

[doc. web no. 9557593]

Injunction order against the Municipality of Luino - 17 December 2020

Register of measures

no. 272 of 17 December 2020

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, components 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 "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 and in 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 office of the Guarantor for the protection of personal data, in www.gpdp.it, doc. web no. 1098801;

Speaker Dr. Agostino Ghiglia;

WHEREAS

1. Introduction

This Authority has received a complaint relating to the online dissemination, by the Municipality of Luino, of personal data and information of the municipal councilor XX.

In particular, from the preliminary verification carried out by the Office on the 20th date, it emerged that on the institutional website of the aforementioned Municipality, in the Transparent Administration/Provisions/Provisions address-political section, the resolution of the Municipal Council no. XX of XX having as object "XX" (url: <https://...>).

The aforesaid resolution contained the complainant's personal data and information, including the fact that he was the recipient of a complaint-complaint by the Mayor.

In this regard, the Municipality of Luino responded to the request for information from the Office (note prot. n. XX of the XX) with the note prot. no. XX.

Specifically, it was, among other things, represented that:

- "resolution no. XX of the XX was made necessary in order to protect the reputation of the Organization from statements that Mr. XX has disclosed in the institutional capacity of Councilor within the Town Hall in its public capacity»;
- «The resolution, therefore, authorized the Mayor to act against, not a private citizen, but a Municipal Councilor in his public capacity»;
- «The subsequent permanence of the personal data, within the resolution in question, was justified by the automatisms in place between the publication of digitally signed documents in the register and their maintenance in the "Transparent Administration" section. However, we inform you that any reference suitable for directly or indirectly identifying the interested parties has been eliminated and that the resolution in question is devoid of personal data";
- «We inform you that, in order to comply with the principles regarding the protection of personal data, this Body, by means of managerial determination n. XX of the XX, has purchased a software with which to systematically record and update all the treatments present and which helps to always keep the lawfulness of the treatments under control and verify the security of the data in an adequate way and as required last by the General Regulation of the European Union on data protection 16/679 (G.D.P.R.)»;
- "As regards the appointment of the Personal Data Protection Officer (DPO), we inform you that on the XX date a tender for the assignment of the service was announced (XX) expiring XX".

2. Applicable law.

Pursuant to the legislation on the subject, "personal data" is "any information relating to an identified or identifiable natural person ("data subject")" and "an identifiable natural person is one who can be identified, directly or indirectly, with particular reference to a identifier such as a name, an identification number, location data, an online identifier or one or more characteristic elements of its physical, physiological, genetic, psychic, economic, cultural or social identity" (Article 4, paragraph 1 , n. 1, of the GDPR).

The processing of personal data must also take place in compliance with the principles indicated in the 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 processing of personal data carried out by public subjects (such as the Municipality) is lawful only if necessary "to fulfill a legal obligation to which the data controller is subject" or "for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (Article 6, paragraph 1, letters c and e, of the GDPR). It is also foreseen that «Member States may maintain [...] more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), by determining more precisely specific requirements for the treatment and other measures aimed at guaranteeing lawful and correct treatment [...]" (art. 6, paragraph 2, of the RGPD), with the consequence that the provisions contained in the art. 19, paragraph 3, of the Code (today repealed but in force at the material time and whose content is reproduced in the new article 2-ter, paragraphs 1 and 3, of the Code), where it is envisaged that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when required by law or regulation.

In this regard, state sector legislation provides that «All the resolutions of the municipality and the province are published by publication on the praetorian register, at the headquarters of the institution, for fifteen consecutive days, except for specific provisions of the law» (art. 124 , paragraph 1, of the legislative decree 18/8/2000 n. 267).

The Guarantor has provided specific indications to the public administrations regarding the precautions to be taken for the dissemination of personal data on the Internet for purposes of transparency and publicity of the administrative action with the

aforementioned Guidelines on transparency, also with reference to publications in the online praetorian register of local authorities.

In the aforementioned Guidelines, it is expressly provided that once the time period established by the individual disciplines for the publication of the deeds and documents in the praetorian register has elapsed:

- «local authorities cannot continue to disseminate the personal data contained therein. Otherwise, for the period exceeding the duration envisaged by the reference legislation, there would be an illicit dissemination of personal data because it is not supported by suitable regulatory conditions [...]. In this regard, for example, the permanence on the web of personal data contained in the resolutions of local authorities beyond the fifteen-day deadline, established by art. 124 of the aforementioned d. lgs. no. 267/2000, can integrate a violation of the aforementioned art. 19, paragraph 3, of the Code [editor's note now reproduced in the art. 2-ter, paragraphs 1 and 3, of the Code], where there is no different legislative or regulatory parameter that provides for its dissemination [...]. [In this hypothesis] if the local authorities want to continue to keep the published deeds and documents on their institutional website, for example in the sections dedicated to the archives of the deeds and/or the legislation of the entity, they must take the appropriate precautions for the protection of personal data. In such cases, therefore, it is necessary to obscure in the published documentation the data and information suitable for identifying, even indirectly, the interested parties» (part two, paragraph 3.a).

Furthermore, with reference to the figure of the Data Protection Officer (DPO), the European legislation provides for the obligation (starting from 25/5/2018) of the relative designation when «the processing is carried out by a public authority or by a body public", as well as the need to "publish [the] contact details of the data protection officer and [to] communicate [them] to the supervisory authority" (Article 37, paragraph 1, letter a, and 7 of the GDPR).

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 has ascertained that the Municipality of Luino has carried out a treatment of personal data that does not comply with the relevant regulations on the protection of personal data contained in the RGPD, as:

- disclosed - at least until the preliminary verification carried out by the Office on the XX date - the personal data of the complainant, contained in the resolution of the Giunta identified above published on the institutional website;

- had not yet designated the Personal Data Protection Officer (DPO), nor published or communicated the relevant contacts to the Guarantor, pursuant to art. 37, par. 1, lit. a), and par. 7, of the RGD, by the date of application envisaged by it (25/5/2018).

Therefore, with the same note the violations carried out were notified to the Municipality (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 RGD 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. Outcome of the investigation relating to the complaint presented.

From the research carried out by the Protocol Office, no response has been received from the Municipality of Luino to the aforementioned note prot. no. XX of the XX, nor any sending of defensive writings or request for a hearing.

In this context, it is deemed to confirm the preliminary assessments of the Office, noting the illegality of the processing of personal data carried out by the Municipality of Luino, as:

1) personal data and information of the complainant were disclosed (including the circumstance of having been the recipient of a complaint-complaint by the Mayor), contained in the resolution of the City Council n. XX of the XX published on the institutional website, for a period exceeding the fifteen days envisaged by art. 124, paragraph 1, of Legislative Decree lgs. no. 267/2000 for publication in the praetorian register, therefore in the absence - for the excess time period - of suitable regulatory conditions for the dissemination of personal data and, therefore, in violation of art. 19 paragraph 3 of the Code (in force at the material time and whose content is now reproduced in art. 2-ter, paragraphs 1 and 3, of the Code), as well as the basic principles of treatment contained in articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b) of the GDPR;

2) the "data protection officer" (RPD/DPO) was not designated, nor the relative contacts were published and communicated to the Guarantor, by the date of 25/5/2018 of application of the RGD, in violation of the 'art. 37, par. 1, lit. a), and 7, of the GDPR.

Considering, however, that the conduct has exhausted its effects - as the personal data of the complainant described above are no longer accessible at the url indicated above and that, following the aforementioned note from the Office (prot. n. XX),

the Municipality of Luino communicated to the Guarantor (acquired under prot. n. XX of the XX) the contact details of the DPO provided for by art. 37, par. 7, of the GDPR (following the award of the data protection officer service with resolution of the General Affairs Service no. XX of the XX) - without prejudice to what will be said on the application of the pecuniary administrative sanction, the conditions for the adoption do not exist of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

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

The Municipality of Luino appears to have violated the articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e), 2, 3, lett. b); 37, par. 1, lit. a), and 7, of the GDPR, as well as art. 19, paragraph 3, of the Code (now repealed but in force at the material time and the content of which is reproduced in the new article 2-ter, paragraphs 1 and 3, of the Code). For the violation of the aforementioned provisions, the application of the administrative sanctions pursuant to art. 83, para. 4 and 5 of the GDPR.

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 exceeds the amount specified for the most serious violation".

In the present case, therefore, the violation of the aforementioned provisions is subject to the more serious administrative pecuniary 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, although the document object of the complaint published online dates back to XX, in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». 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 - given 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. Indeed, the preliminary investigation documents revealed that the unlawful online dissemination lasted at least until the preliminary verification carried out by the Office on the XX date, while the failure to designate the DPO was remedied following the award of the service of data protection officer with resolution of the General Affairs Service of the Municipality of XX n. XX.

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 this sense, it must be taken into consideration that the conduct carried out in violation of the regulations on the protection of personal data had as its object - on the one hand - the dissemination of personal data of a single interested party for more than a year and - on the other - the failure to designate and communicate to this Authority with the related contact details of the Data Protection Officer (DPO) of the Municipality by the application date of 25/5/2018 set by the RGPD. The Municipality of Luino is a medium-sized institution with just over 14,500 inhabitants and in any case, for the purposes of determining the fine, the activation of the administration to obscure the personal data disseminated online in order to remedy the violation, the nature of which appears to be culpable, and the fact that there are no previous violations of the relevant GDPR committed by the aforementioned Municipality. In the response to the Guarantor, some technical and organizational measures implemented by the institution pursuant to articles 25-32 of the GDPR.

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 10,000.00 (ten thousand) euros for the violation of articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e), 2, 3, lett. b); 37, par. 1, lit. a), and 7, of the RGPD, as well as of the art. 19, paragraph 3, 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 unlawful dissemination of personal data on the web - that the ancillary sanction of publication on the website of the Guarantor of this provision should be applied, provided for 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 the Regulation of the Guarantor n. 1/2019.

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the treatment carried out by the Municipality of Luino in the terms indicated in the motivation,
pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR

ORDER

to the Municipality of Luino, in the person of its pro-tempore legal representative, with registered office in Piazza Crivelli
Serbelloni, 1 - 21016 Luino (VA) – Tax Code 84000310122 to pay the sum of 10,000.00 (ten thousand) euros as an
administrative fine for the violations referred to in the justification;

ENJOYS

to the same Municipality to pay the sum of 10,000.00 (ten thousand) euros, according to the methods indicated in the
attachment, within 30 days of notification of this provision, under penalty of the adoption of the consequent executive acts
pursuant to art. 27 of the law no. 689/1981.

It should be remembered 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 the term set out in art. 10, paragraph 3, of
Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph
8, of the Code).

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;
- annotation in the Authority's internal register pursuant to art. 17 of the Regulation of the Guarantor n. 1/2019.

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, 17 December 2020

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

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