

[doc. web n. 9689586]

Injunction order against the Municipality of Fisciano - June 24, 2021

Record of measures

n. 254 of June 24, 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, Professor Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, members and the cons. Fabio Mattei, general secretary;

GIVEN the 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;

Rapporteur the lawyer Guido Scorza;

WHEREAS

1. Introduction

This Authority has received a complaint from Mr. XX, with which a violation of the legislation on the protection of personal data was contested.

Specifically, as emerged from the preliminary verification carried out by the Office, at the url [http: // ...](http://...), a web page called XX opens, from which it is possible to freely view and download documents approved by the municipal administration. In this regard, by filling in the appropriate search form, it was possible to view and download the ordinance of the XX (reg. No. XX) concerning "XX".

The aforementioned ordinance contained personal data and information of the complainant in the subject and in the text, such as name and surname, date and place of birth, domicile, cadastral data of the property owned, information on the proceeding for building abuse against him.

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).

The state legislation of the sector also provides that "All the resolutions of the municipality and of the province are published by publication on the praetorian notice, at the headquarters of the body, for fifteen consecutive days, except for specific provisions of the law" (art. 124, paragraph 1, legislative decree no. 267 of 18/8/2000).

With regard to the publication on the praetorian register, since 2014, the Guarantor has provided specific indications to the administrations on the precautions to be taken for the dissemination of personal data online with general 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 purpose of advertising and transparency on the web by public entities and other obliged entities", published in G.U. n. 134 of 12/6/2014 and in www.gdpd.it, doc. web n. 3134436 (currently being updated, but still current in the substantial part).

In the aforementioned Guidelines of the Guarantor it is expressly stated that once the time period for the publication of the deeds and documents in the praetorian register has elapsed:

- "Local authorities cannot continue to disclose the personal data they contain. Otherwise, for the period exceeding the duration envisaged by the reference legislation, an illegal dissemination of personal data would be determined 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 term of fifteen days, provided for by art. 124 of the aforementioned d. lgs. n. 267/2000, can integrate a violation of the aforementioned art. 19, paragraph 3, of the Code [n.d.r. today reproduced in art. 2-ter, paragraphs 1 and 3, of the Code], where there is no different legislative or regulatory parameter that provides for its disclosure [...]. [In this case] if the local authorities want to continue to keep the deeds and documents published on their institutional website, for example in the sections dedicated to the archives of the deeds and / or legislation of the body, they must make the appropriate measures for the protection of personal data [,] [ndo] obscures in the published documentation the data and information suitable for identifying, even indirectly, the interested parties "(second part, par. 3.a).

3. Preliminary assessments 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 as a result of the investigation, as well as subsequent evaluations, the Office with note prot. n. XX of the XX has ascertained that the Municipality of Fisciano - by disseminating the data and personal information of the complainant contained in the order published online described above - has carried out a processing of personal data that does not comply with the relevant regulations on the protection of personal data contained in the GDPR. 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 memories.

The Municipality of Fisciano, with the note prot. n. XX of the XX, sent to the Guarantor his defense writings in relation to the violations notified.

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, it was highlighted, with reference to the willful or negligent nature of the violation (Article 83, paragraph 2, letter d, RGPD), among other things, that:

- "on the 20th this Body replaced the management applications for administrative documents provided by the company [identified in the documents, hereinafter" replaced company "], including the Praetorian Register, with a new software platform produced by the company [identified in deeds] ";
- "the deeds issued by the 20th century were published with the platform [...] provided [by the replaced company]";
- "to avoid the interruption of the publication service on the praetorian register during the transition period, with note no. XX of the XX [...], this Body ordered the Company [replaced] to restore the service interrupted on the XX (contractual term), leaving it active for the period strictly necessary to comply with the obligations of publication of the documents issued in December »;
- "Unfortunately, we found, following your note, that the [replaced] company did not proceed with the interruption of the service and the deletion of the data present on its servers, despite the note [from the Municipality] and although the Entity did not no longer has any supply relationship with the same ";
- "It was therefore not the intention of the Entity to leave the document object of the dispute online after the deadline established by law";

In relation to the object, purpose of the processing and categories of data, as well as the measures adopted to mitigate the effects of the violation (Article 82, paragraph 2, letter a, c, f, g, of the GDPR), it has been added that:

- "The deed was published pursuant to Presidential Decree 380/01 as it is a demolition order for abusive works and the obvious consequence can be deduced that the mere publication cannot be qualified as a violation of privacy with respect to the principles of relevance, completeness and not excess, since the ordinance is included among those of significant public interest ";

- «This body immediately with note no. XX of the XX [...] has ordered the company involved in the violation to immediately remove the service asking, at the same time, to justify the non-deactivation »;
- "On the same date the service was removed";
- "The deed contains name, surname and date of birth".

With subsequent note prot. n. XX of the XX the Municipality has integrated its own defensive briefs specifying, also, that:

- "the deed was published in the online praetorian register from the twentieth to the twentieth";
- «So much, to our. notice, can only confirm what has already been represented regarding art. 83, par. 2, lett. D-intentional or negligent nature of the violation [...] "and precisely that:
 - "the interruption of the service does not allow public access to all documents published by the 20th (expiry date of the contract);
 - for which the compulsory publication period envisaged by the law for the various proceedings has not ended »;
- "From this it is evidently deduced that it was absolutely not the intention of this body to leave the contested document online after the mandatory publication deadline"
- the Municipality had already pointed out "to the company entrusted with the on-line Albo Praetorian service [that]" It is not possible, by law, to re-publish these documents and it is not possible, for obvious reasons, to immediately transfer the data to the new system adopted by the Entity "for which the republication of the deed is to be charged solely and exclusively to the company itself".

5. Evaluations of the Guarantor

The issue that is the subject of the case submitted to the attention of the Guarantor concerns the disclosure of the complainant's personal data and information (including name and surname, date and place of birth, domicile, cadastral data of the property owned, information on the procedure for building abuse against him), contained in the order of the XX, published online by the Municipality of Fisciano, via an Internet platform provided by an external company, with which the demolition of an illegally constructed steel structure was ordered, which served as a roof for the underlying building for which a building permit was instead issued in amnesty.

As part of the investigation opened in this regard by this Authority, the aforementioned Municipality confirmed, in its defense briefs, the publication of the deed and the online dissemination of the complainant's personal data. From this point of view,

however, the entity has shown that it had replaced the company at the time in charge of the "administrative deeds management applications", including the Praetorian Register, with a new software platform produced by another company. In this context, the replaced company was at the same time asked - in order to "avoid the interruption of the publication service on the praetorian register during the transition period", - "to restore the service interrupted at the XX (contractual term), leaving it active the period strictly necessary to comply with the obligations of publication of the documents issued in December ».

According to what was stated, however, "the [replaced] company [then] did not interrupt the service and delete the data on its servers".

In this regard, the objection raised to the Municipality regarding the IT problem of the company at the time in charge of managing the applications for the publication of online documents, which would not have proceeded to delete the data after the termination of the service, could at most concern any dissemination of personal data created after the end of the contractual relationship, which took place on XX. However, it should be pointed out that - from the preliminary verification carried out by the Office and from the screenshots made by the Office on the web pages of the historic praetorian register of the Municipality - it was found that the deed object of the complaint (ordinance of the XXth), with the data in clear of the complainant, was published on the XX and the end of the publication, even if it was foreseen for the XX date, has continued afterwards.

At the time of publication, the data controller was undoubtedly the Municipality of Fisciano, which used an external company to manage the service, even if it was replaced after about a month and a half.

In this context, it should be noted that the Municipality had the obligation, from the very beginning of the processing, consisting of the online dissemination of the complainant's personal data on the XXth date, to adopt by design (Article 25, paragraph 1, RGPD) suitable technical and organizational measures aimed at minimizing the data published online, avoiding the dissemination of data that is not "limited to what is necessary with respect to the purposes for which they are processed". This with particular reference to the dissemination of the date and place of birth, as well as the domicile of the complainant.

The failure to adopt the aforementioned technical and organizational measures occurred before the date of termination of the contractual relationship of the XX with the previous company that managed the applications for the publication of the documents online, considering that the publication of the ordinance object of the complaint with all the data in clear text of the complainant - as reported on the website - took place on XX18 and in any case had to cease after 15 days.

Compliance with the aforementioned technical and organizational measures by the Data Controller Municipality, "from the

beginning of the processing", would also have prevented the disclosure of the described personal data of the complainant after the expiry of the contract with the aforementioned company.

In addition, the same Municipality, at the time of the conduct, had the obligation to adopt - as indicated in the Guidelines of the Guarantor of 2014 and as challenged by the note of the Office prot. n. XX of the XX - the appropriate "precautions for the protection of personal data [,] [ndo] to obscure in the published documentation the data and information suitable for identifying, even indirectly, the interested parties" after the expiry of 15 days provided for publication in the praetorian register.

On the other hand, the documents seem to emerge - nor did the Municipality produce suitable documentation aimed at proving the contrary - that the personal data of the complainant remained online even under the validity of the contractual relationship in force until the end of December of the 20th with the replaced company. at the time appointed by the Municipality and after the 15 days of publication foreseen for the praetorian register, which had to cease on the 20th when the Municipality was certainly the data controller. This is because, according to what was declared by the body in the defense briefs, on XX the aforementioned company was only asked "to restore" the service interrupted on the XX, in order to "respect the obligations of publication of the documents issued in December », Which however did not concern the deed object of the complaint as it was issued in October.

As for the circumstance highlighted in the defense briefs, for which the "deed was published pursuant to Presidential Decree 380/01" and the published data would be relevant and not excessive as the order would have been "of significant public interest", it is necessary to highlight that the Municipality has limited itself to referring generically to the aforementioned Presidential Decree without identifying any provision that concretely provides for an obligation to publish the ordinance object of the complaint, which in fact is not currently contained therein. The d.p.r. cited, therefore, cannot constitute, in the light of what is represented, an appropriate legal basis for disseminating the personal data of the interested party pursuant to art. 2-ter, paragraphs 1 and 3, of the Code.

In any case, it is acknowledged - as the Municipality itself declared from the point of view of the nature of the violation and the degree of responsibility of the data controller (Article 83, paragraph 2, letters b and d) - "that it was absolutely not the intention [of the] entity to leave the contested document online after the mandatory publication deadline ".

6. Outcome of the investigation relating to the complaint presented

For all of the above, the circumstances highlighted in the defense writings examined as a whole, certainly worthy of

consideration for the purpose of evaluating the conduct, are not sufficient to allow the filing of this proceeding, since none of the hypotheses provided for by art. 11 of the Guarantor Regulation n. 1/2019. This also considering that since 2014 the Authority, in the Guidelines on transparency and online publication mentioned above, has provided all pp.aa. specific indications on how to reconcile the transparency and publicity obligations of the administrative action with the right to the protection of the personal data of the interested parties, also with reference to the online praetorian register.

In this context, the preliminary assessments of the Office are confirmed with the note prot. n. XX of the XX and the unlawfulness of the processing of personal data carried out by the Municipality of Fisciano is noted, as the dissemination of the data and personal information of the complainant, contained in the order of the XX, published online, is:

- a) does not comply with the principle of "minimization" of the data - with reference to the clear indication of the date and place of birth, as well as the domicile of the complainant - considering that they do not appear to have been "limited to what is necessary with respect to the purposes for which they are treated ", in violation of art. 5, par. 1, lett. c), of the GDPR;
- b) devoid of suitable regulatory requirements for the period exceeding the fifteen days provided for by art. 124, paragraph 1, of the d. lgs. n. 267/2000 for publication in the praetorian register in which the Municipality was certainly the data controller, 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.

Considering, however, that the conduct has exhausted its effects, as the Municipality has declared that it has taken steps to have the personal data object of the complaint removed, 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 Fisciano 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), of the GDPR; as well as art. 2-ter, paragraphs 1 and 3, 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 had as its object the online dissemination of personal data, not belonging to particular categories or to criminal convictions or offenses (articles 9 and 10, of the RGPD), referring to a single interested party. The Municipality of Fisciano is in any case a medium-sized body (just over 13,700 inhabitants), which, following the request of the Office, intervened promptly, collaborating with the Authority during the investigation of this proceeding in order to remedy the violation, mitigating the possible negative effects. It is also important that there are no previous violations of the RGPD committed by the entity, in any case.

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 € 1,000.00 (one 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), of the RGPD, as well as of art. 2-ter, paragraphs 1 and 3, 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 in the absence of a suitable legal basis and in violation of the principle of data minimization (Article 5, paragraph 1, letter c, GDPR), it is considered also that the ancillary sanction of the publication of this provision on the Internet site 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

detected the unlawfulness of the processing carried out by the Municipality of Fisciano 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 Fisciano, in the person of the pro-tempore legal representative, with registered office in Piazza Umberto I - 84084 Fisciano (SA) - C.F. 00267790657 to pay the sum of € 1,000.00 (one 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 € 1,000.00 (one 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 RGPD with this provision, as required by art. 17 of the Guarantor Regulation n. 1/2019.

Pursuant to art. 78 of the RGPD, 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, June 24, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Peel

THE SECRETARY GENERAL

Mattei