

[doc. web n. 9718134]

Injunction order against the Academy of Fine Arts in Rome - 16 September 2021

Record of measures

n. 318 of 16 September 2021

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

GIVEN the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, concerning the protection of individuals with regard to the processing of personal data, as well as the free circulation of such data and which repeals Directive 95/46 / CE, "General Data Protection Regulation" (hereinafter, "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of individuals with regard to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46 / EC (hereinafter the "Code");

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

Having seen the documentation in the deeds;

Given the observations made by the secretary general pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Speaker Dr. Agostino Ghiglia;

## WHEREAS

### 1. Introduction.

With a complaint dated 5 June 2019, as subsequently integrated on 11 July 2019, a professor of the Academy of Fine Arts in Rome (hereinafter, the "Academy") complained that, as part of a disciplinary procedure initiated on his own load,

communications would have been sent from the Accademia's institutional certified e-mail address

(abaroma@pec.accademiabellertiroma.it), whose authentication credentials would be in the possession of the Head of the Protocol Office, the Executive Secretary, the Director Administrative Department and the Director of the Accademia's Accounting Services, who could not be considered authorized subjects for processing and, in any case, would not have received adequate instructions from the Academy to process the personal data contained in said communications.

It was also complained that the Academy published the minutes of the board of directors no. 44 of 5 December 2018, containing personal data relating to the complainant - who is expressly mentioned with his name and surname - including references to a disciplinary procedure initiated against him and to the contents of notes sent to the Academy by the complainant through of his lawyer. In particular, in the minutes the following was reported: "[yes] describes [...] the situation that has arisen due to the contents of the defense notes of the lawyer of prof. " , asking "therefore, the Council to authorize the advice of a lawyer [...] in order to best formulate an adequate response. The Board approves and authorizes all further initiatives to protect the dignity and integrity of the Management and the Institution ". The publication of this report would, however, take place after the filing of the disciplinary proceedings.

Furthermore, although, as requested by the complainant on 4 July 2019, through his lawyer, the report in question, starting from the same date, is no longer available on the Academy website and the text of the same has been reformulated. omitting the references to the name and surname of the complainant, the latter complained that the indication in the minutes - in the version in the records of the Academy - of the start date of this disciplinary measure, "due to its particularity [...] and for the knowledge that the academic environment now has of the story "constitutes information from which it would still be possible to trace one's identity.

## 2. The preliminary activity.

With notes of July 15, 2020 (prot. June 2020, and no.47232 of 10 December 2020), the Academy stated, in particular, that: "On 18-1-2019, with the indications desired by the then Director, the Board of Directors approved the report n. 44 in its original text; subsequently and until 4-7-2019 [this report] was published on the website of the Institution [...] with the name of the interested party but which from this last date was removed from the site and with the agreement of the interested party it was reformulated without the data of the person concerned ";

[...], following a request sent [by the complainant's lawyer] to remove [the report] from the site [...] submitted on 4 July 2019

[...], the report in question was removed from the site on the same day as the presentation of the application ";

"It was therefore a mere material error which the [complainant] himself realized [...]".

With a note dated 11 March 2021 (prot. No. 13610), the Office, on the basis of the elements acquired, the verifications carried out and the facts that emerged as a result of the investigation, notified the Academy, pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulations, concerning the violation of articles 5, par. 1, lett. a), 6 of the Regulation, as well as 2-ter, paragraphs 1 and 3, of the Code. Furthermore, on the basis of what emerged during the investigation, the Office also charged the owner with the violation of art. 38, par. 6, of the Regulations, on the assumption that the data protection officer (DPO) designated at the time was in a position of conflict of interest with respect to the role of Administrative Director of the Academy held by the same.

With the same note, the Academy was invited to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code, as well as Article 18, paragraph 1, of the l. November 24, 1981, n. 689).

At the hearing, required pursuant to art. 166, paragraph 6, of the Code and held on 10 May 2021 (see report prot. No. 26535 of 13 May 2021), the Academy stated, in particular, that "with regard to the disclosure of the complainant's personal data, for mere clerical error, [...] the Academy immediately removed the document that contained such data from the institutional website ". On the same occasion, further elements were provided regarding the assessments carried out in practice by the Academy regarding the designation of the DPO in the person of the Administrative Director, arguing that the latter does not have a managerial qualification, is hierarchically dependent on the competent Ministry and has no decision-making power regarding the management of the Academy, having power of signature only in relation to acts that are merely executive resolutions of the Board of Directors, therefore there is no situation of conflict of interest.

### 3. Outcome of the preliminary investigation.

#### 3.1 The regulatory framework

The personal data protection discipline provides that public subjects, even if they operate in the performance of their duties as employers, may process the personal data (Article 4, No. 1 of the Regulation) of employees, if the processing is necessary "to fulfill a legal obligation to which the data controller is subject" (or the specific obligations or tasks provided for by law for the purpose of managing the employment relationship) or "for the performance of a task of public interest or connected to 'exercise

of public authority vested in the data controller "(Article 6, paragraph 1, letter c) and e) of the Regulation).

European legislation provides that "Member States may maintain or introduce more specific provisions to adapt the application of the rules of the [...] Regulation with regard to processing, in accordance with paragraph 1, letters c) and e), determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]"(Article 6, par. 2, of the Regulation). In this regard, it should be noted that the dissemination of personal data (such as publication on the Internet) by public entities is permitted only when provided for by a law or, in the cases provided for by law, by regulation (art. 2-ter, paragraphs 1 and 3, of the Code).

The data controller is also required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "data minimization", on the basis of which personal data must be " processed in a lawful, correct and transparent manner towards the interested party "and must be" adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed "(art. 5, par. 1, lett. a) and c) , of the Regulation).

In compliance with the principle of "data minimization", even in the presence of a publication obligation, the subjects called to implement it cannot in any case disclose excess or irrelevant personal data (see "Guidelines on the processing of personal data , also contained in administrative deeds and documents, carried out for the purpose of advertising and transparency on the web by public entities and other obliged entities ", published in the Official Gazette no. 134 of 12/6/2014 and in [www.gdpd.it](http://www.gdpd.it), doc. web n. 3134436, second part, paragraphs 1 and 3.a.).

With regard to the figure of the DPO, the Regulation provides that this must be mandatorily designated by the data controller "when the treatment is carried out by a public authority or by a public body" (Article 37, paragraph 1, of the Regulation). The DPO must be equipped with the "resources necessary to carry out [his] tasks [...]" and "can perform other tasks and functions. The data controller or data processor ensures that these tasks and functions do not give rise to a conflict of interest "(Article 38, paragraphs 2 and 6, of the Regulation; see cons. 97 of the Regulation, where it is stated that DPOs "should be able to carry out their functions and duties independently).

With specific reference to the prohibition of conflicts of interest, the "Guidelines on data protection officers" (adopted by the Article 29 Working Group on 13 December 2016, in the amended version on 5 April 2017) specify that "the absence of of interests is strictly connected to the obligations of independence. Although a DPO may perform other functions, the assignment of such additional tasks and functions is possible only on condition that they do not give rise to conflicts of interest.

This means, in particular, that a DPO cannot play, within the organization of the data controller or data processor, a role that involves the definition of the purposes or methods of processing personal data. This is an element to be taken into consideration on a case-by-case basis by looking at the specific organizational structure of the individual data controller or data processor "(par. 3.5, p. 21).

### 3.2 The dissemination of personal data

In the present case, it is established that the Academy has published the minutes of the Board of Directors no. 44 of 5 December 2018, containing personal data relating to the complainant - who is expressly mentioned with his name and surname - including references to a disciplinary procedure initiated against him and to the contents of notes sent to the Academy by the complainant through of his lawyer. This report, approved on January 18, 2019, was published on the Academy website until July 4, 2019.

In this regard, it is noted that the Entity, in responding to requests for information from this Authority, has not indicated any legal basis that could justify the online disclosure of such personal data of the complainant, having limited itself to stating that it was a matter of a mere clerical error.

The online disclosure of the complainant's personal data therefore occurred in a manner that did not comply with the principles of data protection (Article 5) and in the absence of an appropriate legal basis, in violation of Articles 5, par. 1, lett. a), and 6 of the Regulations, as well as art. 2-ter, paragraphs 1 and 3, of the Code. Moreover, considering that in addition to the name and surname, information relating to the existing employment relationship with the interested party has been disclosed (with particular regard to the opening of a disciplinary procedure), this circumstance connotes the conduct of the Academy of further gravity ( see Civil Cassation, section II, order no. 18292 of 3 September 2020, which confirmed the decision of the Guarantor no. 193 of 26 March 2015, adopted against a Municipality). The violation of the rules on the protection of personal data through the publication of deeds and documents containing references to events related to the employment relationship, to assessments of the work of employees, as well as to private events of the same, was, in fact, ascertained in numerous provisions of the Guarantor (see, most recently, provision of 24 June 2021, no. 256, forthcoming; 25 February 2021, no. 69, web doc. no. 9565258; 25 February 2021, no. 68, doc. . web n. 9567429; January 27, 2021, n. 34, web doc. n. 9549165).

Otherwise, with regard to the reason for the complaint relating to the authorization profile of the Head of the Protocol Office, the Executive Secretary, the Administrative Director and the Director of the Accademia's Accounting Services for the purposes

of accessing the certified e-mail address of the Academy, the Academy has provided sufficient information to clarify that only authorized subjects have accessed the personal data of the interested party. This is because the Academy has declared that "the subjects who have access credentials to the certified e-mail address [...] are the person in charge of the protocol, the Administrative Director and the Accounting Director for reading only" (the latter "Replacing [endo] the Administrative Director in case of impediment [...], as required by the CCNL"), and that "the Management Secretariat has only sent these figures a correspondence of which it did not know the content" (note prot. n ° 33524 of 24 December 2020), the complaint being therefore considered unfounded in this respect.

The same considerations also apply with regard to the reason for the complaint relating to the mention in the minutes - in the version in the records of the Academy - of the starting date of the disciplinary procedure against the complainant (later archived), on the assumption that this information could in any case allow to trace the identity of the same. This in consideration of the fact that the minutes in question are a document preordained for the description of acts or facts, therefore having a function of documenting the declarations made within the Board of Directors, and that the possibility for third parties to access them remains subject the specific rules of the legal system that regulate the matter, the administration having to assess from time to time whether the conditions exist to limit access to personal data contained in administrative documents (see Article 22 and following of the law of 7 August 1990 , n. 241; Presidential Decree 12 April 2006, n. 184; articles 5 and 5-bis of the legislative decree 14 March 2013, n. 33).

### 3.2 The independence of the DPO designated by the owner

During the investigation it emerged that the Academy has designated its Administrative Director as DPO.

In this regard, the statements made by the Academy at the hearing regarding the position and duties of the Administrative Director are not reflected in the legislative and regulatory framework of the sector, on the basis of the documents produced by the Academy itself (see, in particular, note of 21 May 2021 and its annexes).

In particular, it should be noted that, based on the sector regulations, the position of Administrative Director is attributed, by resolution of the Board of Directors, on the proposal of the Director, to an employee of the institution, or of other public administrations in a position of command, even in a managerial position (see Article 13, paragraphs 3 and 4 of Presidential Decree 28 February 2003, no. 132). Pursuant to paragraph 2 of the same article, the Administrative Director is directly "responsible for the administrative, organizational, financial, asset and accounting management of the institution", also being

able to participate in the Board of Directors with an advisory vote (Article 7, paragraph 5) . He "is at the head of the offices and exercises guidance, direction and control of the technical-administrative staff, takes care of the smooth running of the work and the prompt completion of administrative procedures, in compliance with current legislation and in accordance with the provisions of the Board of Directors ", Since he was" entrusted with all the [...] functions provided for by the law and the Administration, Finance and Accounting Regulations "(Article 18, paragraphs 1 and 3 of the Statute of the Academy, attached to the note of 21 May 2021). In addition, the Administrative Director promotes disciplinary action and can directly decide and impose certain disciplinary sanctions against employees (see art.55 of the national collective bargaining agreement relating to staff in the sector of the Higher Education and Artistic and Musical Specialization Institutions for the 2002/2005 regulatory four-year period and the 2002/2003 economic two-year period, attached to the note of 21 May 2021).

Considering that, in the light of the legislative and regulatory framework of the sector described above, the Administrative Director is called upon to take relevant decisions that have substantial implications on the organizational structure of the Entity and, in particular, with regard to the methods and purposes of processing the personal data of teachers, workers and students, it is believed that the then DPO designated by the Academy was in a position of conflict of interest with respect to the role of Administrative Director held by the same (see part. 3.5 of the "Guidelines on those responsible for data protection "mentioned above). As, in fact, clarified by the Guarantor in the "Faq on the Data Protection Officer (DPO) in the public sphere" of 15 December 2017 (web doc. N. 7322110), "in the public sphere, in addition to the top managerial roles, situations of conflict of interest with respect to top management figures invested with decision-making skills in relation to the purposes and means of the processing of personal data put in place by the public body "(FAQ no. 7). These indications have recently been reiterated by the Guarantor, stating that there is "a conflict of interest in relation to roles [...] such as the human resources or accounting department, the IT manager or the person responsible for corruption prevention and transparency, since these are sectors in which the processing of personal data is certain and transversal with respect to the entire administration, as well as significant in terms of quantity and quality of the personal data processed, as well as risks on the fundamental rights and freedoms of the data subjects "(par. 10.1 of the" Document of address on the designation, position and duties of the Data Protection Officer (RPD) in the public sphere) ", attached to the provision. 29 April 2021, n. 186, doc. web n. 9589104).

This is also confirmed by the fact that, during the investigation relating to the complaint, the findings provided by the Academy to the Authority were signed by the Administrative Director in the name and on behalf of the condition of expressing their own

free evaluations, as DPO, independently of the position of the Academy in the context of the procedure.

In view of the critical issues highlighted above, it is believed that the designation of the DPO by the Academy in the person of the Administrative Director took place in violation of art. 38, par. 6, of the Regulations, having assigned this task to a person who, due to the role covered within the structure of the Body, was in a position of conflict of interest.

Furthermore, it is noted that, taking into account the numerous and burdensome competences attributed by the law to the figure of the Administrative Director, it is unlikely that the latter could have had sufficient time to perform the role of DPO in an adequate manner (see the "Faq on the Data Protection Officer (DPO) in the public sphere ", referred to above, in particular n. 7, which clarifies that" depending on the nature of the processing and the activities and dimensions of the structure of the owner or manager, any additional duties attributed to the DPO should therefore not subtract at the same time the time necessary to fulfill the related responsibilities "; see also paragraph 9 of the" Guidance document on the designation, position and tasks of the Data Protection Officer (DPO) in the public sphere) ", aforementioned).

#### 4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller during the investigation □ the truthfulness of which one may be called to respond pursuant to art. 168 of the Code □, although worthy of consideration, do not allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the dismissal of this proceeding, since none of the cases provided for by the 'art. 11 of the Guarantor Regulation n. 1/2019. Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Academy is noted, for having disclosed personal data relating to the complainant in the absence of an appropriate legal basis, in violation of Articles 5 and 6 of the Regulations, as well as art. 2-ter of the Code, as well as for having designated a DPO in a position of conflict of interest, in violation of art. 38, par. 6, of the Regulation.

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulation, pursuant to art. 58, par. 2, lett. i), and 83, par. 3, of the same Regulation and art. 166, paragraph 2, of the Code.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. I and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary 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 each single case "and, in this context," the College [of the Guarantor] adopts the injunction order, with which it also disposes with regard to the application of the ancillary administrative sanction of its publication, in whole or in excerpt, on the website of the Guarantor pursuant to Article 166, paragraph 7, of the Code "(Article 16, paragraph 1, of the Guarantor Regulation no. 1/2019).

The aforementioned administrative fine imposed, depending on the circumstances of each individual case, must be determined in the amount taking into account the elements provided for by art. 83, par. 2, of the Regulation.

In relation to the aforementioned elements, the sensitivity of personal data was considered, referring to a disciplinary procedure against an employee, which have been disseminated; this also in light of the indications that, since 2014, the Guarantor has provided to all public entities in the "Guidelines on the processing of personal data, also contained in administrative documents and deeds, carried out for the purpose of advertising and transparency on the web by public entities and other obliged entities "(published in Official Gazette no. 134 of 12/6/2014 and in [www.gpdp.it](http://www.gpdp.it), web doc. no. 3134436).

On the other hand, it was considered that, at the request of the interested party, the Academy has taken steps to remove the personal data of the interested party from its institutional website. It was also considered that the Entity, following the notification of the violations by the Guarantor, took note of the consequent resignation of the Administrative Director from the role of DPO, communicating its willingness to act promptly in order to identify a new figure who could take on this role (see note prot. no. 8523 of 8 April 2021). Furthermore, there are no previous violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation.

Due to the aforementioned elements, assessed as a whole, it is considered to determine the amount of the financial penalty in the amount of 5,000.00 (five thousand) euros for the violation of Articles 5, par. 1, lett. a), 6 and 38, par. 6 of the Regulations, as well as art. 2-ter, paragraphs 1 and 3, of the Code, as a pecuniary administrative sanction, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the sensitivity of the data being disseminated (references to a disciplinary procedure against an employee), it is also believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is noted that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

notes the unlawfulness of the processing carried out by the Academy of Fine Arts in Rome for violation of Articles 5, par. 1, lett. a), 6 and 38, par. 6, of the Regulations, as well as art. 2-ter, paragraphs 1 and 3, of the Code, in the terms set out in the motivation;

#### ORDER

at the Academy of Fine Arts in Rome, in the person of the pro-tempore legal representative, with registered office in Via di Ripetta, 222 - 00186 Rome (RM), Tax Code 80228830586, pursuant to art. 58, par. 2, lett. i), and 83, par. 5, of the Regulations, to pay the sum of € 5,000.00 (five thousand) as a pecuniary administrative sanction for the violations indicated 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 thirty days, an amount equal to half of the sanction imposed;

#### INJUNCES

to the aforementioned Academy to pay the sum of € 5,000.00 (five thousand) in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, according to the methods indicated in the annex, within thirty days of notification of this provision, under penalty of the adoption of the consequent executive acts pursuant to art. 27 of the l. n. 689/1981;

#### HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, considering that the conditions set out in art. 17 of the Guarantor Regulation n. 1/2019;

the annotation of this provision in the internal register of the Authority, provided for by art. 57, par. 1, lett. u), of the Regulations, violations and measures adopted in compliance with art. 58, par. 2, of the Regulation.

Pursuant to art. 78 of the Regulation, 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, it is possible to 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 applicant resides abroad.

Rome, September 16, 2021

#### PRESIDENT

Stanzione

#### THE RAPPORTEUR

Ghiglia

THE SECRETARY GENERAL

Mattei