

[doc. web n. 9682169]

Order injunction against the Azienda Socio Sanitaria Territoriale Dei Sette Laghi - April 29, 2021

Record of measures

n. 171 of 29 April 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.gpdp.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;

Professor Ginevra Cerrina Feroni will be the speaker;

WHEREAS

1. Introduction.

With a complaint of 10 July 2019, submitted pursuant to art. 77 of the Regulation, it was represented that, on 9 December 2013, the complainant had sent his curriculum vitae to the Azienda Socio Sanitaria Territoriale (ASST) of the Seven Lakes

(hereinafter, the "Company"), in response to a public notice for the appointment of specialist doctor. After a few years, on 30 April 2018, the complainant had contacted the Company, opposing the disclosure of "personal data relating to private cellular users, personal emails and residential addresses" that appeared in their curriculum vitae, published on the Company's institutional website. On 29 May 2018, the Company replied to the interested party (note prot. 0032339 of 31 May 2018), claiming to have published the personal data of the same on the "Transparent Administration" page of its website by virtue of the consent expressed by the interested on the occasion of the participation in the public notice of 2013, and specifying that the curriculum vitae would remain visible in the "Transparent Administration" section for five years from the date of publication, in accordance with the current provisions on the matter.

The publication of the complainant's curriculum vitae on the Company's institutional website, as well as the indexing on search engines from the page in question, was ascertained by the Office on 9 January 2020 (see service report prot. No. 8 / 20 of 14 January 2020). In particular, it was ascertained that, using the name and surname of the complainant as keywords on the search engine "www.yahoo.it", a link was mentioned with the following description: "[title, name and surname of the data subject] - ASST Sette Laghi www.asst-settelaghi.it/delibere/PubbubblicaFtp/Incarichi / ... [name and surname] [residential address] [private mobile number] [...] [private e-mail] [date of birth] From 2003 - to 2006 [...] ". Through the connection in question it was possible to view and save a copy of the complainant's curriculum vitae, containing, among others, personal data relating to the private mobile phone user, personal email address, residential address and handwritten signature of the same (<https://www.asst-settelaghi.it/delibere/PubbubblicaFtp/Incarichi/Allegati/1161.pdf>).

2. The preliminary activity.

With a note dated January 14, 2020 (prot. No. 1356), 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 Company, 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 Regulation, concerning the alleged violations of articles 5, par. 1, lett. a) and c), 6, par. 1, lett. c) and e), 2 and 3, lett. b), as well as 2-ter, paragraphs 1 and 3, of the Code, inviting the aforementioned holder 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 art. 18, paragraph 1, of the l. November 24, 1981, n. 689).

With a note dated February 13, 2020 (prot. No. No. 0009498), as supplemented on February 14, 2020, the Company stated, in

particular, that:

"[The complainant] took up a free professional position at [the Company, which at the time had a different name,] [...] in 2013.

In compliance with the provisions of current legislation on transparency, the office competent, at the same time as signing the contract, took steps to request a copy of the CV, in order to publish it, on the dedicated section "Transparent Administration" of the company website. The administration, in order to simplify the insertion and publication of the data required by Legislative Decree no. 33/2013, had implemented the company application "Lapis Web" with a mask that did not allow the automation of the sending of data from the aforementioned application to the "Transparent administration" section. In this way, the curriculum was inserted into the application and the competent operator assigned to the SC Human Resources office proceeded, by clicking on the dedicated mask, to send the requested data by implementing the aforementioned legislation ";

"In 2017 [the Company] asked [the interested party] to send a new CV following the assignment of a new appointment as an outpatient specialist. The new curriculum, updated and free of personal data not necessary for the purposes of the processing in question, was published in 2017 ";

following the entry into force of Regulation (EU) 2016/679, "[...] the Company had [, in fact,] taken care to provide the interested parties with the publication obligations provided for by Legislative Decree 33/2013 with precise indications and precise on the conduct to be adopted to fully protect their personal data ", indicating" the methods by which [the curriculum vitae] should have been drawn up (eg without including handwritten signature, etc.) "(see attachment 1 to the note);

"With reference to the facts of the report [of the interested party], or the persistent publication of his CV dating back to 2013 on the Yahoo search engine, [...] the Company, following the request received [from the interested party] on 30 / 04/2018, had promptly removed the document from its website. The same was, however, available on the "Yahoo" search engine, given the technical complexity of the management and the lack of IT tools ";

"Following [...] internal checks, it emerged that [...] the section dedicated to the publication of company resolutions is planned in a manner suitable for avoiding the indexing of published data as well as their possible copying by other search engines. On the other hand, the "Transparent Administration" section does not operate according to the same logic in compliance with the technical standards that require the publication of such data in open .pdf format. Precisely this different operating logic has misled the operators of the Company and determined the events that are the subject of [the complaint] ";

"Having received the request for cancellation of the CV by [the interested party], the Company immediately took steps to

remove the curriculum vitae by opening the related and necessary" ticket "intended as a request for technical IT intervention, or through a formal request removal to the application supplier. The aforementioned action was promptly undertaken and implemented, however it was not sufficient for the purposes in question due to the technical peculiarities described above. Indeed, the operators erroneously assumed that the cancellation of the CV was completed through the sole removal from the application and consequently from the site, that the document could no longer be accessible from other search engines as it is no longer available online ":

"The processing of the aforementioned data was carried out by virtue of the legal obligation imposed [on the Company] and not by virtue of the consent [of the interested party]. Therefore, the same is configured as lawful pursuant to art. 6, par. 1, lett. c) GDPR ";

"The Human Resources Office in the note dated 31/05/2018 only wanted to specify that the processing in question was carried out in fulfillment of the aforementioned regulatory obligation [...]; the use - certainly a-technical - of the term" consent "was used by the Office for the sole purpose of highlighting that [the interested party] was fully [informed] of the purposes and methods of processing his CV and that [this] voluntarily decided to include his personal references in the document ";

"It is very complicated for the Company to verify whether the CV contains data relating to personal or institutional users, as [the Company is] extremely complex and articulated, it is referred to several hospitals, many outpatient facilities, various residential facilities, semi-residential and counseling centers with different users and services ";

the Company "has promptly activated in order to immediately put in place the measures to implement what is requested [by the interested party]. In particular, [the Company] has taken steps to remove the CV object of the report also from the "yahoo" search engine. In addition, the same took steps to verify that the same was no longer available on any of the known search engines ";

the Company has adopted specific initiatives "in order to strengthen the level of protection of the data subjects involved in the processing in question, with the support of the Data Protection Officer".

At the hearing, requested by the Company pursuant to art. 166, paragraph 6, of the Code and held on 10 December 2020, the Company also declared, in particular, that:

"The facts which are the subject of the complaint were caused by human error. First of all, the Protocol Office failed to send the interested party's requests to the DPO. Furthermore, at the time [the employee who handled the request of the interested

party] provided an inadequate response to the request to exercise the rights of the interested party and not compliant with both current legislation and internal regulations, which provided that the requests of the interested parties should be forwarded to the DPO and the privacy committee. [...] Now, with the support of the DPO, the Company has implemented a whole series of improvement actions for data management and, in particular, the publication of curriculum vitae ";

"[...] there was [...] a human error [, since] the publication of CVs had been carried out allowing each interested party to send their CV to the Company, for the purpose of subsequent publication on the website , for the purposes of transparency. In the case of a complaint, however, a correct check of the document was not carried out at the time of publication. The DPO has therefore ascertained the need to periodically check the uploaded files and to issue more stringent guidelines for the employees in charge of managing the publication. A committee dedicated to anti-corruption and transparency was also created, which made it possible to improve processes ";

"In order to balance the need for transparency with data protection, the documents were indexed. The computer systems were configured not to index published documents, with the exception of those published for transparency purposes, given that the legislation allows indexing for these purposes. Now, in the light of the Guarantor's findings, indications have been given to suppliers to automatically delete the documents at the end of the envisaged retention period and to verify that such documents are not yet indexed on search engines ";

"The complaint was [, therefore,] caused [...] by mere human error and by the violation, by an authorized person, of internal procedures regarding the protection of personal data".

3. Outcome of the preliminary investigation.

The personal data protection discipline provides that public subjects, in the context of work, may process the personal data (Article 4, No. 1, of the Regulation) of personnel who work in various capacities in their organizational structure and under their direct authority (see Article 29 of the Regulation), if the processing is necessary, in particular, "to fulfill a legal obligation to which the data controller is subject" (or the specific obligations or tasks provided for by law for management of the employment relationship) or "for the performance of a task of public interest or connected to the 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 required, in any case, 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 data subject" and must be "adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter a) and c), of the Regulation).

Having said that, it is noted that the Company claimed to have published the complainant's curriculum vitae in the "Transparent Administration" section of its institutional website to fulfill the legal obligations regarding advertising and transparency of the administrative action referred to in Legislative Decree no. .lgs. 14 March 2013, n. 33.

In this regard, it is noted that art. 15, paragraph 1, lett. b), of the decree in question provides that "without prejudice to the provisions of Article 9-bis [...], the public administrations publish and update the following information relating to the holders of collaboration or consultancy assignments: [...] b) the curriculum vitae ", also with regard to medical managers (see art. 41, paragraph 3, of the same decree).

However, already in the "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" (provision 15 May 2014, no. 243, web doc. N. 3134436), the Guarantor has clarified that the legislator's reference to the obligation to publish the curriculum vitae cannot, in any case, involve the dissemination of personal data that are not relevant to the transparency purposes pursued. Therefore, "before publishing the curricula on the institutional website, the data controller must [...] make a careful selection of the data contained therein", failing to publish "excess data, such as personal contact details or tax code of the interested parties, also in order to reduce the risk of so-called identity theft "(part one, par. 9.a.) (see the " FAQ on transparency "of the National Anti-corruption Authority, in particular no. 9.8, which states that the publication of the curriculum vitae of the holders of collaboration or consultancy assignments must be carried out by operating "a careful selection of the data contained therein for the purpose of respecting the protection of confidentiality").

As it emerged during the investigation, the Company has instead published the curriculum vitae of the complainant on its institutional website, failing to preventively obscure the data relating to the personal sphere of the same (such as the residence address, private mobile phone, personal e-mail and handwritten signature), which cannot be considered "adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed" (art. 5, par. 1, lett. c), of the Regulations; cf., with regard to compliance with the principle of data minimization when publishing documents online, albeit in different contexts, among others, prov. February 25, 2021, n. 69, doc. web n. 9565258; prov. 11 February 2021, n. 54, doc. web n. 9556625; prov. January 14, 2021, n. 22, doc. web n. 9543138; prov. 1 October 2020, n. 173, doc. web n. 9483375; prov. 3 September 2020, n. 154, doc. web n. 9468523; prov. 29 July 2020, n. 149, doc. web n. 9463997; prov. 9 July 2020, n. 140, doc. web n. 9451734; prov. 9 July 2020, n. 139, doc. web n. 9446659; prov. 2 July 2020, n. 120, doc. web n. 9440075; prov. 2 July 2020, n. 117, doc. web n. 9445324; prov. 12 March 2020, n. 50, doc. web n. 9365159; prov. February 13, 2020, n. 35, doc. web n. 9285411; prov. 6 February 2020, n. 27, doc. web n. 9283029; prov. January 30, 2020, n. 21, doc. web n. 9283014; prov. January 30, 2020, n. 20, doc. web n. 9302897). The processing of such personal data, in the absence of an appropriate legal basis and in a manner that does not comply with the principle of data minimization, has also led to a further and wider dissemination of the same, due to the indexing of the web page. which hosted the complainant's curriculum vitae and the consequent inclusion of said data in the preview of the content displayed in search engines, when the name and surname of the same were used as keywords.

As stated by the Company, the failure to obscure the complainant's personal information was due to human error, as "the document was not [...] properly checked at the time of publication" (hearing on 10 December 2020). Likewise, the publication of the full version of the curriculum vitae, despite the interested party having requested its removal as early as 30 April 2018, occurred as a result of an inadequate response from an employee of the Company who handled this request, who, contrary to the instructions given by the owner, which provided for the necessary involvement of the data protection officer, responded in a manner "not compliant with both current legislation and internal regulations", as well as, more generally, due to human errors in the management of the data published online, which, as ascertained, were still available on the website and indexed by a search engine as of January 9, 2020.

Lastly, it is noted that the fact that the interested party had been "fully [informed] of the purposes and methods of processing his CV and that [this] voluntarily decided to include his personal references in the document" is not relevant for the purposes of

the evaluation of the lawfulness and correctness of the processing, given that the mere inclusion by the interested party of personal information in the curriculum vitae delivered to the Company cannot be equivalent to a "manifestation of free, specific, informed and unambiguous will" to the online dissemination of such information (art. 4, par. 1, n. 11) of the Regulation; cf. also art. 7 and recital nos. 32 and 33 of the Regulation). Furthermore, in the working context, consent cannot, as a rule, "constitute a valid legal basis for the processing of personal data", as there is "an evident imbalance between the data subject and the data controller" (recital 43 of the Regulation ; see par. 21 of the "5/2020 Guidelines on consent pursuant to Regulation (EU) 2016/679" adopted on 4 May 2020 by the European Data Protection Committee, which states that "the imbalance of it also exists in the context of employment. Given the dependence resulting from the employer / employee relationship, it is unlikely that the data subject will be able to deny the employer consent to the processing of data without fear or risk of repercussions [...] Consequently, the Committee considers it problematic for the employer to process the personal data of current or future employees on the basis of consent, as this is unlikely to be freely given. part of the processing activities carried out in the workplace, the legitimate basis cannot and should not be the employee's consent [...] in consideration of the nature of the relationship between employer and employee "). It is noted, in any case, that the publication of personal data relating to the private sphere of the interested party would not have been, however, in compliance with the principle of data minimization (Article 5, paragraph 1, letter c) of the Regulation).

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. It is also represented that for the determination of the applicable law, from a temporal point of view, the principle of legality referred to in art. 1, paragraph 2, of the l. n. 689/1981 which establishes as "Laws that provide for administrative sanctions are applied only in the cases and times considered in them". This determines the obligation to take into consideration the provisions in force at the time of the violation committed, which in the case in question - given the permanent nature of the alleged offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of 25/5/2018 in which the Regulation became applicable and the Legislative Decree 10 August 2018, n. 101 came into effect. In fact, from

the preliminary investigation it emerged that the Company informed that it had ceased the dissemination of personal data belonging to the complainant's private sphere only in January 2020 (see the e-mail of January 28, 2020 from the Coordinator Administrative-Accounting Area of the Company, in the records, where it is stated that "surfing the net, outside the company perimeter, does not show at this time the presence of personal data attributable to the indicated person").

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Azienda Socio Sanitaria Territoriale (ASST) dei Sette Laghi is noted, for having disclosed the complainant's personal data in the absence of suitable regulatory conditions, in violation of art. 6, of the Regulation, and 2-ter, paragraphs 1 and 3, of the Code, as well as the principles of "lawfulness, correctness and transparency" and "data minimization" pursuant to art. 5, par. 1, lett. a) and c) 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. In this context, considering, in any case, that the conduct has exhausted its effects, given that the publication of personal data relating to the complainant's private sphere has ceased, the conditions for the adoption of further corrective measures referred to in 'art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. l 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).

In this regard, taking into account art. 83, par. 3, of the Regulation, in the present case - also considering the reference contained in art. 166, paragraph 2, of the Code - the violation of the aforementioned provisions is subject to the application of the same administrative fine provided for by art. 83, par. 5, of the Regulation.

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, it was considered that the detected conduct, held in violation of the regulations on the protection of personal data, had as its object the dissemination of personal data, 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 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. n. 134 of 12/6/2014 and in www.gpdp.it, doc. web n. 3134436. Account was also taken of the considerable period of time in which the complainant's personal data were disclosed (from the end of 2013 until January 2020).

On the other hand, it was favorably acknowledged that there are no previous relevant violations committed by the data controller or previous measures pursuant to art. 58 of the Regulation, and that the owner promptly took action to remove the data subject to the complaint as soon as he became aware of the violation.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction in the amount of € 4,000 (four thousand) for the violation of Articles 5, par. 1, lett. a) and c), and 6, par. 1, lett. c) and e) and 2 and 3, lett. b) of the Regulations, as well as 2-ter, paragraphs 1 and 3 of the Code, as an administrative pecuniary sanction, pursuant to art. 83, paragraph 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the extended period of time during which the aforementioned data were available on the network, 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

declares, pursuant to art. 57, par. 1, lett. f), of the Regulations, the unlawfulness of the processing carried out by the Azienda Socio Sanitaria Territoriale Dei Sette Laghi for violation of Articles 5, par. 1, lett. a) and c), and 6 of the Regulation, as well as 2-ter, paragraphs 1 and 3 of the Code, within the terms set out in the motivation;

ORDER

to the Azienda Socio Sanitaria Territoriale Dei Sette Laghi, in the person of the pro-tempore legal representative, with registered office in Viale Borri, 57 - 21100 Varese (VA), Tax Code 03510050127, pursuant to art. 58, par. 2, lett. i), and 83, par.

5, of the Regulations, to pay the sum of € 4,000 (four 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 30 days, an amount equal to half of the sanction imposed;

INJUNCES

to the aforementioned Company, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, to pay the sum of € 4,000 (four thousand) according to the methods indicated in the annex, within 30 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.

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, April 29, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei