(a) of LARDA. *See* Pratas, *Lei do acesso*, *supra* n. 61, at 323.

137 Arts 27(1)(c) and 15(3)-(6) of LARDA.

138 Cardoso, *Autoridades administrativas*, *supra* n. 94, at 228.

139 It was established by Law n. 65/93, of 26 Aug. The creation of 'independent administrative bodies' is allowed by Art. 267(3) of the Constitution since 1997 – V. Moreira / M. F. Maçãs, *Autoridades reguladoras independentes* 248–252 (Coimbra 2003); Cardoso, *Autoridades administrativas*, *supra* n. 94, at 437–517; C. Blanco de Morais, *As autoridades administrativas independentes no ordenamento português*, 61 (1) Revista da Ordem dos Advogados 110–114, 147–152 (2001).

140 Art. 25(1) of LARDA.

or public) bodies, mirroring different sources of legitimacy and institutional plurality, and is chaired by a Judge of the Supreme Administrative Court.[141] The terms of office last for (mere) two years and can be renewed – which are factors, especially when combined, that might decrease their independence. Still, during their time in office, the members secure tenure and their functions shall not cease before their terms of office come to an end except in very limited and objective circumstances.[142] Notwithstanding what happens in other 'independent administrative bodies', the legislator opted for not establishing any specific inabilities or incompatibilities as a way to further reinforce its members' independence; double-hatting is therefore permitted, except for its chair, as long as the (general) law allows it.[143]

In addition, CADA was also granted functional independence. It is not subject to any orders, instructions or oversight of any kind by other administrative bodies in the way it runs its activities and performs its tasks. No-one controls the opportunity/merits of its acts, and only the (administrative) courts review its legality.[144] Still, the functional independence is not complete. Lacking legal personality, CADA operates under the aegis of the Assembly of the Republic, rather than under the oversight of an administrative authority, which is argued to be yet another feature that confirms its independence.[145] Despite the truthfulness of the latter claim, it is still a weaker form of independence than that of bodies with legal personality – especially bearing in mind that the Parliament also has (limited) administrative competences, some of which of high political importance.[146] And this is all the more important because CADA's annual budget is also part of the Parliament's budget. This mitigated form of budgetary autonomy[147] is even more problematic from the point of view of CADA's independence.[148] Indeed, being subjected to the budget determined by the Parliament might potentially condition the Commission's freedom of action.[149] Together with the duty to present to the Parliament annual reports which cover its own activities, for publication and

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[141] Art. 26(1) of LARDA. Figueiredo Dias, *Direito à informação*, *supra* n. 68, at 647, claims that the fact that CADA is chaired by a Supreme Administrative Court Justice reinforces its independence. For justifiable criticism, *see*: Cardoso, *Autoridades administrativas*, *supra* n. 94, at 375–377; Blanco de Morais, *As autoridades administrativas*, *supra* n. 139, at 153–154.

[142] Arts 26(4), 29(4) and (6) of LARDA.

[143] Art. 30(2) of LARDA. Also noting this, Blanco de Morais, *As autoridades administrativas*, *supra* n. 139, at 142; Carvalho, *Lei de acesso*, *supra* n. 26, at 71.

[144] Arts 38–39 of LARDA.

[145] Figueiredo Dias, *Direito à informação*, *supra* n. 68, at 647.

[146] *See*, e.g. P. Otero, *Direito constitucional português*, II 313–315 (Coimbra 2010).

[147] Noting that there is still budgetary autonomy when the budget is approved by another entity, A. L. de Sousa Franco, *Finanças públicas e direito financeiro*, I, 152 (4th ed., Coimbra 1992)[1].

[148] CADA also collects its own revenue, which is part of the amounts charged as the result of the imposition of penalties and, to that extent, has financial autonomy– Art. 36(a) of LARDA.

[149] On this, Blanco de Morais, *As autoridades administrativas*, *supra* n. 139, at 152–153.

consideration, this seems to hint at the existence of a weak form of parliamentary oversight over the Commission.[150]

CADA's main task is to act as guarantor of the fundamental right of access to documents, a sort of collective ombudsman for this subject area.[151] To fulfil this task, it is entitled with educational, investigative, punitive, and especially advisory competences.[152] It does not have any competence of supervision of the implementation of transparency and confidentiality policies.

There is one main general reason that justifies the establishment of a mechanism of administrative review: the prevention of courts' workload. As for non-instrumental information, there is an additional reason: specialization. Indeed, CADA only deals with these matters, and therefore is not only very well informed but also particularly sensitive to these issues.

The available facts and figures show the evolution of the number of complaints and cases reviewed by CADA throughout the years since it was established. They show a growing number of complaints until 2001 – from 23 in 1995 to 153 in 2001 – settling from then on around 150 complaints; from the following year on, with the entry into force of the new LARDA, the number of complaints skyrocketed: 386 in 2008, 466 in 2009, 523 in 2010, 438 in 2011, 485 in 2012, and 421 in 2013. The number of opinions requested by administrative authorities regarding the release of documents has also generally increased throughout the years: from 15 in 1995 to 134 in 2002, the figure has since been (generally) between 150 and 200.[153] This might be due to the growing visibility of CADA, but there is no analysis of such data.

Still, the system currently in force, and especially the role of CADA, with the applicant's request going back and forth, being decided in second assessment by the same body that denied it in the first place, is 'complex, lengthy and inefficient'.[154] Moreover, the promptness of the review does not explain the existence of administrative review mechanisms once the available judicial procedure – the 'injunction for disclosure of administrative information' – is of urgent nature.

2.6 Judicial review

In case private parties need to file a court order request, there is a specific judicial procedural means to satisfy all informational claims: the 'injunction for disclosure

[150] Pratas, *Lei do acesso*, *supra* n. 61, at 40–50.
[151] Cardoso, *Autoridades administrativas*, *supra* n. 94, at 227–228.
[152] Art. 27(1) of LARDA.
[153] These statistics are available at www.cada.pt.
[154] *See* Aroso de Almeida, *Os direitos fundamentais*, *supra* n. 3, at 310, about the French system, upon which the Portuguese was modelled.

of administrative information, consultation of files, or issuance of certificates'.[155] It is a self-standing claim, not instrumental to any other legal dispute,[156] which analyses the merits of the case.

This injunction can be filed directly after the timely lack of response to an information request, following the denial of the application, or any other decision which restricts access to administrative documents,[157] or as an appeals mechanism after the CADA decision.[158]

It is an urgent judicial means, which signifies that, even though the decision is on the merits, there is no more than a *summaria cognitio*. The consequences are threefold. Firstly, the whole procedure is simplified to the maximum: apart from the applicant's original application, there is only the respondent's defence, with no reply or rejoinder. Furthermore, in terms of evidence, the only condition the law requires is that the process shall be adversarial, leaving the rest to the judge's discretion.[159] Lastly, all deadlines are short: the deadline to file the application is twenty days from the date the request for information was made to the administrative body, the deadline for the administrative authority to reply is ten days, and the maximum deadline for the administrative authorities to comply with the judicial decision that orders the disclosure of the information is ten days.[160] After this time period has elapsed, the judge shall impose a periodic penalty payment if there is no reasonable justification for the lack of compliance with the injunction.[161]

It should be noted, nonetheless, that even if the process is structurally urgent, the applicant is not required to prove any urgency in obtaining the elements requested – it suffices to fulfil the conditions of admissibility.[162] Indeed, this is a case of urgency by mere legal determination and not by nature, which means that in some cases there will be no pressing need to get hold of such information, files or certificates.[163]

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155 Arts 104–108 of the CPTA. For an overview, J. C. Vieira de Andrade, *A justiça administrativa* 239–242 (12th ed., Coimbra 2012); M. Aroso de Almeida / C. Cadilha, *Comentário ao Código de processo nos tribunais administrativos* 613–628 (2nd ed., Coimbra 2007); David, *Das intimações*, *supra* n. 15, at 55–107.

156 In a specific case, however, it may be instrumental: when an administrative act has not been object of regular and complete formal notice or publication (lacking, e.g. its author, date or reasons), its addressee is entitled to use this procedural means. In such case, timely filing one such claim will interrupt the deadline for requesting the quashing of such administrative act – Arts 104(2), 60(2) and (3), and 106 of the CPTA.

157 Arts 104(1) and 105 of the CPTA.

158 Art. 15(6) of LARDA. *See* C. Fonseca, *Processo temporalmente justo e urgência*, 839 (Coimbra 2009)[1837].

159 Art. 107(1) of the CPTA.

160 Arts 105, 107(1) and 108(1) of the CPTA.

161 Arts 108(2) of the CPTA. On periodic penalty payments, *see* Arts 3(2), 44, 49 and 169 of the CPTA.

162 Case 01130/07.3BECBR, of 29 May 2008, of the Administrative Court of Appeals for the North.

163 Vieira de Andrade, *A justiça administrativa*, *supra* n. 155, at 240[645]; Fonseca, *Processo*, *supra* n. 158, at 447, 823.