

[doc. web no. 9446659]

Injunction order against the Municipality of Baronissi - 9 July 2020

Register of measures

no. 139 of 9 July 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Prof. Licia Califano and Dr. Giovanna Bianchi Clerici, members and Dr. 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");

CONSIDERING the d. lgs. 30 June 2003, no. 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 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 and in www.gpdp.it, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

HAVING REGARD to 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 office of the Guarantor for the protection of personal data, in www.gpdp.it, doc. web no. 1098801;

Speaker Dr. Antonello Soro;

WHEREAS

1. Introduction

This Authority has received a complaint regarding the publication on the institutional website of the Municipality of Baronissi of personal data and information of Mr. XX and his spouse XX.

In particular, from the preliminary assessment carried out by the Office on the 20th date, it emerged that the following documents were visible and freely downloadable on the institutional website of the aforementioned Municipality, in the Online Services/Historic Praetorian Register section: Provvedimento prot. no. XX of the XX of the urban planning-construction sector concerning «XX», with attached the note of the municipal technician prot. no. XX of XX having as object «XX (url <http://...>)». The aforesaid documents contained personal data and information of the subjects concerned, such as personal data and residence data, identification and cadastral data of the owned property, information relating to the construction of illegal works and the findings from the inspection report, photographic surveys the veranda of your apartment, etc.

2. Applicable law.

Pursuant to the legislation on the matter, "personal data" is "any information relating to an identified or identifiable natural person ("interested party") and "an identifiable natural person is one who can be identified, directly or indirectly, with particular reference to an identifier such as a name, an identification number, location data, an online identifier or one or more characteristic elements of his physical, physiological, genetic, mental, economic, cultural or social identity" (Article 4, paragraph 1, No. 1 of the GDPR).

The processing of personal data must take place in compliance with the principles indicated in the 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 personal data carried out by public subjects (such as the Municipality) is lawful only if necessary "to fulfill a legal obligation to which the data controller is subject" or "for the execution of a task of public interest or connected to the exercise of public powers vested in the data controller" (Article 6, paragraph 1, letters c and e, of the GDPR). It is also foreseen that «Member States may maintain [...] more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), by determining more precisely specific

requirements for treatment and other measures aimed at guaranteeing lawful and correct treatment [...]", with the consequence that the provisions contained in art. 19, paragraph 3, of the Code (now repealed but in force at the material time, the content of which is reproduced in Article 2-ter, paragraphs 1 and 3, of the Code), where it is envisaged that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when required by law or regulation. In this regard, state sector legislation provides that «All the resolutions of the municipality and the province are published by publication on the praetorian register, at the headquarters of the institution, for fifteen consecutive days, except for specific provisions of the law» (art. 124 , paragraph 1, of the legislative decree 18/8/2000 n. 267).

The Guarantor has provided specific indications to the public administrations regarding the precautions to be taken for the dissemination of personal data on the Internet for purposes of transparency and publicity of the administrative action with its own Guidelines on transparency, also with reference to publications in the online praetorian register of local authorities. In the aforementioned Guidelines, it is expressly provided that, once the time period envisaged by the individual disciplines for the publication of the deeds and documents in the praetorian register has elapsed: «local authorities cannot continue to disseminate the personal data contained therein. Otherwise, for the period exceeding the duration envisaged by the reference legislation, there would be an illicit dissemination of personal data because it is not supported by suitable regulatory conditions [...]. In this regard, for example, the permanence on the web of personal data contained in the resolutions of local authorities beyond the fifteen-day deadline, established by art. 124 of the aforementioned d. lgs. no. 267/2000, can integrate a violation of the aforementioned art. 19, paragraph 3, of the Code [editor's note today reproduced in the art. 2-ter, paragraphs 1 and 3, of the Code], where there is no different legislative or regulatory parameter that provides for its dissemination [...]. [In this case] if the local authorities want to continue to maintain the published deeds and documents on their institutional website, for example in the sections dedicated to the archives of the deeds and/or legislation of the entity, they must take the appropriate precautions for the protection of personal data. In such cases, therefore, it is necessary to obscure in the published documentation the data and information suitable for identifying, even indirectly, the interested parties» (part two, paragraph 3.a).

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 has ascertained that the

Municipality of Baronissi by disseminating - at least until the preliminary verification carried out by the Office on the XX - the personal data of the complainants, contained in the documents identified above published on the institutional website, has carried out a treatment of personal data does not comply with the relevant regulation on the protection of personal data contained in the RGD. Therefore, with the same note the violations carried out were notified to the Municipality (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, par. . 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 the term of 30 days (Article 166, paragraphs 6 and 7, of the Code; as well as Article 18, paragraph 1, of Law No. 689 of 11/24/1981).

4. Defensive memories and hearing.

With the note prot. no. XX of the XX the Municipality of Baronissi 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, entitled «False statements to the Guarantor and interruption of the performance of the duties or exercise of the powers of the Guarantor».

Specifically, it was highlighted, among other things, that:

- "First of all, it is reiterated that the publication of the ordinance in question (cf. Prov. Prot. n. XX of XX) concerning personal data and information - freely visible and downloadable on the institutional website of the Municipality of Baronissi (Servizionline/Albo Pretorio) – occurred beyond the time prescribed by law due to a mere technical error and a mix-up relating to the internal organization of this Municipality».
- «A scrupulous and diligent obligation towards the legislation on transparency then guided the organization of the Municipality and the personnel in charge, deeming the publication of the common data relating to the ordinance in question due and necessary».
- "In the background a conduct based on good faith and respectful of the context in which this error occurs [...]".
- «the Municipality of Baronissi has taken steps to adopt specific guidelines on the general principles and issued directives regarding the processing of personal data, if the purposes of publicity and transparency of the administrative action emerge,

also representing the multiple hypotheses in which the activity of the public administration, rectius of the Municipality of Baronissi, can reconcile the needs of transparency referred to in the prescribed rules, those of advertising in conjunction with the rules to be observed on the processing of personal data, especially in terms of relevance and necessity of the treatment (principle of minimisation)'.

- «In order to ensure that the contents of the aforementioned ordinance fulfill the obligation prescribed by law without violating the precepts imposed by Regulation (EU) 2016/679, by Legislative Decree 196/2003 and Legislative Decree 101 of 2018, the Municipality of Baronissi has undertaken to remove the aforementioned ordinance from its institutional website. In this regard, the Local Authority itself has organized itself, after the time prescribed by law to comply with the transparency and publicity obligations, to make the administrative deeds and documents present in the Archive section of the Municipality, but accessible only upon request by the interested party". .

- The institution "has issued very precise instructions aimed at modifying the information contained in the administrative documents issued and to be issued, avoiding the insertion of irrelevant and excessive personal data with respect to those necessary, aimed at respecting the constraints of the law".

5. Outcome of the investigation relating to the complaint presented

The subject matter of the case brought to the attention of the Guarantor concerns the dissemination of personal data and information of the complainants (such as personal and residence data, identification and cadastral data of the owned property, information relating to the construction of illegal works and results from the report inspection, photographic surveys of the veranda of the apartment subject to the surveys) contained in the provision prot. no. XX of the Municipality and the relative annex containing the note of the municipal technician prot. no. XX.

In its defense briefs, the Municipality confirmed the online disclosure of the complainants' personal data, justifying it in the light of "a mere technical error" and "a mistake relating to the internal organization [of] the Municipality", as well as an incorrect assessment with regard to the application of the provisions on transparency and personal data protection.

Some observations in this regard, although worthy of consideration, do not in any case allow to overcome the findings notified by the Office with the act of initiation of the procedure and are insufficient to allow the closure of the present procedure, since none of the cases envisaged apply by art. 11 of the Regulation of the Guarantor n. 1/2019. This also considering that since 2014 the Authority, in the Guidelines on transparency, has provided all public entities with specific indications on how to

reconcile the transparency and publicity obligations of administrative action with the right to the protection of personal data of the interested parties.

In this context, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Baronissi is noted, as the complete publication on the institutional website of the document prot. no. XX of the XX of the urban planning-building sector of the Municipality of Baronissi concerning «XX», with all the data and information in clear text of the interested parties, has produced a dissemination of the personal data of the complainants who:

to. were not necessary with respect to the purpose of the processing, with particular reference to the successful dissemination of the date and place of birth, residence, identification and cadastral data of the owned property, information relating to the creation of illegal works, in violation of the principle of minimization and, therefore, of the basic principles of the treatment contained in the articles 5, par. 1, lit. c) of the GDPR;

b. lasted for more than fifteen days provided for by art. 124, paragraph 1, of Legislative Decree lgs. no. 267/2000 for publication in the praetorian register, therefore in the absence - for the excess time period - of suitable regulatory conditions for the dissemination of personal data and, therefore, in violation of art. 19 paragraph 3 of the Code (in force at the material time and whose content is now reproduced in art. 2-ter, paragraphs 1 and 3, of the Code), as well as the basic principles of treatment contained in articles 5, par. 1, lit. a and c; 6, par. 1, lit. c and e, par. 2 and par. 3, letter. b of the GDPR.

Considering, however, that the conduct has exhausted its effects, as the personal data of the complainants described above are no longer accessible at the url address indicated above, without prejudice to what will be said on the application of the pecuniary administrative sanction, the conditions do not apply 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 Baronissi appears to have violated the articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b) of the GDPR; as well as the art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct.

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 this case, 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 taken into account that, although the document subject to the complaint, published online, dates back to May 2017, in order to determine the applicable rule, in terms of time, the principle of legality pursuant to art. 1, paragraph 2, of the law no. 689/1981 which establishes as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - given the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the 25/5/2018 in which the RGPD became applicable. In fact, the preliminary investigation documents revealed that the illicit online diffusion lasted at least until the preliminary verification carried out by the Office on the twentieth.

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 personal data not belonging to particular categories or to criminal convictions or crimes (articles 9 and 10 of the GDPR) of two interested parties. The diffusion lasted for several years, but the administration took steps to obscure the personal data object of the complaint, collaborating with the Authority during the investigation of the present proceeding in order to remedy the violation - whose character, also given what was stated by the Municipality, it appears to be culpable - mitigating 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 Baronissi.

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 2,000.00 (two thousand) euros for the violation of articles 5, par. 1, lit. a) and c); 6, par. 1, lit. c) and e), par. 2 and par. 3, letter. b) of the GDPR; as well as of the art. 19, paragraph 3, 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, relating to the violation of the principle of data minimization and the dissemination of personal data on the web in the absence of a suitable regulatory basis, it is also believed that the accessory sanction of 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's Regulation n. 1/2019.

It is also believed 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.

ALL THIS CONSIDERING THE GUARANTOR

having detected the illegality of the treatment carried out by the Municipality of Baronissi in the terms indicated in the motivation pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR

ORDER

to the Municipality of Baronissi, in the person of its pro-tempore legal representative, with registered office in Piazza della Repubblica, 1 - 84081 Baronissi (SA) – Tax Code 80032710651 to pay the sum of 2,000.00 (two thousand) euros as an administrative fine for the violations referred to in the justification;

ENJOYS

to the same Municipality to pay the sum of 2,000.00 (two 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.

It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph 8, of the Code).

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's Regulation n. 1/2019, and it is also 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.

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, 9 July 2020

PRESIDENT

Soro

THE SPEAKER

Soro

THE SECRETARY GENERAL

Busia