[doc. web no. 9361151]

Injunction order against the Municipality of Asti - 26 February 2020

Register of measures

no. 41 of 26 February 2020

GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

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

HAVING REGARD TO Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, as well as on the free circulation of such data and repealing Directive 95/46 /CE, “General Data Protection Regulation” (hereinafter “GDPR”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data (hereinafter the "Code");

CONSIDERING the general provision n. 243 of 15/5/2014 containing the «Guidelines on the processing of personal data, also contained in administrative deeds and documents, carried out for the purpose of publicity and transparency on the web by public subjects and other obliged bodies», published in the Official Gazette no. 134 of 12/6/2014 and in www.gpdp.it, doc. web no. 3134436 (hereinafter "Guidelines of the Guarantor on transparency");

CONSIDERING the Regulation n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor for the protection of personal data, approved with resolution no. 98 of 4/4/2019, published in the Official Gazette no. 106 of 8/5/2019, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Supervisor Prof. Licia Califano;

WHEREAS

1. Introduction

This Authority has received a report from Dr. XX (hereinafter "the whistleblower") regarding the publication on the institutional website of the Municipality of Asti of managerial determination no. XX of the XX, concerning the granting of permits pursuant to art. 33 of the law n. 104 of 02/05/1992 ("Framework law for assistance, social integration and the rights of handicapped persons"), containing personal data of the disabled subject, parent of the reporting party, who had requested to assist him because, as stated in the provision, "seriously disabled person".

In the report it is highlighted that, before contacting the Guarantor, the rights regarding the protection of personal data had been exercised with respect to the Municipality of Asti, asking for the criteria, methods and purposes of the processing to be taken into account; of the details of the owner and manager, as well as of the subjects to whom the data could be communicated.

The whistleblower has attached the screenshots of the web pages published, as well as the XX email also sent to the Data Protection Officer (hereinafter "DPO") of the aforementioned Municipality to ask to «eliminate free access to sensitive data referring to [the] parent", after he had explained to him in a previous email from the 20th century that the document was no longer "available for consultation at the Praetorian Register of the City of Asti as it was removed upon expiry of the terms of publication", but was still accessible "at the "XX", area XX, using a search key (https://..), as well as "at the internal procedural platform (deed management) of the Administration", accessible to all employees through access credentials.

2. Applicable legislation

The case in question concerns the dissemination by the Municipality on the institutional website and on the internal platform of the Municipality accessible only to employees, of data on the health of one's parent identified by the relative initials.

In this regard, it is necessary to remember that "personal data" is "any information relating to an identified or identifiable natural person ("data subject")" and that "an identifiable natural person is one who can be identified, directly or indirectly, with particular reference to an identifier such as the name, an identification number, location data, an online identifier or one or more characteristic elements of its physical, physiological, genetic, psychic, economic, cultural or social identity" (art. 4, par. 1, no. 1, of the GDPR).

The processing of personal data must take place in compliance with the principles indicated by art. 5 of the GDPR, including those of "lawfulness, correctness and transparency" as well as "data minimization", according to which personal data must be - respectively - "processed in a lawful, correct and transparent manner in relation to the interested party", as well as «adequate,

pertinent and limited to what is necessary with respect to the purposes for which they are processed» (par. 1, letters a and c).

In this context, the processing of "particular categories of personal data" listed by art. 9, par. 1, of the RGPD – which includes «data relating to health» or rather «personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health» (art. 4, par. 1, n. 15; recital n. 35 of the RGPD) – unless one of the exceptions provided for in paragraph 2 of the aforementioned art. 9.

The aforementioned exceptions include the case in which "the processing is necessary for reasons of significant public interest on the basis of Union or Member State law, which must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for appropriate and specific measures to protect the fundamental rights and interests of the interested party" (Article 9, paragraph 2, letter g). In any case, «Member States may maintain or introduce further conditions, including limitations, with regard to the processing of […] data relating to health» (Article 9, paragraph 4, GDPR).

In this context, the legislation on the protection of personal data provides that the processing of particular categories of personal data "necessary for reasons of significant public interest" are allowed "if they are provided for by European Union law or, in the internal legal system , by legal provisions or, in the cases provided for by law, by regulation which specify the types of data that can be processed, the operations that can be carried out and the reason of significant public interest, as well as the appropriate and specific measures to protect fundamental rights and interests of the interested party" (art. 2-sexies, paragraph 1, of the Code) and that, in any case, the "data relating to health" cannot be disclosed (2-septies, paragraph 8. See also art. 22 , paragraph 8, of the previous Code).

3. Preliminary evaluations of the Office on the processing of personal data carried out

From the checks carried out on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the Municipality - with the complete publication of the managerial determination n. XX in the praetorian register and in the freely accessible administrative documents area of the institutional website, as well as in the "internal procedural platform (deed management) of the Administration" with access credentials provided to all employees - caused the dissemination of data and information personal data relating to the health of Dr. XX's parent.

Since the aforementioned processing of personal data did not comply with the relevant regulations on the protection of personal data, with the same note the violations carried out were notified to the Municipality of Asti (pursuant to article 166,

paragraph 5, of the Code), communicating the initiation of the procedure for the adoption of the measures referred to in article 58, paragraph 2, of the GDPR and inviting the aforementioned Municipality to send the Guarantor defense writings or documents and, possibly, to ask to be heard by this Authority, within 30 days (art. 166, paragraphs 6 and 7, of the Code; as well as art. 18, paragraph 1, of law n. 689 of 11/24/1981).

4. Defensive memories and hearing

With the note prot. no. XX of the XX the Municipality of Asti sent its defense writings to the Guarantor in relation to the notified violations.

In this regard, it should be remembered that, unless the fact constitutes a more serious offence, anyone who, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false deeds or documents is liable pursuant to art. 168 of the Code «False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor».

Specifically, in relation to the disputed facts, the Municipality represented, among other things, that:

- «On the XX date [the whistleblower] submits an application aimed at obtaining the authorization to use the benefit pursuant to art. 33, paragraph 3, Law no. 104/1992 and subsequent amendments and i., and with Executive Resolution n. XX of the XX the same was authorized»;
- «How ordinarily the authorizing deeds in question were drafted, at the time, in the D.D. quoted, the full name of the applicant employee and the initials of the relative or relative in need of assistance were indicated";
- "contrary to what was defined in the notification of the violation, [the whistleblower never asked the] Administration [...] to remove the communication but [asked] to know the criterion by which employees are identified and why in dat [e] following the provision [object of the report], different precautions are taken. The response referred to in note no. XX of the XX in fact provides [the whistleblower] with the requested clarifications";
- "[on the other hand, at the same time as the note sent by the DPO to the whistleblower on the XX date, the latter] signaled the need to remove or make the determination in question inaccessible to those without rights or operational legitimacy";
- «On the XX date, steps were taken to make the aforementioned managerial determination accessible in confidential mode and unavailable for download on the web "XX"»;
- «Once the communication from the Guarantor has been received and having become aware of the problem, [provision has

been made for] removing from the web and from the management system all the documents [and] to date, the deeds referred to in the Guarantor's notification of sanctions and the deeds similar by category cannot be found in any way other than on the administration's website (from XX) nor on the internal network (from XX)".

On the other hand, as regards the conduct held, the Municipality highlighted that:

- «The reference to a seriously disabled person constitutes a condition for obtaining the right while, in no way, is reference made to the resulting underlying pathology which would constitute the real sensitive datum (now particular datum)";
- «The necessity of the reference to the handicap in serious conditions is, moreover, confirmed in the provision of the Guarantor [...] of 10 December 2015 which expressly defines: "Noting that, as provided for in point 8.6. of the Guidelines on the processing of personal data for the purpose of managing the employment relationship in the public sector (Official Gazette 13 July 2007, n. 161 – web doc. n. 1417809), the employer is permitted to process personal data relating to the state of health also of the worker's relatives in order to allow them to enjoy the benefits of the law, including leave for the assistance of disabled family members in serious situations pursuant to law no. 104/92”»;
- «It seems undoubted that in the management of the activity there was no profile of intentionality in damaging Dr. XX»;
- "the Administration has intervened over time by questioning itself on the most correct and appropriate path, making numerous changes to the procedure, acting with the clear intention of pursuing the public interest and compliance with the rules, also in terms of transparency";
- «As things stand […] Only the members of the office that administers the personnel situation hold this document for the purpose of carrying out the work activity and in the interest of the employee. These documents are kept in compliance with the provisions on the protection of privacy".

On the 20th date, the hearing requested by the Municipality of Asti pursuant to art. 166, paragraph 6, of the Code, on the occasion of which "in addition to what has already been reported in the documentation sent", it was specified that "there was no discriminatory attitude towards the employee, given that it is a case of the all isolated".

5. Outcome of the investigation relating to the report presented

The Municipality of Asti, both in the defense briefs and in the subsequent hearing, confirmed the publication of management decision no. XX of the XX: on the online praetorian register; in the area «“XX”, area XX»; as well as, "at the internal procedural platform (deed management) of the Administration" accessible through access credentials to all employees.

With the aforementioned managerial determination, the granting of days of leave was arranged in favor of the whistleblower, pursuant to law no. 104/992 ("Framework law for assistance, social integration and the rights of handicapped persons"), for parental assistance, Mr. XX.

Therefore, the relative publication on the web and on the internal platform accessible through access credentials to all employees, has caused - respectively - in addition to a "dissemination" to unspecified subjects, also a "communication" to unauthorized third parties (art. 2 -ter, paragraph 4, letters a and b, of the Code) of the personal data and information contained therein, such as the name and surname of the whistleblower, the initials of the parent XX and the indication that the latter is "disabled in serious situation". These elements make the sick parent indirectly identifiable (cf. art. 4, par. 1, n. 1, GDPR).

In this regard, the Municipality highlighted - in support of its defense - that the whistleblower would never have asked the Municipality to remove the data but only "the criterion with which the employees are identified" and that in the published provision there is only the reference to the condition of handicap, without indicating the pathology; as well as, finally, that the processing relating to data on the parent's disability would be lawful in the light of par. 8.6 of the Guarantor's Guidelines «on the subject of personal data processing for the purpose of managing the employment relationship in the public sphere» [doc. web no. 1417809].

From the preliminary investigation it appears that the whistleblower actually turned to the Municipality with the XX note to formally exercise his rights regarding the protection of personal data, without however requesting the removal of personal data. However, the subsequent e-mail from the XX sent by the whistleblower to the Municipality's DPO was acquired in the documents, with which it is requested to "eliminate the free accessibility to sensitive data referring to [one's] parent" and, from the response provided by the Municipality, it would seem that the aforesaid manager has taken action in this sense at the Body, which proceeded to remove the file from XX's website (after the email to the DPO) and from XX's internal network (after notification of the violations by the Guarantor) .

As for the other observations of the Municipality, it is noted that the same do not allow, in any case, to overcome the findings notified by the Office with the deed of initiation of the procedure, since:

- since 2014, the Authority, in the Guarantor's guidelines on transparency, has highlighted that data suitable for revealing the state of health is not only the indication of the pathology, but any information "from which it can be inferred, even indirectly , the state of illness or the existence of pathologies of the subjects involved, including any reference to the conditions of invalidity,

disability or physical and/or mental handicap" (see part one, paragraph 2; part two, paragraph 1; as well as provisions cited in note no. 5). This orientation is confirmed by the new definition of data relating to health contained in art. 4, par. 1, no. 15 of the GDPR (see also cons. n. 35);

- furthermore, as highlighted in the Guarantor's Guidelines «on the matter of personal data processing for purposes of managing the employment relationship in the public sector» cited by the Municipality, the «processing of data relating to the health of the worker (and also of his relatives), in order to allow him to enjoy the benefits of the law [as in the case of] the facilitations provided for the assistance of disabled family members, paid leave and leave for serious family reasons" (par. 8.6).

This, however, means that the Entity can process the aforementioned data for the purposes indicated, but it is certainly not authorized to publish them online either on the institutional website or on the internal portal accessible to all employees.

For these reasons, in relation to the conduct held, the arguments reported by the Municipality are not sufficient to allow the filing of the present proceeding, as none of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019.

In this context, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Municipality of Asti is noted, as the publication of managerial determination n. XX on the internal platform accessible through access credentials to all employees and on the institutional website, has caused the dissemination and communication to unauthorized third parties of data and information on the state of health of the interested party, in violation of the basic principles of the treatment contained in the articles 5, par. 1, lit. a) and c); 9, par. 1, 2, lit. g), and 4, of the GDPR, as well as the ban on the dissemination of health data (2-septies, paragraph 8; see also art. 22, paragraph 8, of the previous Code) and the particular guarantees envisaged for the treatment of particulars of personal data (art. 2-sexies, paragraph 1, of the Code) considering, however, that there is no provision that provides for the making available of the data subject of the report to all employees of the entity via the internal platform accessible with credentials.

Considering, however, that the conduct has exhausted its effects, as the Municipality has taken steps "to remove the deed object of the report from the web and from the management system" and the same cannot be found "other than on the administration's website (from XX) not even on the internal network (from XX)», without prejudice to what will be said on the application of the pecuniary administrative sanction, the conditions for the adoption of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

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

The Municipality of Asti appears to have violated the obligations and basic principles of the treatment contained in the articles 5, par. 1, lit. a) and c); 9, par. 1, 2, lit. g), and 4, of the GDPR, as well as articles 2-sexies, and 2-septies, paragraph 8, of the Code (similar content to the previous article 22, paragraph 8, of the Code).

In this regard, the art. 83, par. 3, of the GDPR, provides that «If, in relation to the same treatment or related treatments, a data controller or a data processor violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction will not exceeds the amount specified for the most serious violation".

In the present case - also considering the reference contained in the art. 166, paragraph 2, of the Code – the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5 of the GDPR, which therefore applies to the present case.

It should also be considered that, even if the violation began in XX, for the determination of the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law n. 689 of 11/24/1981 which, in establishing that «Laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», affirms the recurrence of the principle of tempus regit actum. Compliance with these principles determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - considering 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 the XX on which the GDPR became applicable. In fact, the preliminary investigation documents revealed that the illicit online diffusion ceased in XX (the month in which the Municipality removed the file from the institutional website) and communication to unauthorized third parties ceased in XX (month in which the resolution was also removed from the internal network accessible to all employees).

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR as well as art. 166 of the Code, has the corrective power to «impose a pecuniary administrative sanction pursuant to article 83, in addition to the [other] [corrective] measures referred to in this paragraph, or instead of such measures, depending on the circumstances of every single case". In this framework, «the Board [of the Guarantor] adopts the injunction order, with which it also orders the application of the ancillary administrative sanction of its publication, in whole or in part, on the website of the Guarantor pursuant to article 166, paragraph 7, of the Code" (art. 16, paragraph 1, of the Guarantor's Regulation no. 1/2019).

The aforementioned pecuniary administrative sanction imposed, according to the circumstances of each individual case, must

be determined in the amount, taking into due account the elements provided for by art. 83, par. 2 of the GDPR.

In relation to the aforementioned elements, the reported conduct in violation of the regulations on the protection of personal data concerned the dissemination of data relating to the health of a single interested party. The diffusion lasted for a period of more than three years and from the documents it appears that the whistleblower had already contacted the administration in advance to request a verification regarding the treatment carried out. In any case, the Municipality of Asti highlighted the culpable nature of the violation and the inexistence of any intention to damage or discriminate against the whistleblower. The administration has taken steps to remove the personal data reported and has collaborated with the Authority during the investigation of this proceeding in order to remedy the violation and mitigate its possible negative effects. In the response to the Guarantor, various technical and organizational measures implemented pursuant to articles 25-32 of the GDPR. There are no previous relevant GDPR violations committed by the Municipality of Asti.

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine pursuant to art. 83, para. 2 and 3, of the RGPD, the amount of the pecuniary sanction, provided for by art. 83, par. 5, of the RGPD, in the amount of 8,000.00 (eight thousand) euros for the violation of articles 5, par. 1, lit. a) and c); 9, par. 1, 2, letter g), and 4, of the GDPR, as well as articles 2-sexies, and 2-septies, paragraph 8, of the Code, as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same GDPR.

In relation to the specific circumstances of the present case, it is also believed - also in consideration of the nature of the data subject to unlawful dissemination and the duration of the offense - that the ancillary sanction of publication on the website of the Guarantor of this provision must be applied, envisaged by art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019.

Finally, it is believed that the conditions set forth in art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the processing carried out by the Municipality of Asti pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR, as well as art. 166 of the Code for violation of articles 5, par. 1, lit. a) and c); 9, par. 1, 2, lit. g), and 4, of the GDPR, as well as articles 2-sexies, and 2-septies, paragraph 8, of the Code, in the terms set out in the justification.

ORDER

to the Municipality of Asti, in the person of its pro-tempore legal representative, with registered office in P.zza S. Secondo,1 - 14100 Asti (AT) – Tax Code 00072360050 to pay the sum of 8,000.00 (eight thousand) euros as an administrative fine for the violations indicated in this provision; 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 fine imposed.

ENJOYS

to the same Municipality to pay the sum of 8,000.00 (eight thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting the consequent executive acts pursuant to art. 27 of the law no. 689/1981.

HAS

the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019 and believes that the conditions pursuant to art. 17 of Regulation no. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to art. 78 of the GDPR, of the articles 152 of the Code and 10 of Legislative Decree no. 150/2011, against this provision it is possible to lodge an appeal before the ordinary judicial authority, under penalty of inadmissibility, within thirty days from the date of communication of the provision itself or within sixty days if the appellant resides abroad.

Rome, 26 February 2020

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia