[doc. web no. 9302897]

Injunction order against the Municipality of Colledara - 30 January 2020

Register of measures

no. 20 of 30 January 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);

CONSIDERING the d. lgs. 30 June 2003, no. 196 containing the "Code regarding the protection of personal data" (hereinafter "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 and in www.gpdp.it, 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 office of the Guarantor for the protection of personal data (web doc. n. 1098801);

Supervisor Prof. Licia Califano;

WHEREAS

1. Introduction

This Authority has received a report from Mr. XX regarding the publication on the institutional website of the Municipality of Colledara of personal data and information, contained in the rankings relating to the XX public competition.

Specifically, as verified on the basis of the first preliminary assessment carried out by the Office on XX, it was found that:

1) at the url http://... there was the document entitled "Public competition XX", which contained the ranking of suitable and unsuitable candidates, with the marks obtained for the qualifications and in the various tests (written and oral) in the aforementioned competition (n. XX competitors);

2) at the url http://... there was the Determination of the Accounting Sector of the Municipality of Colledara n. XX of the XX concerning «Public competition XX», which contained the documents and minutes of the Competition Commission, with personal data and information of the participants in the written and oral tests, such as names: of the candidates who took the written tests (no. XX) with an indication of the points assigned (divided by qualifications, service, curriculum and various qualifications; as well as the mark of the two written tests including the indication, depending on the case, of a written test that cannot be evaluated or not examined); of the candidates who extracted the traces or who attended the delivery operations of the documents (No. XX); of the subjects who took part in the oral tests with specific indication of the questions and the marks obtained (no. XX).

With a subsequent assessment by the Office carried out on the XX date, it was verified that the personal data of competitors who had not been admitted to the competition or who were not winners (but who had only been admitted, even if only conditionally, to take the written tests) were still visible), contained in documents entitled as follows:

3) «Public competition XX» (url http://...), which contained personal data of all candidates admitted to take the written tests (name, place and date of birth of XX subjects);

4) «Public competition XX» (url http://...), which contained personal data of candidates not admitted to take the written tests (name, place and date of birth, reasons for exclusion, referring to n. XX subjects);

5) «Public competition XX» (url http://...), which contained personal data of all candidates admitted, even with reservations, to take the written tests (name, place and date of birth of XX subjects).

In this regard, the Municipality of Colledara responded to the requests for information from this Authority (notes prot. n. XX of the XX and n. XX of the XX) with the notes prot. no. XX of the XX and prot. no. XX of the XX

Specifically, with the notes prot. no. XX of the XX and prot. no. XX of the XX was, among other things, represented that he had

taken steps to remove the disputed documents since "the reason for the publication no longer exists (i.e. the knowledgeability for the purposes of the appeal, within the terms of the law, by any interested parties)" , adding that:

- «the data referred to in points 1-2-3 [editor's note of the Guarantor's request for information corresponding to the previous nos. 3, 4 and 5 indicated in this paragraph] do not pertain to any competition ranking, not even intermediate tests. It is the list of candidates called to take the written tests (first competition test in the absence of a previous pre-selection test)»;

- «The publication in the Transparent Administration Section fulfilled the function of legal publicity for the purpose of notifying the written test diary to the participants»;

- "In order to facilitate the procedures for consulting the rankings or the results of the competition tests, the Body is currently evaluating (as proposed by the Personal Data Protection Officer) the evaluation of software applications on the web, that allow access with authentication credentials only to interested parties".

The Body's personal data protection officer, in turn, with note prot. no. XX of the XX (attached to the response of the Municipality), specified that:

- «the documents relating to the final ranking of the competition and determination no. XX of the XX have been published in the Praetorian Register and on the website of the Municipality, as required by Legislative Decree on Transparency n. 33 of 03/14/2013";

- "in art. 6 (XX) of the Public Competition Announcement XX published on the XX date "The lists of admitted candidates, those excluded, the exam schedules, the results of the tests and any other communication concerning the competition in question, will be made public exclusively through publication on the Praetorian register online and on the website of the Municipality ... omissis";

- «in the application for participation in the aforementioned tender, it was requested to accept the following conditions by explicitly crossing out the following points:

• To be aware of the provisions contained in the competition announcement and to accept them in full;

• To have acknowledged that all communications relating to the competition procedure, including the calendar of tests and any other communication, will be disclosed exclusively by publication in the online Praetorian Register .... omitted";

- "All participants in the Call, having signed the application form, have accepted the conditions indicated in the application itself [...]".

2. Applicable legislation

Pursuant to the relevant legislation, "personal data" is "any information relating to an identified or identifiable natural person ("data subject"); 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 identity, physiological, genetic, psychic, economic, cultural or social" (art. 4, par. 1, n. 1, of the RGPD).

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).

Furthermore, it is envisaged that «Member States may maintain […] more specific provisions to adjust the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), determining with greater precision specific requirements for the treatment and other measures aimed at guaranteeing a lawful and correct treatment [...]", with the consequence that - in the present case - the provisions contained in the art. 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 provided for by a law or, in the cases envisaged by the regulating law (the previous article 19, paragraph 3, of the Code was of the same tenor).

In relation to the case brought to the attention of the Guarantor, it should be noted that the state legislation on transparency contained in Legislative Decree lgs. no. 33/2013, cited by the Personal Data Protection Officer of the Municipality of Colledara, does not provide for the disclosure of personal data contained in the documents published online, previously detailed in par. 1 to nos. 1-5, and that the only provision relating to competitions and selective tests contained in art. 23, paragraph 1, lett. c), of the aforesaid decree (moreover relating to the publication of summary elements of the final provisions of the proceedings and not of the deeds, minutes, lists of admitted candidates, rankings formed at the conclusion of the procedure, nor of information

concerning any intermediate tests), was repealed by art. 22, paragraph 1, lett. a), no. 3), of the d. lgs. 25/5/2016, no. 97.

Furthermore, the further arguments reported by the aforementioned Data Protection Officer cannot be accepted. Firstly, the art. 6 of the Public Competition Announcement XX does not meet the requirements of the aforementioned art. 2-ter, paragraphs 1 and 3 (as well as the previously applicable art. 19, paragraph 3) of the Code, given the nature of a non-regulatory deed of the competition announcement (see the Guarantor's provision n. 384 of 6/12/2012 , at www.gpdp.it, web doc. n. 2223278).

Similarly, it is not possible to invoke, as a suitable prerequisite for disseminating personal data online, "the consent" from the competitors which would have been expressed with the acceptance, in the application form, of the clauses contained in the announcement. This is because «The legal basis envisaged by article 6, paragraph 3, letter b), of the regulation consists exclusively of a law or, in the cases provided for by law, a regulation» (article 2-ter, paragraph 1 , of the Code) and, as a rule, it is therefore not possible to ask for consent to the processing of personal data of the subjects concerned by public bodies (Article 6, paragraph 1, letters c and e; recital No. 43, of the Regulation; art. 2-ter, paragraph 1, of the Code, as well as the previous art. 18, of the Code).

Furthermore, the Municipality has not indicated further provisions of law or regulation which provide for forms of "legal publicity" aimed at the "notification of the written test diary to the participants", with the obligation to publish the "list of candidates called to take the written tests (first competition test in the absence of a previous pre-selection test) », as supported in the note prot. no. XX of the XX.

On the other hand, it should be noted that, in the case in question, the sector discipline contained in art. 15, paragraph 6-bis, of the Presidential Decree 9/5/1994, no. 487 (Regulation containing rules on access to employment in public administrations and the procedures for carrying out competitions, single competitions and other forms of recruitment in public employment), which provides, in the first place, that they are published "in the praetorian register of the related body” the only definitive rankings of the winners of the competition at the local territorial bodies and not also, as in the matter brought to the attention of the Guarantor, the personal data previously detailed in par. 1 to nos. 1-5, referring to candidates who: have been admitted, even with reserve, to take the written tests (name, place and date of birth of XX subjects); participated in the written and oral tests (name with indication of the points awarded for qualifications, service, curriculum and various qualifications; of the vote or outcome of the two written tests even if not assessable or not examined of a total of XX subjects; have extracted the traces or

who have attended the delivery operations of the documents (n. XX subjects) have participated in the oral tests with specific indication of the questions and the grade obtained (n. XX subjects).

On the other hand, in compliance with the principles of "purpose limitation" and "data minimization" (Article 5, paragraph 1, letters b and c, of the GDPR) and, in compliance with the Guarantor's Guidelines on transparency, "in order to facilitate the procedures for consulting the rankings to be published in compliance with sector regulations (for purposes other than transparency), the same may also be made available to interested parties in selected access areas of institutional websites, allowing the consultation of the results of the tests or of the proceeding only to the participants in the tender or selection procedure by attributing them authentication credentials (e.g. username or password, protocol number or other identification details provided by the entity to those entitled, or through the use of authentication devices, such as the national service card)" (second part, par. 3.b).

This was also understood by the Municipality of Colledara which, in responding to the Guarantor's request for information, highlighted that they are being evaluated "In order to facilitate the procedures for consulting the rankings or the results of competition tests, [...] software applications on the web, which allow access with authentication credentials only to interested parties".

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

As a preliminary point, it should be noted that, unless the fact constitutes a more serious offence, whoever, 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».

In this context, on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent evaluations, the Office ascertained that the Municipality of Colledara with the complete publication of the documents identified in par. 1 to nos. 1-5 has caused the dissemination of personal data and information contained therein and described above.

Since the processing of personal data carried out does not comply with the relevant regulations on the protection of personal data, we proceeded with the notification of the violations carried out by the Municipality (pursuant to article 166, paragraph 5, of the Code), communicating to the body the initiation of the procedure for the adoption of the measures referred to in Article

58, paragraph 2, of the GDPR and inviting him to send the Guarantor defense writings or documents and, possibly, to ask to be heard by this Authority, within the deadline 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. Outcome of the investigation relating to the report presented

The Municipality of Colledara in the defense briefs and in the observations of the Data Protection Officer attached to them, confirmed the successful dissemination of the personal data object of the report, as well as the violation of the notified provisions, albeit caused by an incorrect application of the art. 23, paragraph 1, lett. c), of Legislative Decree lgs. no. 33/2013 and "subject to the consent expressed by the participants during the registration phase of the tender clauses (art. 6 [...])", also considering "the need for speed of the procedure and given the impossibility of proceeding with the assignment of the service of computerized management of applications to participate in an external company, in consideration of the scarce budget resources".

However, these elements, although worthy of consideration, do not allow the findings notified by the Office to be overcome with the act of initiation of the procedure and are not sufficient to allow the closure of the present procedure, since none of the cases provided for by the art. 11 of the Regulation of the Guarantor n. 1/2019. This also considering that since 2014 the Authority, in the Guidelines mentioned above, has provided all public entities with specific indications on how to reconcile the transparency and publicity obligations of administrative action with the right to protection of personal data of the interested parties .

Therefore, the preliminary assessments of the Office are confirmed and the illegality of the processing of personal data carried out by the Municipality of Colledara is noted, for having disseminated personal data and information contained in the documents identified above in par. 1 to nos. 1-5, referring - in particular - to competitors who: have been admitted, even with reserve, to take the written tests (name, place and date of birth of XX subjects); participated in the written and oral tests (name with indication of the points awarded for qualifications, service, curriculum and various qualifications; of the vote or outcome of the two written tests even if not assessable or not examined of n. XX subjects in all) ; have extracted the traces or have attended the delivery operations of the documents (n. XX subjects); participated in the oral exams (name with specific indication of the questions and the mark obtained by No. XX subjects).

The aforementioned disclosure of personal data took place in the absence of suitable regulatory conditions, in violation of art.

2-ter, paragraphs 1 and 3 (and of the previous art. 19, paragraph 3, of the Code), as well as the basic principles of the treatment contained in 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 RGPD (see also the provision contained in article 15, paragraph 6-bis, of the Presidential Decree 9/5/1994, n. 487).

In this context, considering, in any case, that the conduct has exhausted its effects, given that the Municipality has declared that it has taken steps to remove the documents from the institutional website, the conditions do not exist for the adoption of corrective measures pursuant to to art. 58, par. 2, of the Regulation.

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

The violation of the aforementioned provisions, caused by the conduct put in place by the Municipality of Colledara noted above, is subject to the application of the administrative fine pursuant to art. 83, par. 5, letter. a) of the GDPR.

The Municipality of Colledara appears to have violated the art. 2-ter, paragraphs 1 and 3 (and of the previous art. 19, paragraph 3, of the Code), as well as the basic principles of the treatment contained in 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 (see also art. 15, paragraph 6-bis, of the Presidential Decree n. 487/1194). In this regard, the art. 83, par. 3, of the Regulation, on the basis of which, if, in relation to the same treatment or related treatments, a data controller violates, with willful misconduct or negligence, various provisions of the Regulation, the total amount of the pecuniary administrative sanction does not exceed the amount specified for the most serious violation (referred to in Article 83, paragraph 5, of the Regulation), thus absorbing the other less serious violations. Therefore, the aforementioned violations having as their object, among others, the dissemination of personal data in the absence of a suitable legal basis consisting exclusively of a law or regulation pursuant to art. 2-ter of the Code, are to be traced back, pursuant to art. 83, par. 3 of the same Regulation and of the art. 166, paragraph 2, of the Code, in the context of the sanction envisaged for the aforementioned violation with consequent application of the sanction envisaged in art. 83, par. 5, of the Regulation.

It should also be considered that, although the violation began in December 2017, 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 providing that «The laws that provide for administrative sanctions are applied only in the cases and within the times considered in them», asserts the recurrence of the principle of tempus regit actum. The application of these principles determines the obligation to take into consideration the provisions in force at the time of the violation committed. In the present case, this moment - considering the permanent nature of the disputed offense - must be identified in the moment of cessation of the unlawful

conduct, which from the preliminary investigation documents appears to have lasted at least until the verification carried out by the Office on the institutional website on 9/8/2018, i.e. after 25/5/2018 in which the GDPR became applicable.

The Guarantor, pursuant to articles 58, par. 2, lit. the); 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 each individual case" and, 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 full 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 aforesaid elements, the detected conduct in violation of the regulations on the protection of personal data concerned the dissemination of personal data of competitors in selective tests who were not admitted or who did not win with the marks obtained. The diffusion lasted for a period of about a year. The Municipality of Colledara, which is a small entity (approx. 2200 inhabitants) with a limited number of employees and scarce budgetary resources, has, in any case, highlighted: the culpable nature of the violation, the need for speed of insolvency procedure, as well as the limited number of interested parties participating in the competition. The body then took action to remove the personal data of the interested parties and collaborated with the Authority during the investigation of the present 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 Colledara.

Based on the aforementioned elements, evaluated as a whole, it is deemed necessary to determine pursuant to art. 83, par. 2 and 3, of the RGPD, the amount of the pecuniary sanction, provided for by art. 83, par. 5, letter. a) of the GDPR, in the amount of 4,000.00 (four thousand) euros – as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same RGPD – for the violation: of the art. 2-ter, paragraphs 1 and 3 (and of the previous art. 19 paragraph 3 of the Code), as well as the basic principles of the treatment contained in 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 RGPD (see also the provision contained in article 15, paragraph 6-bis, of

the Presidential Decree 9/5/1994, n. 487.

In relation to the specific circumstances of the present case, it is also believed - also in consideration of the high number of interested parties involved; the type of data being unlawfully disclosed; of the time elapsed from the time of publication until the ranking is removed from the Municipality's website - that the ancillary sanction of publication on the website of the Guarantor of this provision should apply, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Regulation of the Guarantor n. 1/2019. Finally, it should be noted 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

notes the illegality of the processing carried out by the Municipality of Colledara and pursuant to articles 58, par. 2, lit. i), and 83 of the GDPR, as well as art. 166 of the Code,

ORDER

to the Municipality of Colledara, in the person of its pro-tempore legal representative, with registered office in Via San Paolo - 64042 Colledara (TE) – Tax Code 80004630671 to pay the sum of 4,000.00 (four thousand) euros as an administrative fine for the violations indicated in the justification; 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 4,000.00 (four thousand) euros, in the event of failure to settle the dispute pursuant to art. 166, paragraph 8, of the Code, according to the methods indicated in the attachment, 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 no. 689/1981.

HAS

pursuant to art. 166, paragraph 7, of the Code, the entire publication of this provision on the website of the Guarantor and believes 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, 30 January 2020

PRESIDENT

Soro

THE SPEAKER

Califano

THE SECRETARY GENERAL

Busia