

[doc. web no. 9361162]

Injunction order against the Municipality of Fogliano Redipuglia - 26 February 2020

Register of measures

no. 42 of 26 February 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

At today's meeting, in the presence of Dr. Antonello Soro, president, of dott.ssa Augusta Iannini, vice president, of prof.ssa Licia Califano and of dott.ssa Giovanna Bianchi Clerici, members and of dott. Giuseppe Busia, 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 "GDPR");

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data (hereinafter the "Code");

CONSIDERING the general provision n. 243 of 15/5/2014 containing the «Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged bodies», published in the Official Gazette no. 134 of 12/6/2014 and in www.gpdp.it, doc. web no. 3134436 (hereinafter "Guidelines of the Guarantor on transparency");

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, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given 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. Giovanna Bianchi Clerici;

WHEREAS

1. Introduction

This Authority has received a complaint from Mr. XX, XX, regarding the publication on the institutional website of the Municipality of his personal data and information.

From the preliminary verification carried out by the Office, it was found that on the institutional website of the aforementioned Municipality, in the "XX" section, the following documents were visible and freely downloadable at the url indicated:

- 1) Provision of the General Manager n. XX, concerning «XX – Provision of unjustified absence during a check-up visit» (<http://...>);
- 2) Provision of the General Manager n. xx of xx, concerning "XX - Request for recognition of invalidity due to service - Inadmissibility/Inadmissibility" (<http://...>).

In both measures, in addition to the identification data of the complainant, information and details were reported on the tax visits carried out in the event of absence from work for health reasons (with indication of the relative dates), on the outpatient visits, on the pathology suffered.

2. Applicable law

The complaint in question concerns the dissemination by the Municipality of data on a worker's health on its institutional website.

In this regard, it should be recalled that "personal data" is "any information relating to an identified or identifiable natural person ("data subject")" and that "data relating to health" are all "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health" (art. 4, paragraph 1, n. 15; recital n. 35, of the RGPD).

In this regard, it should be noted that the processing of personal data must take place in compliance with the principles indicated by art. 5 of the GDPR, including those of "lawfulness, correctness and transparency" as well as "data minimization", according to which personal data must be - respectively - "processed in a lawful, correct and transparent manner in relation to the interested party", as well as «adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed» (par. 1, letters a and c).

In this context, the dissemination of data relating to health is - in any case - prohibited (Article 2-septies, paragraph 8, of the Code; Article 9, paragraphs 1, 2, 4, of the GDPR; see also Article 22, paragraph 8, of the previous Code)

3. Preliminary evaluations of the Office on the processing of personal data carried out

From the checks carried out on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the Municipality of Fogliano Redipuglia - with the complete publication of the provisions identified in nos. 1 and 2 of paragraph 1 of this provision – caused the dissemination of personal data and information relating to the health of the complainant Mr. XX. Since the aforementioned processing of personal data did not comply with the relevant regulations on the protection of personal data, the violations carried out were notified to the Municipality with the same note (pursuant to article 166, paragraph 5, of the Code), communicating the initiation of the procedure for the adoption of the measures referred to in article 58, par. 2, of the GDPR and inviting the aforementioned Municipality to send the Guarantor defense writings or documents and, possibly, to ask to be heard by this Authority, within the term of 30 days (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of Law No. 689 of 11/24/1981).

4. Defensive memories

With the note prot. no. XX of the XX the Municipality of Fogliano Redipuglia sent its defense writings to the Guarantor in relation to the notified violations.

In this regard, it should be remembered that, unless the fact constitutes a more serious offence, anyone who, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code, entitled «False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor».

Specifically, in relation to the disputed facts, the Municipality represented, among other things, that:

- «The violation [...] concerned the publication of personal data of a single subject starting from the XX. Following receipt of your note, the documents containing personal data were promptly removed»;
- «The alleged violation did not depend in any way on intentional conduct but on a mere error on the part of the person who gave the order for the publication of the documents. Specifically, the operator was ordered to publish files numbered from n. 1 to no. 10, present inside a folder, in the unawareness that, within that range, the two files containing personal data were found»;
- «The removal of the provisions subject to violation took place immediately on the XX date, precisely to confirm the non-intentional nature of this conduct. The Body therefore immediately verified, following the dispute in question, compliance

with art. 2-sexies, Legislative Decree 196/2003, inserted by Legislative Decree 101/2018, on the subject of the processing of particular categories of personal data for reasons of significant public interest";

- «The Municipality, even if small in size and therefore with chronic problems of scarcity of human resources [...] has fulfilled all the provisions and in particular:

- Drafting of the treatment register pursuant to art. 30 EU Regulation 679/2016;

- Appointed a DPO as communicated to the Guarantor for the protection of personal data [...];

- Prepared a training plan on the protection of personal data processing for all employees of the Municipality of Fogliano Redipuglia who process data [...];

- Proceeded to appoint all employees authorized/in charge of processing pursuant to the provisions of art. 29 EU Regulation 2016/679 and art. 2 quaterdecies paragraph 2 of Legislative Decree 196/2003;

- Appointment of Data Processors identified pursuant to art. 28 EU Regulation 2016/679 in progress;

- Implemented the 45 minimum AGID measures (AGID circular 2/2017)".

5. Outcome of the investigation relating to the complaint presented

The Municipality of Fogliano Redipuglia in its defense briefs confirmed the online dissemination of the complainant's personal data, as well as the violation of the provisions notified, albeit highlighting that the conduct was not intentional, but the result of an error.

However, these elements, although worthy of consideration, do not allow the findings notified by the Office to be overcome with the act of initiation of the procedure and are not sufficient to allow the closure of the present procedure, since none of the cases provided for by the art. 11 of the Regulation of the Guarantor n. 1/2019. This also taking into account that since 2014 the Authority, in the Guidelines on transparency, has provided all public entities with specific indications on how to reconcile the obligations of transparency and publicity of administrative action with the right to data protection personal data of the interested parties, also with reference to the prohibition of dissemination of data suitable for revealing the state of health (cf. part one, paragraph 2; part two, paragraph 1; as well as provisions cited in note no. 5).).

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Fogliano Redipuglia is noted, for having disseminated data and information on the health of the complainant contained in provisions n. XX and no. XX of XX of the General Manager, published on the institutional website, in

violation of the obligations and basic principles of treatment contained in articles 5, par. 1, lit. a) and c); 9, par. 2 and 4 of the GDPR, as well as art. 2-septies, paragraph 8, of the Code (see also the previously applicable articles 18, 19 and 22, paragraph 8, of the Code).

Considering, however, that the conduct has exhausted its effects, as the Municipality has taken steps to remove the documents containing the personal data of the complainant described above from the institutional website, without prejudice to what will be said on the application of the pecuniary administrative sanction, I do not see the conditions exist for the adoption of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

6. Adoption of the injunction order for the application of the administrative fine (articles 58, paragraph 2, letter i; 83 GDPR)

The Municipality of Fogliano Redipuglia appears to have violated the obligations and basic principles of the treatment contained in the articles 5, par. 1, lit. a) and c); 9, par. 1, 2 and 4 of the GDPR, as well as art. 2-septies, paragraph 8, of the Code (see also the previously applicable article 22, paragraph 8, of the Code).

In this regard, the art. 83, par. 3, of the GDPR, provides that «If, in relation to the same treatment or related treatments, a data controller or a data processor violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction will not exceed the amount specified for the most serious violation».

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 GDPR, which therefore applies to the present case.

It should also be taken into account that, even if the measures covered by the complaint published online date back to XX for the determination of the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law n. 689 of 11/24/1981 which, in establishing that «Laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», affirms the recurrence of the principle of *tempus regit actum*. This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - considering the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the 25/5/2018 in which the RGPD became applicable. In fact, the preliminary investigation documents revealed that the illicit online diffusion ceased in XX (the month in which the Municipality declared that it had taken steps to remove the measures from the institutional website).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR as well as art. 166 of the Code, has the corrective 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, depending on the circumstances of every single case". In this framework, «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, according to the circumstances of each individual case, must be determined in the amount, taking into due account the elements provided for by art. 83, par. 2 of the GDPR.

In relation to the aforementioned elements, the reported conduct in violation of the regulations on the protection of personal data involved the dissemination of data relating to the health of a single interested party. The diffusion lasted for a period of more than five years. The Municipality of Fogliano Redipuglia, which in any case is a small entity (just over 3,000 inhabitants) "with chronic problems of scarcity of human resources", has also highlighted the culpable nature of the conduct resulting from a clerical error. In addition, the administration has taken action to remove the personal data that is the subject of the complaint and has collaborated with the Authority during the investigation of this proceeding in order to remedy the violation and mitigate its possible negative effects. In the response to the Guarantor, various technical and organizational measures implemented pursuant to articles 25-32 of the GDPR. There are no previous relevant GDPR violations committed by the Municipality of Fogliano Redipuglia.

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine pursuant to art. 83, para. 2 and 3, of the RGPD, the amount of the pecuniary sanction, provided for by art. 83, par. 5, of the RGPD, in the amount of 6,000.00 (six thousand) euros for the violation of articles 5, par. 1, lit. a) and c); 9, par. 1, 2 and 4 of the GDPR, as well as art. 2-septies, paragraph 8, of the Code, as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same GDPR.

In relation to the specific circumstances of the present case, it is also believed - also in consideration of the nature of the data subject to unlawful dissemination and the duration of the offense - that the ancillary sanction of publication on the website of the Guarantor of this provision must be applied, envisaged by art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019.

Finally, it is believed 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.

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the treatment carried out by the Municipality of Fogliano Redipuglia pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR, as well as art. 166 of the Code for violation of articles 5, par. 1, lit. a) and c); 9, par. 1, 2 and 4 of the GDPR, as well as art. 2-septies, paragraph 8, of the Code, in the terms set out in the justification.

ORDER

to the Municipality of Fogliano Redipuglia, in the person of its pro-tempore legal representative, with registered office in Largo Donatori diblood, 10 - 34070 Fogliano Redipuglia (GO) - Tax Code 00123380313 to pay the sum of 6,000.00 (six thousand) euros as a pecuniary administrative sanction indicated in this provision; 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 same Municipality to pay the sum of 6,000.00 (six 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 no. 689/1981.

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019 and believes 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.

Pursuant to art. 78 of the GDPR, 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, 26 February 2020

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia