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Injunction order - April 4, 2019

Register of measures

no. 100 of 4 April 2019

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, in the presence of Dr. Antonello Soro, president, of dr. Augusta Iannini, vice president, of dr. Giovanna Bianchi Clerici and of prof. Licia Califano, members, and of dr. Giuseppe Busia, general secretary;

CONSIDERING the art. 1, paragraph 2, of the law of 24 November 1981, n. 689, pursuant to which the laws that provide for administrative sanctions are applied only in the cases and for the times considered in them;

CONSIDERING the Legislative Decree 196/2003 containing the "Code regarding the protection of personal data" (hereinafter "Code");

NOTING that the Public Liberties and Health Department of this Authority examined a report presented on November 22, 2016 alleging an alleged violation of the Code in relation to the methods of acquiring a document - containing personal data of the reporting person - produced in the context of a dispute - by this counterparty on 14 September 2016. In particular, the aforementioned document (D.I.A. n. 275/09 of 20 October 2009), already the subject of an application for access to the documents presented to the Municipality of Rutigliano (hereinafter the "Municipality) by the cited counterparty of the whistleblower, was provided to the latter - following the response of refusal of access by the Municipality - by the municipal councilor XX (hereafter the "adviser");

GIVEN the note prot. no. 17377 of 15 May 2017 of the Department of Public Freedoms and Health of this Authority, with which the councilor was invited to provide any information useful for the investigations and evaluation of the case; in particular, the director was asked, if the aforementioned D.I.A. no. 275/09 of 20 October 2009, requested to the Municipality by the councilor with note n. 7119 of 21 April 2015 and acquired by the latter pursuant to art. 43, paragraph 2, of Legislative Decree 18 August 2000, n. 267, in consideration of the functions of municipal councilor, had or not been communicated to third parties;

HAVING ACKNOWLEDGED the reply dated 28 June 2017 with which the director declared that "the undersigned has not disclosed the protocol document no. 7119 of 21 April 2015" referring, with this, to his request note to the Municipality of the D.I.A. concerning the whistleblower;

GIVEN the note prot. no. 32630 of Oct . n. 7119), i.e. the D.I.A. no. 275/09 of 10.20.2009, containing the personal data of (...) (signalant), whether or not it has been delivered to third parties (...)";

CONSIDERING that the aforementioned note of 13 October 2017, duly notified on the same date by certified mail, the acknowledgment of receipt of which is kept in the file, has not received any response;

GIVEN the subsequent request for information prot. no. 2509 of 24 January 2018, formulated by the Secretary General of this Authority pursuant to article 157 of the Code, with which the invitation was renewed to the director to respond - no later than 12 February 2018 - to the requests made by the whistleblower and already advanced by the Guarantor, recalling that, in the event of non-compliance with the invitation, the pecuniary administrative sanction provided for by article 164 of the Code would be applied;

CONSIDERING that the aforementioned request was duly notified on 24 January 2018, by certified mail, the acknowledgment of receipt of which is kept in the file documents;

HAVING ACKNOWLEDGED the reply dated February 27, 2018 with which the director declared, among other things, that "(...) with my previous note dated May 15, 2017, with which I communicated that "I had not communicated to third parties the protocol document number 7119 of 21 April 2015" I meant that I did not communicate the document in question to third parties, other than the legitimate applicant (...)", meaning, by the latter, the counterparty of the whistleblower requesting access to the documents relating to the mentioned D.I.A. no. 275/09 of 20 October 2009, denied by the Municipality;

GIVEN the note prot. no. 14703 of 17 May 2018 with which the Department of Public Freedoms and Health, in defining the procedure whose reasons are understood to be fully referred to, in the light of the investigation carried out, did not recognize the conditions that would legitimize the director to communicate to third parties and, in in this case to the counterparty of the whistleblower, the documentation concerning the D.I.A. no. 275/09 of 20 October 2009 containing personal data of the whistleblower himself and has therefore ascertained that this communication was made in violation of articles 11, paragraph 1, lett. a) and b) and 19, paragraph 3, of the Code. This, as " (...) the municipal and provincial councilors have the "right to obtain from the offices, respectively, of the municipality of the province, as well as from their dependent companies and entities, all the news and information in their possession, useful for the fulfillment of one's mandate" (art. 43, Legislative Decree no. 267/2000) (...) Therefore, the need remains that the personal data acquired in this way are effectively used only for the purposes really pertinent to the mandate (...) ". "(...) With reference, on the other hand, to the use of such documentation

(D.I.A. n. 275/09 of 20 October 2009) for the sole purposes pertaining to the mandate, it should be noted that the communication of such documentation to the (...) (judicial counterpart of the whistleblower) cannot be considered attributable to the purposes set out in the aforementioned provision. The legislation on access to administrative documents, in case of express or tacit refusal, identifies specific protection tools that the applicant can exercise before the competent authorities; (the director) took the place of the Administration by issuing to (…) (the whistleblower's counterparty) the documentation acquired pursuant to art. 43 of Legislative Decree 267/1990 (…)". However, even in the face of the unlawful conduct put in place, the aforementioned Department has not identified the grounds for promoting the adoption of a prescriptive or inhibitory measure by the College, pursuant to art. 11, paragraph 1, letter d and 13, paragraph 4, of the internal regulation n. 1/2007 of 14 December 2007 (web doc. n. 1477480 traceable at www.gpdp.it), in consideration of the fact that this conduct had, at present, exhausted its effects. At the end of the note, the aforementioned Department communicated to the councilor that the Authority would reserve the right to verify, with an autonomous procedure, the existence of the conditions for contesting the administrative violation envisaged by art. 162, paragraph 2 bis, of the Code, for violation of articles 11, paragraph 1, lett. a) and b), and 19, paragraph 3, of the Code;

GIVEN the note prot. no. 0014862 of 17 May 2018 with which the aforementioned Department sent the documents to the Inspection Activities Department, so that it could evaluate the conditions for the application of the administrative sanction referred to in article 162, paragraph 2-bis, of the Code in relation to the communication , by the adviser, of documentation containing personal data of the whistleblower in the absence of the legitimizing regulatory conditions and, therefore, in the non-compliance with articles 11, paragraph 1, lett. a) and b), and 19, paragraph 3, of the Code;

CONSIDERING the act prot. no. 18957/113348 of 22 June 2018 with which the Guarantor charged XX, as data controller, with the administrative violation envisaged by art. 162, paragraph 2-bis, of the Code, which punishes the violation of the provisions indicated in art. 167 and, in this case, the violation of the art. 19, paragraph 3, for having carried out an unlawful processing of personal data consisting, specifically, in the communication of documentation (D.I.A. n. 275/09 of 20 October 2009) containing personal data of the whistleblower and acquired as municipal councilor, to the counterparty legal proceedings of this whistleblower in the absence of the legitimizing regulatory conditions;

NOTING that from the administrative report prot. no. 30832/113348 of 18 October 2018, prepared by the Office of the Guarantor pursuant to art. 17 of the law of 24 November 1981 n. 689, the reduced payment has not been made;

HAVING REGARD to the written defense dated 1 August 2018, formulated pursuant to art. 18 of Law No. 689/1981 with reference to the aforementioned notice of dispute prot. no. 18957/113348 of 22 June 2018, with which the councilor requested the dismissal of the sanctioning procedure, initiated against him, highlighting that "(...) constitutes an obligation of the municipal councilor if he becomes aware of a crime that can be prosecuted ex officio pursuant to article 331 of the c.p.p. inform the competent judicial authority. Therefore, by virtue of the obligation sanctioned by 331 c.p.p., the grievances advanced (...) (by the whistleblower) are devoid of any foundation".

And again that "(...) building titles are not covered by privacy (...)" and that "when the neighbor has a concrete, personal, and current interest in accessing building permits (...) the building titles are public documents. There is no privacy that matters when there is a concrete personal interest in accessing the administrative authorizations on building permits. The jurisprudence in subiecta materia has embraced a line of maximum transparency in urban planning matters, in fact the law on administrative procedure (…) which indicates the cases and methods of exclusion from the right of access, expressly provides that applicants must in any case be guaranteed the access to administrative documents, the knowledge of which is necessary to take care of or to defend one's legal interests. No right to privacy can be opposed because all the deeds of the municipal and provincial administration are public with the exception of those reserved by express indication of the law or by effect. Furthermore, the neighborhood relationship already constitutes in itself a concrete and current legitimate interest, such as to justify access to the administrative documents of the file of one's adjacent owner.

Therefore (the judicial counterpart of the whistleblower who was denied access to the documents by the Municipality and who subsequently obtained this document from the councilor) had and has a legitimate interest in protecting his legal and economic situations (...) ";

CONSIDERING that the arguments put forward, aimed at demonstrating the groundlessness of what was contested, are not suitable for determining the closure of the sanctioning procedure. In fact, first of all, with regard to the fact that "building permits are not covered by privacy" and are "public deeds", we reiterate what has already been represented in the aforementioned note prot. no. 14703 of 17 May 2018 of the Department of Public Freedoms and Health of this Authority, according to which "(…) Legislative Decree no. 97/2016 repealed the art. 23, paragraph 1, lett. a), of Legislative Decree no. 33/2013, which required the public administrations to publish the lists of measures adopted on the institutional website, with particular reference "to the final measures of the proceedings of: a) authorization or concession", to which, according to the

orientation adopted by ANAC also the DIA and the SCIA were to be considered equivalent (Orientamento n. 11 of 21/5/2014, in https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/ArchivioStorico/Orientamenti/Orientamenti/_orientation?id=e155116a0a7780422a6899a8fa56d3f9). It should be noted that, in any case, the obligation to publish online the "complete provisions" was not envisaged in the legislative text previously in force, but only a "summary file" of the elements envisaged by the provision, i.e. "the content, the object , any expected expenditure and the details relating to the main documents contained in the file relating to the proceeding" (art. 23, paragraph 2, of Legislative Decree no. 33/2013, repealed), without specific references to the publication of personal data therein contents".

Then, as regards the arguments relating to the legitimacy of the exercise of the right of access and the envisaged occurrence, by the judicial counterparty of the whistleblower, of the requirements and elements necessary for the application for access to the documents presented to the Municipality to be accepted, as well as the consequent alleged illegitimacy of the refusal of access to the D.I.A. no. 275/09 of 20 October 2009 expressed by the latter, it is stated that such arguments certainly cannot constitute conditions legitimizing the communication to third parties of this D.I.A. by another body (in this case the councilor) or administrative body, other than the one competent to rule on the request for access such as, in the case in question, the Municipality.

This also applies with regard to the aforementioned occurrence, in the case in question, of the crime of forgery: pursuant to art. 331 c.p.p., the public official or the person in charge of a public service, who become aware of "a crime prosecutable ex officio" have, yes, the obligation to report this crime, but only to the judicial authority, not providing information about any other person, whether or not the latter has an interest in the illicit matter.

CONSIDERING the art. 162, paragraph 2-bis, of the Code which punishes the violation of the provisions indicated in art. 167 of the same Code, including art. 19, paragraph 3, of the same Code with the administrative sanction of the payment of a sum from ten thousand euros to one hundred and twenty thousand euros;

CONSIDERING that, for the purposes of determining the amount of the pecuniary sanction, it is necessary to take into account, pursuant to art. 11 of the law of 24 November 1981 n. 689, of the work carried out by the agent to eliminate or mitigate the consequences of the violation, the seriousness of the violation, the personality and economic conditions of the offender;

CONSIDERING that the conditions for applying art. 164-bis, paragraph 1, of the Code which provides that, if any of the

violations referred to in articles 161, 162, 162-ter, 163 and 164, is less serious, the minimum and maximum limits are applicable in an amount equal to two fifths;

CONSIDERING, therefore, on the basis of the aforementioned elements evaluated as a whole, that it is necessary to determine, pursuant to art. 11 of the law n. 689/1981, the amount of the fine provided for by art. 162, paragraph 2-bis of the Code, to the minimum amount of 10,000.00 (ten thousand) euros for the violation of art. 19, paragraph 3, of the same Code, reduced by two fifths, according to the provisions of art. 164-bis, paragraph 1, of the Code for the occurrence of the requirement of less seriousness, for an amount equal to Euro 4,000.00 (four thousand);

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations of the Office, formulated by the Secretary General pursuant to art. 15 of the Guarantor's regulation n. 1/2000, adopted with resolution of 28 June 2000;

SPEAKER Dr. Giovanna Bianchi Clerici;

ORDER

to XX, by way of a pecuniary administrative sanction, the sum of Euro 10,000.00 (ten thousand) provided for by art. 162, paragraph 2-bis of the Code, reduced by two fifths, according to the provisions of art. 164-bis, paragraph 1, of the same Code, for an amount equal to 4,000.00 (four thousand) euros, for the violation of art. 19, paragraph 3, of the Code for having communicated to third parties, in the capacity of municipal councilor, in the absence of suitable legal conditions, documentation containing personal data of the whistleblower;

ENJOYS

to the same to pay the sum of 4,000.00 (four thousand) euros 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 law of 24 November 1981, n. 689.

Pursuant to articles 152 of the Code and 10 of Legislative Decree lg. no. 150/2011, opposition to this provision may be lodged with the ordinary judicial authority, with an appeal lodged with the ordinary court of the place where the data controller has his residence, within the term of thirty days from the date of communication of the provision itself or sixty days if the appellant resides abroad.

Rome, April 4th 2019

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia