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Injunction order against the "San Carlo" regional hospital in Potenza - 27 January 2021

Register of measures

no. 35 of 27 January 2021

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members and the Cons. Fabio Mattei, general secretary;

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE, "General Data Protection Regulation" (hereinafter "Regulation");

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national legal system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data, as well as to the free movement of such data and which repeals Directive 95/46/EC (hereinafter the "Code");

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019 and in [www.gpdp.it](http://www.gpdp.it), doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

HAVING REGARD to the documentation in the deeds;

GIVEN the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Dr. Agostino Ghiglia;

## WHEREAS

### 1. The violation of personal data and the preliminary investigation

A complaint was received from Mr. XX regarding the dissemination of data relating to the death from Covid-19 of the father (Mr. XX) through the distribution of a press release issued by the "San Carlo" regional hospital in Potenza ( hereinafter

Company), then taken up by some local telematic newspapers.

As indicated by the complainant, in the aforementioned press release there are numerous and detailed information on the clinical conditions of Mr. XX relating to the various accesses made by the same to the aforementioned Company (date and time of first access to the emergency room, triage code, detailed medical history and, in particular: XX), the prescribed therapies, the measure of home isolation, the date and time of the patient's subsequent hospitalization, the methods of transporting the same, the diagnostic tests carried out and the relative outcome, the details of the pharmacological therapy (e.g. XX"), the adoption of an experimental therapy, the reaction to the treatments, the details of the clinical practices carried out (eg "XX"), hospitalization in the intensive care unit and finally other details regarding the evolution of the patient's clinical conditions.

Following the aforementioned complaint, the Office requested information from the aforementioned Company (note of 15 April 2020, prot. no. 14159) which provided a reply with a note dated 21 April 2020 (prot. no. 15586), in which it represented , in particular, of having issued the aforesaid press release "when the data were already public or made known to the public opinion by the Facebook profile of XX - today's complainant and son of Mr. XX (...) in this case, therefore there was no disclosure of confidential data as it was already disclosed by the family of the interested party". As represented by the Company, "the press release issued by the Company Press Office, therefore, responds to the need to guarantee the right to information regarding facts that have become of public interest, since they have already been disclosed by external parties unrelated to the Undersigned", with the aim of disseminating "an aseptic press release that responds to the preliminary requirement of the constitutionally guaranteed right to information" also in light of the "current degree of apprehension of public opinion justified by the spread of the virus on the national territory and by the stringent containment measures ". In support of what is represented, the Company has attached a copy of the statements made by the complainant on the related Facebook profile.

In relation to the results of the aforementioned preliminary investigation, the Office, with deed no. 18347 of 19 May 2020, notified the "San Carlo" regional hospital of Potenza, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in article 58, paragraph 2, of the Regulation, inviting the aforesaid holder to produce defense writings or documents to the Guarantor or to ask to be heard by the Authority (art. 166, paragraphs 6 and 7, of the Code; as well as art. 18, paragraph 1, of law n. 689 of 11/24/1981).

In particular, the Office, in the aforementioned deed, represented that:

- the Company disseminated information on the state of health of Mr. XX, following his death from Covid-19, through the distribution of a press release containing numerous detailed information on the state of health of the person concerned referred to above;
- from the analysis of the three statements made by Mr. XX's son (Mr. XX) on the relative Facebook page, it is noted that the complainant, during his father's hospitalization, despite having disclosed the history of the latter's various accesses to the aforesaid hospital company only referred generically to the state of health of the interested party (e.g. "fever" and "cough"), without therefore ever reporting the anamnestic, clinical and therapeutic details indicated in the aforesaid press release;
- the aforementioned press release contains information on the health of Mr. XX with a level of clinical detail which the statements published by the child of the interested party lack;
- there are no declarations, made during his lifetime by the interested party, regarding his health conditions with reference to the matter being examined;
- the purpose of assuring the population regarding the treatments offered by the aforementioned Company to Covid-19 patients could be usefully achieved even without disseminating detailed clinical information on the state of health of Mr. XX, which are detrimental to his dignity;
- the provision of the aforesaid personal data, through the distribution of the aforementioned press release, therefore led to the dissemination of data on the health of Mr. XX, expressly prohibited by art. 2-septies, paragraph 8, of the Code.

In the aforementioned deed of 19 May 2020, the Office therefore considered that the Company had processed the personal data of Mr. XX in violation:

- of the obligations of the holder, in order to respect the basic principles of the treatment referred to in articles 5, par. 1, lit. a) and 9 of the Regulation;
- the ban on the dissemination of health data, pursuant to art. 2-septies, paragraph 8, of the Regulation.

With a note dated 15 June 2020, the Company asked to be heard by the Authority and sent its defense briefs, in which, in particular, it was represented that:

- a) "In his Post of 20 March 2020 on Facebook, Mr. XX spoke... expressly of respiratory problems and fever, for three weeks, while with the post of 22 March 2020 he communicated the execution of the swab and always with a subsequent post of 22

March 2020 communicated the result of the swab. While our press release did not say anything more in terms of anamnesis and clinical details and in relation to therapeutic details, they are not subjective in nature since they are disseminated by the protocols to which the Company has complied";

b) "In this proceeding it is expected ... that the Guarantor for the Protection of Personal Data understands how the writing Company in the person of its legal representative, in the face of such a strong invective (the one carried out by Mr. XX) had the duty to protect their image by exposing the truth to avoid mystifications of any kind. – It is quite clear that the posts on social networks, with a high number of consents and referring to the state of health of a person hospitalized for Covid, required a press release which, by exposing the truth, was suitable for neutralizing the media offensive. – It means - in other words - that in a state of emergency, taking into account the justified apprehension of the entire country linked to the fear of the spread of the virus, the San Carlo Hospital - COVID Center of Basilicata - had the duty to stigmatize the media offensives aimed at bringing out an imperfect, misleading and untrue image of the facts".

Although with a note dated 25 June 2020 (prot. n. 24131) the Company confirmed the request to be heard already expressed in the aforementioned briefs, with a subsequent note dated 22 October 2020 (prot. n. 40145) it then renounced the aforementioned hearing in consideration of the fact that the sanctioning procedure initiated by the Authority "concerns a press release issued by the spokesman of the pro-tempore General Manager, dott. XX", which "provided its reasons regarding the reasons for issuing the press release with the note prot. no. 15586 of 21.4.2020" and that "in execution of the sentence of the Tar for Basilicata n. 533/2020" was "cancelled the deed of assignment to Dr. XX of General Manager of the Company" with the consequence that, with "the forfeiture of the General Manager, also the assignment conferred, pursuant to art. 7 of the law n. 150 of 2000 to the Spokesperson". It was also represented that "as of 11 August 2020, the San Carlo Regional Hospital of Potenza operates under a commissioner system" and that the "commissioner management of the Company believes nothing it can assert regarding the legitimacy or otherwise of the dissemination, through the press release object of the proceeding initiated by this Authority, of data pertaining to Mr. XX's health".

## 2. Outcome of the preliminary investigation.

The preliminary investigation carried out by the Office concerned the dissemination of data on the health of a patient who died from Covid-19 by the "San Carlo" regional hospital in Potenza.

Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter, the

"Regulation"), personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party ( «integrity and confidentiality»)" and must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed ("data minimization")" (art. 5, paragraph 1, letters a) and c) of the Regulation).

The regulation on the protection of personal data provides - in the health sector - that information on the state of health can only be communicated to the interested party and can be communicated to third parties only on the basis of a suitable legal prerequisite or on the indication of the interested party himself subject to written authorization from the latter (Article 9 of the Regulation and Article 83 of Legislative Decree No. 196 of 30 June 2003 (Code regarding the protection of personal data - hereinafter, the "Code") in conjunction with the 'article 22, paragraph 11, legislative decree no. 101 of 10 August 2018; see also the general provision of 9 November 2005, which can be consulted at [www.gpdt.it](http://www.gpdt.it), web doc. no. 1191411, deemed compatible with the aforementioned Regulation and with the provisions of decree no. 101/2018; see art. 22, paragraph 4, of the aforementioned legislative decree no. 101/2018).

Furthermore, the legislation in force expressly prohibits the dissemination of data suitable for revealing the state of health of the interested parties (Article 2-septies, paragraph 8 and Article 166, paragraph 2, of the Code).

With specific reference to the dissemination of personal data concerning people who have tested positive for Covid-19 on social media and in the press, including digital ones, it should be noted that the Guarantor has specified that "even in an emergency situation such as the current one, in which the information shows all its characteristics of an indispensable service for the community, certain guarantees to protect the confidentiality and dignity of the people affected by the disease contained in the legislation in force and in the deontological rules relating to journalism cannot be disregarded" (Press release of 31 March 2020, in [www.gpdp.it](http://www.gpdp.it), web doc. n. 9303613).

With regard to the fact that the treatment in question concerns a deceased person, it should be noted that the Guarantor has repeatedly represented that the recognition of the possibility of exercising the rights regarding the protection of personal data (articles 15-22, of the Regulation) from part of the subjects listed in the art. 2-terdecies, paragraph 1, of the Code, entails – as a natural consequence and necessary logical-juridical prerequisite – that the protections provided by the regulations on the protection of personal data continue to apply to personal data concerning deceased persons (cf. ex multis opinion 7 February 2019, n. 27, web doc. n. 9090308).

Furthermore, in the health sector, the death of the interested party does not exclude, by express regulatory provision, that

information concerning him/her continues to be guaranteed a high degree of confidentiality linked to the deontological discipline, in addition to that specifically dedicated to the protection of personal data. On this point, in fact, reference is made to the provisions of the Code of medical ethics according to which "the death of the assisted person does not exempt the doctor from the obligation of professional secrecy" (art. 10, code of medical ethics, as last updated on 26.2. 2020).

### 3. Conclusions.

In the light of the assessments referred to above, taking into account the statements made by the data controller during the preliminary investigation ☐ and considering that, unless the fact constitutes a more serious crime, anyone who, in a proceeding before the Guarantor, falsely declares or certifies or circumstances or produces false deeds or documents, it is liable pursuant to art. 168 of the Code "False declarations to the Guarantor and interruption of the execution of the duties or the exercise of the powers of the Guarantor" ☐ the elements provided by the data controller in the defense briefs do not allow to overcome the findings notified by the Office with the deed of initiation of the proceeding, since none of the cases envisaged by art. 11 of the Regulation of the Guarantor n. 1/2019.

In particular, it should be noted that the aforementioned Company disseminated information on the state of health of Mr. XX, following his death from Covid-19, through the distribution of a press release containing numerous and detailed information on the state of health of Mr. XX cited above, of which the declarations, made public by the son of the interested party, are instead lacking. In fact, these statements do not report the anamnestic, clinical and therapeutic details indicated in the aforementioned press release, making exclusive reference to the history of Mr. XX's various accesses to the aforementioned Company with generic references to his state of health (e.g. "fever", "breathing problems" and "coughing").

It is also believed that the purpose of assuring the population regarding the treatments offered by the aforementioned Company to Covid-19 patients could be usefully achieved even without disseminating detailed clinical information on the state of health of Mr. XX.

For these reasons it should be noted that the provision of the aforementioned personal data through the distribution of the aforementioned press release resulted in the dissemination of data on Mr. XX's health, expressly prohibited by art. 2-septies, paragraph 8, of the Code in violation of articles 5, par. 1, lit. a) and 9 of the Regulation.

Given this, considering the circumstances of the aforementioned disclosure of personal data and what has been declared by the Company, the conditions for the adoption of the corrective measures pursuant to art. 58, par. 2, of the Regulation.

4. Adoption of the injunction order for the application of the pecuniary administrative sanction and accessory sanctions (articles 58, paragraph 2, letter i and 83 of the Regulation; article 166, paragraph 7, of the Code).

The violation of the articles 5, par. 1, lit. a), and 9 of the Regulation and art. 2-septies, paragraph 8, of the Code, caused by the conduct put in place by the "San Carlo" regional hospital of Potenza is subject to the application of the administrative pecuniary sanction pursuant to, respectively, art. 83, par.5, lett. a) of the Regulation also pursuant to art. 166, paragraph 2 of the Code. In the present case - also considering the reference contained in the art. 166, paragraph 2, of the Code – the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5 of the Regulation, which therefore applies to the present case.

Consider that the Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, has the power to "impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, according to the circumstances of each single case" and, in this context, "the Board [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

The aforementioned pecuniary administrative sanction imposed, depending on the circumstances of each individual case, must be determined in the amount taking into account the principles of effectiveness, proportionality and dissuasiveness, indicated in art. 83, par. 1, of the Regulation, in the light of the elements provided for in art. 85, par. 2 of the Regulation in relation to which it is noted that:

- the dissemination of data via the aforementioned press release concerned information on the health of a patient who died from Covid -19 (Article 83, paragraph 2, letter a) of the Regulation);
  - the Company allegedly acted to reassure public opinion on the assistance provided to patients hospitalized for Covid-19 (Article 83, paragraph 2, letter b) of the Regulation);
  - the dissemination of data on the complainant's health took place in the context of an exceptional health emergency which particularly affected the health and administrative activity of health facilities (Article 83, paragraph 2, letter k) of the Regulation)
- ;

Based on the aforementioned elements, evaluated as a whole, it is decided to determine the amount of the pecuniary sanction

provided for by art. 83, par. 4, lit. a) and par. 5, letter. b) of the Regulations, to the extent of 70,000.00 (seventy thousand) euros for the violation of articles 5, par. 1, lit. a), and 9 of the Regulation and art. 2-septies, paragraph 8 of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and sufficiently dissuasive.

It is also believed that the ancillary sanction of publication on the Guarantor's website of this provision should be applied, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019, also in consideration of the potential number of interested parties and the type of personal data subject to unlawful processing. Finally, it should be noted that the conditions pursuant to art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

#### ALL THIS CONSIDERING THE GUARANTOR

declares the illegality of the processing of personal data carried out by the "San Carlo" regional hospital of Potenza, for the violation of the articles 5, par. 1, lit. a), and 9 of the Regulation and art. 2-septies, paragraph 8, of the Code, in the terms set out in the justification.

#### ORDER

pursuant to articles 58, par. 2, lit. i) and 83 of the Regulation, as well as art. 166 of the Code, to the "San Carlo" regional hospital of Potenza, with registered office in Potenza, Via Potito Petrone - Tax Code and VAT number - 01186830764, in the person of its pro-tempore legal representative, to pay the sum of 70,000 euros .00 (seventy thousand) as a pecuniary administrative sanction for the violations indicated in this provision, according to the methods indicated in the attachment, within 30 days of the notification in the motivation; it is represented that the offender, pursuant to art. 166, paragraph 8, of the Code, has the right to settle the dispute by paying, within 30 days, an amount equal to half of the fine imposed.

#### ENJOYS

to the aforementioned Company, to pay the sum of 70,000.00 (seventy thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law n. 689/1981. In this regard, it is recalled that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also art. 10, paragraph 3, of



Legislative Decree no. 150 of 09/01/2011);

HAS

pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and believes that the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to art. 78 of the Regulation, of the articles 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision it is possible to lodge an appeal before the ordinary judicial authority, under penalty of inadmissibility, within thirty days from the date of communication of the provision itself or within sixty days if the appellant resides abroad.

Rome, 27 January 2021

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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