

[doc. web n. 9681028]

Injunction order against the Municipality of Trieste - April 29, 2021

Record of measures

n. 168 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; dr. Agostino Ghiglia

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 / EC, "General Data Protection Regulation" (hereinafter "RGPD");

GIVEN the d. lgs. June 30, 2003, n. 196 containing the "Code regarding the protection of personal data (hereinafter the " Code ");

GIVEN 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 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 (hereinafter "Guidelines on transparency");

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 4/4/2019, published in the Official Gazette n. 106 of 8/5/2019 and in www.gpdp.it, doc. web n. 9107633 (hereinafter "Regulation of the Guarantor no. 1/2019");

GIVEN the documentation in the deeds;

HAVING REGARD to the observations made by the Secretary General pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and operation of the office of the Guarantor for the protection of personal data, in www.gpdp.it, doc. web n. 1098801;

Speaker prof. Pasquale Stanzione;

WHEREAS

1. Introduction

This Authority received a report, with which a violation of the legislation on the protection of personal data by the Municipality of Trieste was complained.

Specifically, from the preliminary verification carried out by the Office, it was found that at the web address [http: // ...](http://...) a web page entitled "Calls and Competitions" was opened, relating to executive determination no. XX, published on XX, concerning "XX" (XX), with the relative "intermediate acts" and "annexes".

Among the attachments published online were freely accessible and available:

1) the file called "XX", downloadable from the url:

[http: // ...](http://...);

2) the "XX" folder, downloadable from the url:

[http: // ...](http://...), which included a folder called "XX", with n. 4 rows, including 2 rows named "XX" and "XX".

All the aforementioned files contained information and personal data, referring overall to hundreds of injured parties involved in the claims, with clear indication, among other things, of the name, the dynamics and type of damage, the date of the accident and the entity of the sum received as compensation. In some cases it was also highlighted the existence of the physical injury reported by the injured party and its type - such as to reveal a data on health -, where the item about the existence of the injury to persons or the related consequences was reported, such as «left femoral neck fracture consisting [of] omitted sidewalk maintenance», «knee contusion», «patella fracture», injury due to falling into a hole or from stairs or due to omitted maintenance, etc.

2. The legislation on the protection of personal data

Pursuant to the relevant regulations, "personal data" is "any information concerning an identified or identifiable natural person ("interested")" and "the natural person who can be identified, directly or indirectly, with particular reference to a 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).

In this regard, public entities, such as the Municipality, may disclose "personal data" only if this operation is provided for "by a law or, in the cases provided for by law, by regulation" (Article 2-ter, paragraphs 1 and 3, of the Code), in compliance - in any

case - with the principles of data protection, including that of "minimization", according to which personal data must be "adequate, relevant and limited to what is necessary in compliance to the purposes for which they are processed "(art. 5, par. 1, lett. c, of the RGPD).

In any case, the dissemination of data relating to health is prohibited (Article 2-septies, paragraph 8, of the Code), ie "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which disclose information relating to your state of health "(articles 4, par. 1, no. 15; 9, par. 1, 2 and 4, recital 35 of the GDPR).

In this context, moreover, it is recalled that since 2014 the Guarantor has highlighted that the data suitable for revealing the state of health are, in addition to those relating to the indication of the pathology, also those relating to any information "from which it can be inferred, even indirectly, the state of illness or the existence of pathologies of the subjects concerned, including any reference to the conditions of invalidity, disability or physical and / or mental handicap "(see provision no. 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 purposes of advertising and transparency on the web by public entities and other obliged entities", being updated but still substantially valid, published in Official Gazette no.134 of 12/6/2014 and in www.gpdp.it, web doc. no. 3134436, first part par. 2 and second part, par. 1; as well as provisions cited therein in note no. 5).

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

Following the verifications carried out on the basis of the elements acquired and the facts that emerged during the investigation, as well as subsequent evaluations, the Office, with note prot. n. XX of the XX, has ascertained that the Municipality of Trieste - by disseminating the data and personal information of the interested parties contained in the documents published online described above - has carried out a treatment that does not comply with the relevant regulations on the protection of personal data contained in the RGPD. Therefore, with the same note the violations carried out (pursuant to art.166, paragraph 5, of the Code) were notified to the aforementioned Municipality, communicating the start of the procedure for the adoption of the measures referred to in Article 58, par. 2, of the RGPD and inviting the aforementioned administration to send to the Guarantor defensive writings or documents and, if necessary, to ask to be heard by this Authority, within the term of 30 days (Article 166, paragraphs 6 and 7, of the Code; as well as art.18, paragraph 1, of law no. 689 of 11/24/1981).

4. Defensive memoirs and hearing.

The Municipality of Trieste, with the note of the twentieth, prot. n. XX - XX, sent to the Guarantor its defense writings in relation

to the notified violations.

In this regard, please note that, unless the fact constitutes a more serious crime, anyone who, in a proceeding before the Guarantor, falsely declares or certifies news or circumstances or produces false documents or documents, is liable pursuant to art. 168 of the Code, entitled "False statements to the Guarantor and interruption of the performance of the tasks or the exercise of the powers of the Guarantor".

Specifically, the entity represented, among other things, that:

- "Immediately upon receipt of the communication, the owner, on the same day of the 20th, implemented all the necessary and adequate measures aimed at eliminating the documents visible in the links highlighted from the website of the Municipality and, after a few hours from the acquisition of the communication of the guarantor, the structure has taken steps to remove the links and, therefore, not to make the data in the indicated folders accessible ";
- "the publication of the files including the names of the injured was due to [...] carelessness and, therefore, due to lack of control";
- "the tender documents, including the files relating to accident statistics, had remained in publication even after the deadline for the notice under the regulatory provisions of art. 8 of Legislative Decree 33/2013 ";
- «the claims statistics files had been [...] published to ensure equal treatment between competitors, in compliance with the indications contained in ANAC Resolution no. 2/2013 and 618/2016, the latter containing: "Operational guidelines and standard contractual clauses for the award of insurance services" [and] the ANAC determinations expressly provide - with a sanction in case of omission - that in the deeds of tender, the potential economic operators must be on a level of real equality, and have all the information necessary for the quotation of the risk (so-called XX), which is an essential element for the Insurance Companies that must know in advance both the number of claims and the value of the same ";
- "the" statistic "whose publication was compulsory involved, however, the necessary cancellation of the column relating to the names of the injured, which was thought to be something already done by the owner who had it available, that is, by the insurance [identified in deeds] , data transmitted by the same to the contracting authority and by the broker and whose cancellation verification [the administration] had not made any checks, trusting in the professionalism of both the Insurance and the Broker ";
- "in consideration of the provisions of the Anti-Corruption Authority referred to in compliance with the principle of minimization,

the only data that had to be obscured were only those relating to the column with the names of the injured parties / compensated with the remaining data in the" dynamic "column and that of "Economic values" and "consequences" »;

- «The data as published were transmitted by the [insurance company identified in deeds], which on the basis of web document n. 9169688 of the Guarantor Authority, as insurance, plays the role of independent Data Controller of the policyholders »;

- "Likewise in relation to the skills of the brokerage service [identified in the documents], whose legal basis for the processing has its source in art. 6, paragraph 1, letter c), being the treatment necessary to fulfill a legal obligation to which the Data Controller is subject for the purposes connected to the pre-contractual and contractual activity of insurance brokerage, connected to the assistance and consultancy activity. and management of the claims settlement phase, in turn is configured as an additional independent Data Controller ".

- "[the administration] has, objectively, relied on both the competence of the insurance holder of the data and the professional competence of the Broker, independent holder";

- "It is therefore clearly the responsibility of the insurance [...] that [has] transmitted the statistics that do not comply with the contractual requirements that did not require [...] among the data to transmit the names of the injured";

- "There are no precedents in relation to procedures, findings or disputes to the detriment of the Municipality of Trieste".

The hearing requested by the Municipality of Trieste pursuant to art. 166, paragraph 6, of the Code on the occasion of which, in addition to confirming and resuming the content of what has already been reported in the defense briefs, it was represented, in addition to what has already been reported in the documentation sent, among other things that:

- "The publication of the disputed files was mandatory, but the names of the interested parties had to be obscured";

- "To this we must add that, from the searches on the log files carried out, from February to November, it was verified that the files distributed were viewed by a few subjects in the number of 55 accesses ... Furthermore, some accesses are only a few seconds and , therefore, not suitable for viewing and downloading the personal data subject to reporting. Presumably the accesses were made by economic operators participating in the tender and by the subjects involved in the sanctioning procedure of the Guarantor for the necessary checks. This can be deduced from the fact that 44 accesses were made during the tender period (February-April), 4 in November (after the contestation by the Guarantor) and 7 in the remaining months, some of which only took a few seconds ";

- «In relation to the principle of accountability (art. 5, par. 2 and 24 of the RGPD), all subjects participating in the processing are jointly responsible. In this regard, it is recalled that the Guarantor in the provision of 28/10/2019 (web doc. N.9169688) qualifies the particular position of the insurance company with respect to the data subject of this proceeding, well regulated also in the contractual relationship between the Municipality and the company insurance »;

- «We also recall the provisions that oblige the insurance company and the broker to transmit the data to the Municipality to be published - pursuant to art. 9, 14, of the tender regulations - in compliance with the legislation on the protection of personal data »;

- "The municipal body could therefore respond on a residual basis for the failure to supervise the failure to delete personal data transmitted by the insurance company prior to online disclosure. This omission can also be attributed to the particular moment in which the pp.aa. in the period of emergency from Covid-19 and lockdown, remote work, as well as the urgency to activate the tender procedures also due to the delay with which the insurance company transmitted the statistical data to the Municipality for the purposes of the aforementioned tender which was expiring »;

- "The Entity also asks to take into account that in the structure and especially in the contract sector, as a form of prevention, a capillary training activity has also been carried out for employees on the precautions to be observed in the matter of publishing data online and that the error is due to the extemporaneous coexistence of the aforementioned external events. In any case, what happened constitutes a completely accidental and above all occasional event, also due to the fact that in the excel file published, containing numerous information columns, the column of the interested parties was not immediately visible and in the individual passages the relative presence escaped. As a demonstration of the good faith of the Municipality, it should be noted that art. 14 of the contractual specifications, which regulates the relationship between the Municipality and the insurance company, expressly states that the names of the interested parties must not be contained in the statistics that the insurance company is required to transmit to the Municipality. The Municipality was, therefore, misled by the failure to comply with the contractual fulfillment of the aforementioned company which, on the other hand, also transmitted the names of the interested parties published online. It should be noted that if the insurance company had complied with the aforementioned contractual obligation - in which the Municipality had relied on - there would have been no disclosure of personal data »;

- "It is added, moreover, that - for the entire duration of the publication - the Municipality has not received any report or complaint, or grievance from the interested parties or third parties, nor any request for damages".

5. Evaluations of the Guarantor

The issue that is the subject of the case submitted to the attention of the Guarantor concerns the dissemination of personal data and information contained in some files on the statistics of damages published online by the Municipality of Trieste as part of a procedure for the assignment of the general civil liability insurance service of the 'body. These files in excel format contained information and personal data, referring overall to hundreds of injured parties, with clear indication, among other things, of the name, the dynamics and type of damage, the date of the accident and the amount of the sum. received as compensation. In some cases it was also highlighted the existence of the physical injury reported by the injured party and its type - such as to reveal a data on health -, where the item about the existence of the injury to persons or the related consequences was reported, such as «left femoral neck fracture consisting [of] omitted sidewalk maintenance», «knee contusion», «patella fracture», injury due to falling into a hole or from stairs or due to omitted maintenance, etc.

In this regard, it is noted as a preliminary point - in order to respond to the objection of the entity contained in the defense briefs in the part in which reference is made to the insurance company as if it were the only independent holder of the data of the insured - that the Municipality of Trieste undoubtedly holds the title of data controller carried out in the case examined, relating to the dissemination of personal data on the institutional website, pursuant to art. 4, par. 1, no. 7, of the GDPR. This clarified, in the context of the investigation opened in this regard by this Authority, the Municipality has in any case confirmed the online dissemination of the personal data described above, representing that the publication of documents relating to accident statistics was mandatory and necessary " to ensure equal treatment among competitors, in compliance with the indications contained in ANAC Resolution no. 2/2013 and 618/2016 ", as well as to guarantee potential economic operators who wanted to submit offers, as part of the procedure for awarding the entity's general civil liability insurance service," all the information necessary for listing the risk (so-called XX), which constitutes an essential element for Insurance Companies which must know in advance both the number of claims and their value ".

However, the same body pointed out in this regard that in carrying out this publication it would have been necessary to "delete the column relating to the names of the injured parties", obscuring the identity of the interested parties, and that "the publication of files including the names of the injured parties [it] occurred due to [...] carelessness and, therefore, due to lack of control "by the Municipality.

In relation to the conduct, however, the administration also highlighted that the aforementioned incorrect publication is also due

to the fact that it had thought that the obscuring of personal data contained in the statistics had been carried out upstream by the insurance company and the broker at the time. the transmission of the files to the contracting authority. This in consideration - as stated in the defense briefs and during the hearing - of the provisions contained in Articles 9 and 14 of the tender regulations / contractual specifications "which regulates the relations between the Municipality and the insurance company, [where it is] expressly stated that in the statistics that the insurance company is required to transmit to the Municipality, the names of the stakeholders". Consequently, the entity argued that "if the insurance company had complied with the aforementioned contractual obligation - in which the Municipality had relied on - there would have been no disclosure of personal data". The Municipality would therefore "have been misled by the failure to comply with the contractual fulfillment of the aforementioned company which, on the other hand, also transmitted the names of the interested parties published online". In the context described, it is acknowledged - without this affecting the judgment regarding the lawfulness of the processing but as an element for the evaluation of the conduct - of the good faith of the entity and the circumstance that the error committed by it in the publication of the files subject of this proceeding may also be due to the behavior of the insurance company that transmitted the statistics to the Municipality without eliminating the column containing the names of the injured parties (whose knowledge is in no way necessary for the purposes of the procedure for the assignment of the insurance service of general civil liability of the entity).

However, the circumstances highlighted in the defense writings, examined as a whole, certainly worthy of consideration for the purposes of assessing the conduct, are not sufficient to allow the filing of this proceeding against the Municipality of Trieste, since none of the hypotheses envisaged exist. from art. 11 of the Guarantor Regulation n. 1/2019.

6. Outcome of the investigation relating to the complaint presented

For all of the above, the preliminary assessments of the Office contained in the note prot. n. XX of the XX and the unlawfulness of the processing of personal data carried out by the Municipality of Trieste is noted, as the publication of the files previously identified in par. 1, called "XX", "XX" and "XX", caused the dissemination of the data and personal information of the interested parties contained therein, referring overall to hundreds of damaged parties, with clear indication, among other things, of the name, the dynamics and type of damage, the date of the accident and the amount of the sum received as compensation, highlighting. in some cases, even the existence of the physical injury reported by the injured party and its type, such as to reveal a data on health (where the item about the existence of the injury to persons or the related consequences was reported,

such as " left femoral neck fracture consisting of [from] omitted sidewalk maintenance "," knee contusion "," patella fracture ", injury from falling into a hole or from stairs or from omitted maintenance, etc.).

This conduct produced:

- a dissemination of personal data in the absence of suitable regulatory conditions, not being provided for by any provision of law or regulation, in violation of art. 2-ter, paragraphs 1 and 3, of the Code; as well as the basic principles of processing contained in articles 5, par. 1, lett. a) and c); 6, par. 1, lett. c) and e), par. 2 and par. 3, lett. b), of the GDPR;
- dissemination of data on the health of the parties concerned, in violation of the specific prohibition provided for by art. 2-septies, paragraph 8, of the Code; as well as the basic principles of the processing referred to in art. 5, par. 1, lett. a) and c); 9, para. 1, 2 and 4 of the GDPR.

Considering, however, that the conduct has exhausted its effects, as the data controller has declared that he has removed personal data from the web, 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.

7. Adoption of the injunction order for the application of the pecuniary administrative sanction (Articles 58, paragraph 2, letter i; 83 of the GDPR)

The Municipality of Trieste appears to have violated Articles 5, par. 1, lett. a) and c); 6, par. 1, lett. c) and e), par. 2 and par. 3, lett. b); 9, para. 1, 2 and 4, of the GDPR; as well as Articles 2-ter, paragraphs 1 and 3; 2-septies, paragraph 8, of the Code.

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

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

The Guarantor, pursuant to art. 58, par. 2, lett. i) and 83 of the RGPD, as well as art. 166 of the Code, has the corrective power to "inflict 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 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 GDPR.

In this sense, the detected conduct in violation of the regulations on the protection of personal data is of a culpable nature and linked to "a completely accidental and [...] occasional event". The processing has in any case had as its object the online dissemination of personal data, for about nine months, also belonging to particular categories (in this case of data relating to health referred to in art.9, of the RGPD), referring as a whole to more than 1100 stakeholders. The Municipality of Trieste is a medium-sized body (just over 201,500 inhabitants), which in any case intervened promptly following the request of the Office, collaborating with the Authority during the investigation of this procedure in order to remedy the violation, mitigating the possible negative effects. In the reply to the Guarantor, various technical and organizational measures implemented pursuant to art. 25-32 of the RGPD and, in any case, there are no relevant previous violations of the RGPD committed by the entity.

It is also believed that the following can be considered as additional mitigating circumstances: the limited number of accesses made to the files subject to online dissemination (as shown in the log files cited in the defense briefs); the reliance that the Municipality placed on the insurance company regarding the transmission of accident statistics without personal data; the "urgency to activate the tender procedures also due to the delay with which the insurance company transmitted the statistical data to the Municipality for the purposes of the aforementioned tender which was about to expire"; as well as the absence of "any report or complaint, or grievance by the interested parties or third parties, nor any request for damages" against the Municipality.

Due to the aforementioned elements, assessed 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, to the extent of € 45,000.00 (forty-five thousand) for the violation of Articles 5, par. 1, lett. a) and c); 6, par. 1, lett. c) and e), par. 2 and par. 3, lett. b); 9, para. 1, 2 and 4, of the GDPR; as well as Articles 2-ter, paragraphs 1 and 3; 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 RGPD.

In relation to the specific circumstances of this case, relating to the dissemination of personal data online also relating to health

in violation of the prohibition set out in art. 2-septies, paragraph 8, of the Code, it is also believed that the ancillary sanction of the publication of this provision on the website of the Guarantor, provided for 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 out in art. 17 of the Guarantor Regulation n. 1/2019.

WHEREAS, THE GUARANTOR

the unlawfulness of the processing carried out by the Municipality of Trieste in the terms indicated in the motivation pursuant to Articles 58, par. 2, lett. i), and 83 of the GDPR

ORDER

to the Municipality of Trieste, in the person of the pro-tempore legal representative, with registered office in Piazza dell'Unità d'Italia, 4 - 34121 Trieste (TS) - Tax Code 00210240321 to pay the sum of € 45,000.00 (forty-five thousand) as a pecuniary administrative sanction for the violations mentioned in the motivation;

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to the same Municipality to pay the sum of € 45,000.00 (forty-five 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.

Please note that the offender has the right to settle the dispute by paying - again according to the methods indicated in the annex - of an amount equal to half of the sanction imposed, within the term set out in art. 10, paragraph 3, of d. lgs. n. 150 of 1/9/2011 provided for the submission of the appeal as indicated below (Article 166, paragraph 8, of the Code).

HAS

- the publication of this provision on the website of the Guarantor pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019;
- the annotation in the internal register of the Authority of the violations and measures adopted pursuant to art. 58, par. 2, of the RGD with this provision, as required by art. 17 of the Guarantor Regulation n. 1/2019.

Pursuant to art. 78 of the RGD, of the arts. 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

Stanzione

THE SECRETARY GENERAL

Mattei