

[doc. web n. 9547225]

Injunction order - January 27, 2021

Record of measures

n. 26 of January 27, 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 law n. 689/1981 and subsequent amendments and additions;

GIVEN art. 1, paragraph 2, of the aforementioned law, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered therein;

GIVEN the report received on 24 March 2017, accompanied by specific documentation, according to which Dr. Massimo Candela, born on the 20th to the 20th, and residing in XX, Tax Code: XX, would have transmitted the registers of surgical cases, containing the list of surgeries performed at the OU of Orthopedics of the Hospital of Livorno and of the Hospital of Paola - where the aforementioned doctor had served - attached to the request for participation in the public notice, adopted by the Hospital of Cosenza for the assignment of the management of complex structure orthopedics and traumatology (see resolution of the Extraordinary Commissioner of 17 December 2015, no. 373). In particular, the aforementioned attached documentation contained, in one case, directly identifying personal data (name and surname) of the patients, as well as information on their health (diagnosis, date and type of intervention carried out); in another, personal data directly identifying patients (name, surname, age), anesthesiologists and instrumental nurses (surname), as well as information on the health of the patients themselves (diagnosis, date of surgery, type of anesthesia administered and intervention carried out);

HAVING REGARD to the requests for information from the Health and Research Department of this Authority, with which the NHS Tuscany North-West and Provincial Healthcare Companies of Cosenza were invited (prot. Notes nos. 0009201 and 0009209 of March 15, 2019), as well as Dr. Candela (prot.note n.30721 of October 17, 2018 and n.9571 of March 19, 2019) to provide all useful elements and information in relation to what has been reported;

TAKING NOTE of the declarations of the Data Protection Officer (RPD) of the Usl Toscana Nord-Ovest company contained in the note of 4 April 2019, according to which, in the documents of the general protocol, no requests were made, either incoming

or outgoing of access and release of documents containing operating cases by "Candela" and that "on the basis of further investigations carried out on various aspects of the company activity it would seem possible to exclude that the production of the operating room register by the professional, for purpose of participation in the selection, may have occurred with the conscious competition of the company ";

NOTING, also, of the letter of 11 April 2019 with which the DPO of the Provincial Health Authority of Cosenza, forwarding a communication sent by Dr. Candela to the same DPO, declared that the registers of operating cases produced to participate in the public competition, organized by the Hospital of Cosenza for the assignment of the management of a complex structure Orthopedics and traumatology, would be "personal and non-corporate registers" that is, belonging to the health company;

TAKING INTO ACCOUNT the statements of dr. Candela, according to which the same would have limited himself to producing, "for the sole purpose of participation (and relative correct and legitimate evaluation) in the competition (..), the operating registers of the interventions performed by the writer, endorsed (certificates, that is, conform to the original) by the administrative managers of the related health facilities "(note of 13 June 2019);

GIVEN the note prot. n. 32357 of 24 September 2019 of the Department of Health and Research, with which the procedure was defined, the reasons for which must be understood as fully referred to herein, in which it is ascertained that

- dr. Candela "produced, as part of a public selection, documentation containing personal data of patients undergoing surgery at the OU of Orthopedics and Traumatology of the Hospital of Paola and of the Hospital of Livorno. The aforementioned documentation also contained information relating to the personnel (anesthetists and instrumental nurses) participating in the surgical interventions performed in the public facilities where the S.V. had served ";

- the hospitals involved in the investigation "have declared that the documentation in question does not appear to have been formally requested [by Dr. Candela], possibly also through access requests formulated pursuant to law no. 241/1990 and of the d.P.R. n. 184/2006 ";

- "the fact that the information relating to the health of patients operated on [by dr. Candela] have come out of the availability (and therefore from the control) of the legitimate data controllers (hospitals) to be used [by dr. Candela] to participate in a selection and, therefore, have been sent to an administrative commission appointed by a third party (Azienda Ospedaliera di Cosenza) has no basis in the legal basis that originally legitimized the processing. Moreover, the communication of the aforementioned health data had not been requested by the public notice which, instead, among the documentation to be

attached to the application, required to include a "Certification of the Medical Director ... concerning the qualitative and quantitative type of services performed from the candidate ", therefore a document without personal data. Similarly, in the context of the attribution of scores, reference was made to the "qualitative and quantitative type of services performed by the candidate also with regard to the activity / case series treated in the previous ones, measurable in terms of volume and complexity", with the consequence that "The treatment carried out [by Dr. Candela] took place in the absence of suitable legitimizing conditions and, in particular, without having previously provided the information to the patients concerned and their specific consent acquired (articles 11, 13 and 26 of the Code, in force at the time they were the facts covered by the report have been carried out) ";

CONSIDERING that the facts covered by the report occurred in February 2016, therefore on a date prior to that in which Regulation (EU) 2016/679 became fully applicable (25 May 2018) and that, therefore, to the processing of personal data in question, the Code regarding the protection of personal data applies, in the version prior to the reformulation of the same carried out by means of Legislative Decree no. 101/2018;

HAVING REGARD to the contestation deed prot. n. 0039728/115879 adopted on November 18, 2019, with which Dr. Massimo Candela, born on XX to XX and residing in XX - XX XX; C.F. : XX, the violation of the provisions of art. 13 and 26 of the Code, sanctioned, respectively, by art. 161 and 162, paragraph 2-bis of the same Code, for having carried out a processing of health data in the absence of suitable legitimizing conditions and, in particular, without having provided the information to the patients concerned and acquired their specific consent;

NOTING that the administrative report prepared pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment pursuant to art. 16 of law 689/81;

GIVEN the defense brief dated 10 March 2020, presented pursuant to art. 18 of the law of 24 November 1981 n. 689, with which Dr. Candela stated that "only the name, surname and age of each patient operated on were indicated. Therefore, it is not sensitive data, pursuant to the provisions of art. 4, paragraph 1, lett. d) of Legislative Decree no. 196/2003, in force *ratione temporis*; nor is it data that allows the univocal and exact identification of the data subjects, since only the age in years is indicated and not the date and place of birth of each one. Nor is the tax code indicated; (...) "Furthermore, due to the very nature of the comparative procedure... having to examine and evaluate surgical cases and other health data, it is natural that the commission should have to face and examine data from other people. In addition, the certified operating register is a

necessary tool for the examining body to carry out precise checks on the truthfulness of the declarations of the candidates in the competition, or for the hypothesis - anything but remote - of false or false declarations "highlighting that" the selection... required a particular degree of detail of the information to be produced, so as to contain all the elements useful for evaluation by the commission of experts "; in the same note, Dr. Candela also represented that he "acted in the most absolute good faith and conviction of correctness. Without the slightest intent or awareness of engaging in unlawful processing of personal data and with the sole purpose of complying with the lex specialis of the selection procedure in question and presenting as complete and detailed documentation as possible, so as to allow the Commission to examine and evaluate in the best way ". In closing, Dr. Candela asked, principally, "the annulment and / or revocation of the dispute in the epigraph or, in the alternative, (...) a significant reduction in the two penalties imposed";

CONSIDERING that the arguments put forward by Dr. Candela are not suitable to accept the requests formulated in the defense brief. In fact, with reference to the notion of personal data, it should be noted that, pursuant to art. 4, paragraph 1, lett. b) of the Code, in force at the time in which the facts covered by the report took place, "personal data" means any information relating to a natural person, identified or identifiable, even indirectly, by reference to any other information, including a personal identification number (see now also art.4, par.1, point 1 of Regulation (EU) 2016/679 and Recital nos. 26, 27 and 30); therefore, the fact that some elements were not indicated, such as the date, place of birth and tax code of the patients, is not relevant for the purpose of the alleged exclusion of the aforementioned information from the category of "personal data"; moreover, unlike what has been stated, from the examination of the documents, it is noted that the aforementioned information constitutes sensitive data, as it is suitable for revealing the state of health (Article 4, paragraph 1, letter d) of the Code, in the previous version to the legislative decree n. 101/2018; now belonging to the particular category of personal data, v. art. 4, par. 1, point 15, and art. 9 of the aforementioned Regulation), subject to a more stringent protection regime highlighted in art. 26 of the Code.

In relation, then, to the good faith highlighted by the doctor, it should be noted that according to consolidated jurisprudence (Cass. Civ. Section I of 21 February 1995 no. 1873; Cass. Civ. Section II of 13 March 2006, no. 5426) , for the application of art. 3 of the law n. 689/1981 it is necessary that good faith or error, in order to be excusable, be based on a positive element, foreign to the agent and capable of determining in him the conviction of the lawfulness of his behavior. This positive element must not be obvious to the interested party with the use of ordinary diligence. In this case, the doctor should have diligently

known the applicable legislation, concerning the production of the documentation required for the purposes of the evaluation by the examining commission, and, therefore, carefully consider which documents were required in the selection procedure, verifying, in the case specific, that the public notice required, among the documentation to be attached to the application, to include a "Certification of the Medical Director ... concerning the qualitative and quantitative type of services performed by the candidate", therefore a document without personal data. Similarly, in the context of the attribution of scores, reference was made to the "qualitative and quantitative type of performance performed by the candidate also with regard to the activity / case history dealt with in the previous ones, measurable in terms of volume and complexity"; this, moreover, in line with the Ministerial Decree January 30, 1992, n. 283 which, governing the evaluation criteria of the operating cases by the examining commission, does not refer to the need to produce a document containing personal data, providing that "for the purposes of evaluating the operating cases, the examining commission must pay particular attention to the documents presented by the candidate concerning the reference to the operating register showing the type of intervention and the degree of participation of the candidate. Said documentation must be accompanied by the "confirmation visa" of the medical director "(art. 4, paragraph 5, of the aforementioned decree); if a diligent examination of the public notice in question had been carried out, it could therefore have been assumed that the transmission of documentation containing personal data on the health of patients was not required in order to participate in the selection procedure;

NOTING that, on the basis of the above considerations, Dr. Candela, on her own initiative and therefore as the data controller, appears to have committed violations of the provisions of art. 13 and 26 of the Code sanctioned, respectively, by articles. 161 and 162, paragraph 2-bis, of the same Code, for having carried out the processing of data, in part also suitable for revealing the health conditions of the interested parties, in the absence of suitable legitimizing conditions and, in particular, without having provided the information to the patients concerned and their specific consent acquired;

GIVEN art. 161 of the Code which punishes the violation of art. 13 of the same Code with the administrative sanction of the payment of a sum from € 6,000.00 (six thousand) to € 36,000.00 (thirty-six thousand);

GIVEN art. 162, paragraph 2-bis of the Code, which punishes the violations indicated in art. 167, including the violation relating to art. 26, of the same Code, with the administrative sanction of the payment of a sum from € 10,000.00 (ten thousand) to € 120,000.00 (one hundred and twenty thousand);

CONSIDERING that, for the purposes of determining the amount of the financial penalty, 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 that, in relation to the seriousness of the violation, the processing, despite also having as its object data on health, consisted in communicating them only to the examining commission appointed by the Hospital of Cosenza which adopted the public notice;

CONSIDERING, also, that the doctor has produced the registers of surgical cases, containing personal data, in the erroneous belief that this was essential to offer "documentation that is as exhaustive and detailed as possible, so as to allow the Commission to examine and evaluate in the better way";

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that, if any of the violations referred to in Articles 161, 162, 162-ter, 163 and 164, is of lesser severity, the minimum and maximum limits are applicable to an extent equal to two fifths;

CONSIDERING, therefore, by reason of the aforementioned elements assessed as a whole, to have to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the pecuniary sanction provided for by art. 161 of the Code, to the extent of € 6,000.00 (six thousand) for the violation of art. 13 of the same Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of lesser seriousness, for an amount equal to EUR 2,400.00 (two thousand four hundred), as well as the amount of the pecuniary sanction provided for by art. 162, paragraph 2-bis of the Code, to a minimum of € 10,000.00 (ten thousand) for the violation of art. 26 of the same Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of lesser seriousness, for an amount equal to Euro 4,000.00 (four thousand), for the total sum of Euro 6,400.00 (six thousand and four hundred);

HAVING REGARD to the documentation on file;

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

SPEAKER Attorney Guido Scorza;

ORDER

To Dr. Massimo Candela, resident in XX - XX; Tax Code: XX to pay the sum of € 6,000.00 (six thousand), provided for by art.

161 of the Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the same Code, for an amount equal to Euro 2,400.00 (two thousand four hundred), as a pecuniary administrative sanction for the violation of the provision referred to in art. 13 of the Code for failing to provide information to the interested parties, as well as the sum of € 10,000.00 (ten thousand) provided for by art. 162, paragraph 2-bis of the Code, reduced by two fifths, in accordance with the provisions of art. 164-bis, paragraph 1, of the same Code, for an amount equal to € 4,000.00 (four thousand), as a pecuniary administrative sanction for the violation of the provision referred to in Article 26 of the Code for failing to acquire consent of the interested parties, for a total amount of € 6,400.00 (six thousand and four hundred);

#### INJUNCES

to the same dr. Candle to pay € 4,000.00 (four thousand) and € 2,400 (two thousand four hundred), for the total sum of € 6,400.00 (six thousand and four hundred), 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 law of 24 November 1981, n. 689.

Pursuant to art. 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision, opposition may be proposed to the ordinary judicial authority, with an appeal filed with the ordinary court of the place where the data controller resides, within thirty days from the date of communication of the provision itself. , or sixty days if the applicant resides abroad.

Rome, January 27, 2021

#### PRESIDENT

Stanzione

#### THE RAPPORTEUR

Peel

#### THE SECRETARY GENERAL

Mattei