[doc. web n. 9584421]

Injunction order against the Municipality of Castellanza - 25 March 2021

Record of measures

n. 106 of 25 March 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 / CE, "General Data Protection Regulation" (hereinafter, "Regulation");

GIVEN the legislative decree 30 June 2003, n. 196 containing the "Code regarding the protection of personal data, containing provisions for the adaptation of the national system to Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, relating to the protection of individuals with regard to to the processing of personal data, as well as to the free circulation of such data and which repeals Directive 95/46 / EC (hereinafter the "Code");

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

Having seen the documentation in the deeds;

Given the observations made by the secretary general pursuant to art. 15 of the Guarantor Regulation n. 1/2000 on the organization and functioning of the office of the Guarantor for the protection of personal data, Doc. web n. 1098801;

Speaker prof. Pasquale Stanzione;

WHEREAS

1. Introduction.

With a complaint of the XX, submitted pursuant to art. 77 of the Regulation, the publication of the determination n.XX of the XX, by the Municipality of Castellanza, concerning the "XX", containing the personal data of the complainant and of the other

participants in the procedure, including the registered residence . Furthermore, from what was represented in the complaint, the resolution was also available online, through search engines.

2. The preliminary activity.

With a note dated XX (prot. No. XX), the Municipality, in response to a request for information formulated by the Office, stated, in particular, that:

- the mobility procedure was put in place in compliance with Article 30 of Legislative Decree 165 of 2001 and Article 25 of the Internal Regulations "for the discipline of competitions and other recruitment procedures";

- on the 20th, the complainant asked for "the immediate obscuring of personal data concerning her residence, published in Resolution no. XX of the XX ";

- following the aforementioned communication, on XX, the “removal of the minutes of resolution no. XX [...] and its new publication on the Institution's institutional website following the application of the "blackout" coding method of all the data of the complainant and other candidates;

- although the administration has followed up, through the data obscuring method, the request of the complainant, "the determinations drawn up by the P.A. comply with the protection of the right to access data and the legal basis of the processing concerning the publication of the determination concerning the search for personnel through the voluntary mobility procedure as well as the need for the data relating to residence to be reported in this deed [...] as ascertained by the entity's DPO ";

- "the legislative decree of 14 March 2013, n. 33, introduces the principle of widespread control by citizens over the work of institutions and the use of public resources. The principle of transparency is extended by the legislative decree of 25 May 2016, n. 97, with total accessibility to documents managed by public administrations;

- "Legislative Decree no. 97/2016 made a series of changes to the transparency legislation, with the expansion of the institution of civic access aimed at controlling the activities of the institutions and the use of public resources ".

With a note of the XX (prot.n.XX), on the basis of the elements acquired, also through the documentation sent, and the facts that emerged during the investigation, the Office notified the Municipality, as data controller, to the pursuant to art. 166, paragraph 5, of the Code, the initiation of the procedure for the adoption of the measures referred to in art. 58, par. 2, of the Regulation, concerning the alleged violations of articles 6, par. 1, lett. c) and e) and para. 2 and 3 lett. b) and 5, par. 1, lett. a)

and c), of the Regulations, as well as art. 2-ter, paragraphs 1 and 3 of the Code, inviting the aforementioned holder to produce defensive writings or documents to the Guarantor or to ask to be heard by the Authority (Article 166, paragraphs 6 and 7, of the Code, as well as Article 18, paragraph 1, from the law of 24 November 1981, n. 689).

The Municipality has sent its defense briefs, with a note of the XX (prot.n.XX), representing, in particular, that:

- the complainant “complained of a violation of privacy in relation to the publication of minutes XX. In particular [...] he pointed out how his address for residence was present in the minutes attached to the determination XX of XX and requested the immediate obscuration of personal data ";

- the Municipality "noting the evidence of the report [...] automatically proceeded to immediately suspend the act published [...] on the appropriate institutional web page in the Transparent Administration section";

- "in order to comply with the obligations of Legislative Decree 33/2013, the Personal Service was invited to prepare the minutes of the mobility procedure in compliance with the privacy legislation and subsequently the Information / Innovation Office made sure that the publication was carried out with the 'omission of personal data ”;

- the Municipality "as soon as it became aware of the reported violation, [took steps] to take appropriate measures to reduce the risk of data dissemination (removal of the deed and republication of the same with the anonymization and coding of personal data present in the report omitting not only the personal references (address and date of birth), but also the names of the people who had participated in the mobility) ";

- “the published data […] are data in the public domain, that is, disseminated and available from tangible and intangible sources, such as telephone directories, electronic online databases […] social media in general; the published data are easily available on social networks;

- “according to the registry regulation, Presidential Decree 233/1989 art. 33, paragraph 1 "Without prejudice to the prohibitions on the communication of data, established by special provisions of the law, and the provisions of article 35, the registry officer issues to anyone who requests them, after identification, the certificates concerning residence, the family status of those registered in the national registry of the resident population, as well as any other information contained therein ".

3. Outcome of the preliminary investigation.

3.1 The regulatory framework.

The personal data protection discipline provides that public subjects, if they operate in the performance of insolvency, selective

or otherwise evaluative procedures, can process the personal data of the interested parties (Article 4, No. 1, of the Regulation), if the processing is 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 authority vested in the data controller" (Article 6, paragraph 1, letters c) and e) of the Regulation).

The national legislation has also introduced more specific provisions to adapt the application of the rules of the Regulation, determining, with greater precision, specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing (Article 6, par. 2, of the Regulation) and, in this context, has provided that the processing operations, and among these the "dissemination" of personal data, are allowed only when 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).

The data controller is also required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", on the basis of which personal data must be "processed in lawful, correct and transparent manner towards the interested party "and must be" adequate, relevant and limited to what is necessary with respect to the purposes for which they are processed "(Article 5, paragraph 1, letters a) and c), of Regulation).

3.2 Dissemination of personal data

With regard to the publicity of the results of the competitive exams and the final rankings, it is noted that the sector regulations establish, in general, the publicity of the final measures and rankings, as well as of the other documents concerning competitions, selective tests and career progressions. and other procedures that end with the formation of rankings. Other specific forms of disclosure of these deeds, provided for by the law, find their discipline in provisions which have been stratified over time in order to allow interested parties, participating in insolvency or selective procedures, to activate forms of protection of their rights and control the legitimacy of the administrative action.

These rules also provide that only the final rankings of the winners of the competition are published and not the results of the intermediate tests or further personal data of the competitors, including residence (see Article 7, Presidential Decree 10 January 1957, n. 3; as well as art.15, Presidential Decree No. 487 of 9 May 1994, in particular, paragraphs 5, 6 and 6 bis, Regulation laying down rules on access to employment in public administrations and the procedures for carrying out competitions, single competitions and other forms of recruitment in public offices and more generally, on the publicity of the procedures for the recruitment of public administration personnel, Article 35, paragraph 3, of Legislative Decree no. 165 of

March 30, 2001). The Guarantor has also provided specific indications to public administrations regarding the precautions to be taken for the dissemination of personal data on the Internet for the purposes of transparency and publicity of the administrative action with the Guidelines on transparency, also with reference to the publication of the rankings of public competitions (provision no. 243 of 15 May 2014, web doc. no. 3134436, spec. II, par. 3.b), but see also Guidelines on the processing of personal data, of workers for purpose of managing the employment relationship in the public sphere, provision 161 of 14 June 2007, web doc 1417809).

The legislative decree 14 March 2013, n. 33, moreover, recalled by the Municipality during the investigation, does not contain any provision that provides for the mandatory publication of this type of deeds or, in general, of determinations that report personal data of candidates, including data relating to residence. This is because the provision relating to competitions and selective tests contained in art. 23, paragraph 1, lett. c), of the aforementioned decree, moreover relating to the publication of summary elements of the final provisions of the proceedings, was repealed by art. 22, paragraph 1, lett. a), no. 3, of the d. lgs. 25 May 2016, n. 97. In any case, moreover, art. 19 of Legislative Decree 14 March 2013, n. 33 which provides for the publication of the final rankings only, and moreover, having entered into force from 1 January 2020, it does not apply to this case.

Therefore, except for the forms of legal advertising of the rankings, this Municipality should not have indexed the page of its website, which hosted the specific subject of the complaint, on generalist search engines, given that art. 9 of Legislative Decree 14 March 2013, n. 33, which prohibits public administrations from “arranging filters and other technical solutions to prevent web search engines from indexing and searching within the transparent administration section”, was not applicable to this case.

Nor can widespread control by citizens be invoked on the work of the Public Administration nor the institution of generalized civic access (Article 5 paragraph 2 of the aforementioned legislative decree) considering that this - even if it allows anyone to access data and documents held by public administrations in addition to those subject to publication, (within the limits provided for by art.5-bis paragraph 2) - is configured, in any case, as autonomous and independent from publication obligations which, on the other hand, remain limited exclusively to those indicated by law. In fact, even in the presence of a specific request for civic access, which in any case does not appear to have been received by the Municipality, the aforementioned regulatory framework provides for the activation of a specific procedure that includes the involvement of the counter-interested party who

is in any case guaranteed the possibility of submit a reasoned opposition; in any case, civic access must be refused if the existence of a concrete prejudice to the protection of personal data is verified (Article 5-bis, paragraph 2, letter a).

Moreover, the Municipality, if it wanted to publish the determination, that it did not have the obligation to publish, pursuant to Legislative Decree no. 33/2013, should have immediately "ordered the publication on its institutional website of data, information and documents [...] proceeding with the anonymous indication of any personal data present" (Article 7-bis, paragraph 3, of Legislative Decree no. 33/2013).

The circumstance that the published data were "in the public domain" does not allow, in any case, to consider lawful the treatment put in place by the Municipality, given that the personal data published in public registers, lists, deeds or documents that can be known by anyone can be processed with the limits and methods that the applicable sector laws establish for the knowledge and publicity of data, in compliance with the principle of "purpose limitation", according to which personal data must be "collected for specific, explicit and legitimate, and subsequently processed in such a way that it is not incompatible with these purposes "(Article 5, paragraph 1, letter b) of the Regulation). In other words, the simple fact that personal information is made publicly available online does not imply that it can be freely reused by anyone and for any purpose, having to evaluate from time to time "if, for what purposes and according to what limits and conditions any use further personal data made public may be considered lawful in light of the "principle of purpose" and of the other principles of a European matrix on the protection of personal data "(see, precisely in the workplace, the provision of the Guarantor of 12 March 2020, web doc. no. 9429218 and see, albeit in relation to the issue of the re-use of published data for transparency purposes, paragraph 6 of the "Guidelines on the processing of personal data, also contained in administrative documents and deeds, carried out for purposes of advertising and transparency on the web by public entities and other obliged entities "of the Guarantor, cited above).

4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller in the defense writings whose truthfulness may be called upon to answer pursuant to art. 168 of the Code - do not allow the findings notified by the Office to be overcome with the act of initiating the procedure and are insufficient to allow the filing of this proceeding, however, none of the cases provided for by art. 11 of the Guarantor Regulation n. 1/2019.

It is also represented that in order to determine the applicable rule in terms of time, the principle of legality referred to in art. 1, paragraph 2, of law no. 689 of 11/24/1981 for which "Laws that provide for administrative sanctions are applied only in the

cases and times considered in them". The application of this principle determines the obligation to take into consideration the provisions in force at the time of the committed violation. Therefore, even if the conduct object of the investigation by this Authority began before (XX) the date of full application of the Regulation, in the case that concerns us at that moment - considering the permanent nature of the contested conduct - it must be identified at the time of cessation of the unlawful conduct which, from the preliminary investigation documents, appears to have continued at least until the 20th, i.e. after 25 May 2018, the date on which the Regulation became fully applicable.

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Municipality of Castellanza is noted, for having disclosed personal data relating to the complainant contained in determination no. XX of the XX concerning the "XX" in the absence of suitable regulatory conditions, in violation of Article 6 of the Regulation and of art. 2-ter, of the Code, as well as the basic principles of processing contained in art. 5, par. 1, lett. a) and c) of the Regulations.

The violation of the aforementioned provisions makes the administrative sanction provided for by art. 83, par. 5, of the Regulations, as also referred to by art. 166, paragraph 2, of the Code.

In this context, considering, in any case, that the conduct has exhausted its effects, given that the publication of the determination, containing the data of the complainant and the other candidates, on the website of the Municipality has ceased, the conditions for the '' adoption of further corrective measures pursuant to art. 58, par. 2, of the Regulation.

5. Adoption of the injunction order for the application of the pecuniary administrative sanction and ancillary sanctions (articles 58, par. 2, lett. I and 83 of the Regulation; art. 166, paragraph 7, of the Code).

The Guarantor, pursuant to art. 58, par. 2, lett. i) and 83 of the Regulations as well as art. 166 of the Code, has the power to "inflict an administrative pecuniary 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 single case "and, 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).

In this regard, taking into account art. 83, par. 3, of the Regulation, in the present case - also considering the reference contained in art. 166, paragraph 2, of the Code - the violation of the aforementioned provisions is subject to the application of

the same administrative fine provided for by art. 83, par. 5, of the Regulation.

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 Regulation.

In relation to the aforementioned elements, it was considered that the detected conduct, held in violation of the regulations on the protection of personal data, had as its object the dissemination of personal data, also in light of the indications that, since 2014, the Guarantor, has provided all public entities in 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" mentioned above. This disclosure of personal data lasted for a considerable period of time (approximately one year).

On the other hand, it was favorably taken into account that the Municipality had a collaborative conduct with this Authority and that there are no previous relevant violations committed by the data controller or previous measures pursuant to art. 58 of the Regulation.

Due to the aforementioned elements, assessed as a whole, it is believed to determine the amount of the pecuniary sanction in the amount of € 4,000.00 (four thousand) for the violation of Articles 5, paragraph 1, lett. a) and c), 6, paragraph 1, lett. c) and e) and 2 and 3, lett. b) of the Regulation, as well as of articles 2-ter, paragraphs 1 and 3 of the Code, as a pecuniary administrative sanction withheld, pursuant to art. 83, paragraph 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the extended period of time during which the aforementioned data were available on the network, it is also believed that the ancillary sanction of the publication on the website of the Guarantor of this provision, provided for by art. 166, paragraph 7 of the Code and art. 16 of the Guarantor Regulation n. 1/2019.

Finally, it is noted that the conditions set out in art. 17 of Regulation no. 1/2019.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. f), of the Regulations, declares unlawful the conduct of the Municipality of Castellanza, described in the terms set out in the motivation, consisting in the violation of articles 5, par. 1, lett. a) and c), 6 of the Regulations and articles 2-ter of the Code, in the terms set out in the motivation;

ORDER

to the Municipality of Castellanza, in the person of the pro-tempore legal representative, with registered office in Viale

Rimembranze 4 - 21053 Castellanza (VA), C.F. 00252280128, pursuant to articles 58, par. 2, lett. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of € 4,000.00 (four thousand) as a pecuniary administrative sanction for the violations indicated in the motivation;

INJUNCES

to the aforementioned Municipality to pay the sum of € 4,000.00 (four 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. In this regard, it is recalled 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 30 days from the date of notification of this provision, pursuant to art. 166, paragraph 8, of the Code (see also Article 10, paragraph 3, of Legislative Decree no. 150 of 1/9/2011);

HAS

pursuant to art. 166, paragraph 7, of the Code, the publication of this provision on the website of the Guarantor, considering that the conditions set out in art. 17 of the Guarantor Regulation n. 1/2019 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

Pursuant to art. 78 of the Regulation, 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, March 25, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Stanzione

THE SECRETARY GENERAL

Mattei