

[doc. web no. 9116773]

Injunction order against the Municipality of Porto Sant'Elpidio - 14 March 2019

Register of measures

no. 65 of 14 March 2019

## THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

CONSIDERING the Legislative Decree 196/2003 containing the "Code regarding the protection of personal data" (hereinafter "Code");

CONSIDERING the Legislative Decree 101 of 10 August 2018 containing the "Provisions for the adaptation of national legislation to the provisions of 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 to the free movement of such data and repealing directives 95/46/EC (general regulation on data protection)" and, in particular, art. 18, concerning the "Simplified definition of violations regarding the protection of personal data" to which offenders have the right to access against whom a pending sanctioning procedure has not yet been defined as of 25 May 2018;

CONSIDERING the law n. 689/1981 and subsequent amendments and additions and, in particular, the art. 1, paragraph 2, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

HAVING REGARD to the provision "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 entities and other obliged bodies" - Doc. web no. 3134436 contained in [www.gpdp.it](http://www.gpdp.it) and published in the Official Gazette no. 134 of 12 June 2014;

HAVING REGARD to the report received by the Guarantor on 2 February 2016, concerning the dissemination of personal data relating to participants in a competition organized by the Municipality of Porto Sant'Elpidio (hereinafter the "Municipality"), with registered office in Sant' Elpidio, Via Umberto I n. 485, tax code 81003650447, including also the personal data concerning the whistleblower. More specifically, the complained diffusion was determined by the possibility of viewing, also through the Google search engine and again after "(...) several years (...)" from the completion of the aforementioned competition, the list

"(...) of the names of the conditionally admitted to the public selection, reserved for disabled workers (...);

HAVING REGARD TO the report of the operations carried out by the competent Public and Private Work Unit Department of this Authority on 8 March 2016, with which investigations were carried out in relation to the facts covered by the aforementioned report;

CONSIDERING the provision n. 244 of 1 June 2016, doc. web no. 5260571 traceable at [www.gpdp.it](http://www.gpdp.it) – inhibitory, prescriptive and request for information pursuant to art. 157 of the Code - adopted by the Guarantor towards the Municipality following the ascertained presence, on the institutional website [www.elpinet.it](http://www.elpinet.it) of the Municipality, of documents relating to a selective procedure banned by the latter (resolutions and rankings) containing personal data of persons with disabilities, as well as references to the law of 12 March 1999, n. 68 (Regulations for the right to work of the disabled), immediately visible on the net also through generalist search engines”;

GIVEN the note prot. no. 25133 of 13 July 2016 with which the Municipality communicated to the Guarantor that it had eliminated the rankings subject to notification, that it had modified the documents present on the website (civic network and Praetorian register), reporting only the initials of the interested parties, as well as having to disseminate the aforementioned Guidelines of the Guarantor among the employees;

GIVEN the note prot. no. 19058/104142 of 27 June 2016 with which the aforementioned Department of Public and Private Work transmitted the documents, together with the provision of the Guarantor n. 244 of 1 June 2016, to the Inspection Activities Department, so that it could evaluate the conditions for the application of the administrative sanction referred to in article 162, paragraph 2-bis, of the Code in relation to the successful dissemination of data suitable for revealing the state of health (art. 22, paragraph 8, of the Code) of the participants in the public selection mentioned above;

CONSIDERING the act prot. no. 24405/104142 of 18 August 2016 with which the Guarantor charged the Municipality with violating the provision referred to in article 22, paragraph 8, of the Code sanctioned by article 162, paragraph 2-bis of the same Code, in relation to the ascertained diffusion of data suitable for revealing the state of health of subjects participating in a public selective procedure banned by the Municipality "(...) In fact, the presence of documents (resolutions and rankings) was ascertained on the institutional website [www.elpinet.it](http://www.elpinet.it) of the Municipality, containing personal data of persons with disabilities, with references to the law of 12 March 1999, n. 68 (Regulations for the right to work of the disabled), immediately visible on the net also through generalist search engines”;

NOTING that from the administrative report prot. no. 14366/104142 of 14 April 2017, prepared by the Office of the Guarantor pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment pursuant to art. 16 of law 689/81;

HAVING REGARD to the defense brief, presented pursuant to article 16 of the law of 24 November 1981 n. 689, with which the Municipality highlighted that its personnel office had taken steps to publish on the institutional website two determinations bearing, respectively, the list of those excluded and those admitted subject to the aforementioned selection procedure (Decision no. 60 prot. general n. 175 of 24.04.2013) and the final ranking of this procedure (Determination n. 90 prot. general n. 280 of 26.06.2013) " (...) in the belief that it has complied with the publicity obligations established by law in order to the documents relating to competitions and public selections and therefore the possible violation of article 22, paragraph 8 of the Code was completely involuntary". In support of this, he represented that " (...) in recent years there has been an expansion of the publicity and transparency obligations of Public Bodies with obvious difficulties for operators to reconcile the need and obligation of transparency with the need to comply with privacy legislation, so much so that the new Guidelines were issued in 2014 by the Guarantor Authority, both with regard to the entry into force of Legislative Decree 33/2013 and with regard to updates and further specifications compared to the previous Guidelines, also with reference to the publicity of the results of competition tests and final rankings (section 3.b "Rankings"), and this demonstrates the interpretative and application difficulties that have developed over time".

Furthermore, the party highlighted that "(...) the only data resulting from the deeds are the names of the participants (and) not also other data (...) such as date of birth, tax code, residence and anything else that may be considered suitable for the identification of the interested parties (...)".

In consideration of these arguments, as well as also on the basis of the fact of "(...) having promptly adapted the Code as (...) prescribed (with provision) by the Guarantor, notifying (...) (to the latter) with the (...) protocol note 25133 of 13 July 2016", the Municipality therefore requested to evaluate the possible "(...) exclusion, in the case in question, of the subjective element and therefore the exclusion of guilt in the conduct put in place as envisaged by law 689/1981 for the purpose of filing the disciplinary provision in question, as well as, alternatively, the reduction of the sanction imposed to the minimum permitted by legislation (...)".

"(...) In a further subordinate way (...)", the Municipality requested the payment in installments of any sanction imposed, formulating, in conclusion, the request for a hearing with the Guarantor;

HAVING REGARD TO the minutes of the hearing of the parties which took place on 16 January 2017 with which the Municipality fully recalled the contents of the defense brief presented;

GIVEN the written defense dated 9 February 2019, sent to the Guarantor pursuant to art. 18, paragraph 4, of Legislative Decree 101 of 10 August 2018, with which the Municipality renewed what was represented and requested with the aforementioned defense brief, as well as during the aforementioned hearing;

CONSIDERING that the arguments put forward by the Municipality are not suitable to fully accept the requests formulated in the defense briefs and during the hearing before the Guarantor.

In fact, with reference to the absence of the psychological element and to the invoked good faith, it should be noted that, according to consolidated jurisprudence (Cass. Civ. section I of 21 February 1995 n. 1873; Cass. Civ. section II of 13 March 2006, No. 5426), it is necessary that such good faith or, in the terms of art. 3 of law 689/1981, the error, in order to be excusable, is based on a positive element, extraneous to the agent and capable of determining in him the conviction of the legitimacy of his behavior. This positive element must not be remediable by the interested party with the use of ordinary diligence. The Municipality, as data controller and in relation to the performance of its institutional functions, was diligently required to know the applicable rules in the matter in question, as well as the relative interpretation and therefore, mainly, to know and observe the prohibition of dissemination of sensitive data established by law through the regulatory provision contained in the aforementioned art. 22, paragraph 8, of the Code, as well as the guidelines given by the Guarantor with the document containing the above-mentioned Guidelines and the related interpretations.

As for the argument for which "(...) the only data resulting from the deeds are the names of the participants (and) not also other data (...)", it should be noted that, although in attachment A of the determination of the Municipality above cited (Resolution n. 60 prot. general n. 175/2013) only the names and surnames of the interested parties are listed, however, in the name of this list, it is clearly visible that the n. 1 permanent and part-time administrative instructor position announced for tender for the "Social Services" sector - "Personal and community services" area of the Municipality, is reserved exclusively for disabled workers pursuant to law 68/99. Similarly, in the determination of approval of the ranking (Determination n. 90 prot. general n. 280 of 26.06.2013) explicit reference is made to this law relating to disabled workers, thus establishing a dissemination of data suitable for revealing the state of health of the subjects involved in the case. This illegality was duly ascertained by the Authority with the aforementioned provision no. 244 of 1 June 2016, which does not appear to have been challenged pursuant

to art. 152 of the Code;

NOTING that, on the basis of the considerations referred to above, the Municipality, as data controller pursuant to art. 4, paragraph 1, lett. f), and 28 of the Code, is found to have committed a violation of the provision pursuant to art. 22, paragraph 8, of the Code sanctioned by art. 162, paragraph 2-bis, of the same Code, for having carried out unlawful processing of personal data through the dissemination of data suitable for revealing the state of health, as specified above;

CONSIDERING the art. 162, paragraph 2-bis of the Code, which punishes the violations indicated in art. 167, including the violation relating to art. 22, paragraph 8, of the same Code with the administrative sanction of payment of a sum ranging from 10,000.00 (ten thousand) to 120,000.00 (one hundred and twenty thousand) euros;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law n. 689/1981, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERING, therefore, on the basis of the aforementioned elements evaluated as a whole, that it is necessary to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine provided for by art. 162, paragraph 2-bis of the Code, to the minimum amount of 10,000.00 (ten thousand) euros for the violation of art. 22, paragraph 8, of the same Code;

HAVING DEEMED to accept the Municipality's request for payment in installments of the amount of the fine determined above in no. 25 (twenty-five) monthly installments corresponding to the amount of Euro 400 (four hundred) each;

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations of the Office formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to the Municipality of Porto Sant'Elpidio, with registered office in Sant'Elpidio, Via Umberto I n. 485, tax code 81003650447, to pay the sum of 10,000 (ten thousand) euros as a pecuniary administrative fine for the violation of the provision referred to in article 22, paragraph 8, of the Code, sanctioned by article 162, paragraph 2-bis of the same Code, by dividing it, in acceptance of the installment request, into no. 25 (twenty-five) monthly installments of Euro 400.00 (four hundred) each;

ENJOYS

to the same Municipality to pay the sum of 10,000.00 (ten thousand) euros according to the methods indicated in the attachment, the fractional payments of which will begin by the last day of the month following the one in which the notification of this ordinance will take place, under penalty of adoption of the consequent executive acts pursuant to art. 27 of the law of 24 November 1981, n. 689, prescribing that, within 10 (ten) days from the payment, receipt of the payment must be sent to this Authority, in original or certified copy.

Pursuant to articles 152 of the Code and 10 of Legislative Decree no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, 14 March 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia