[doc. web n. 9689607]

Injunction order against the Municipality of Cogollo del Cengio - June 24, 2021

Record of measures

n. 256 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 / 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 4/4/2019, 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");

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;

Professor Ginevra Cerrina Feroni will be the speaker;

WHEREAS

1. The complaint.

With a complaint submitted to this Authority on the 20th, the publication on the website of the Municipality of Cogollo del Cengio of a resolution containing personal data and assessments on the work of an employee of the Municipality was

complained. In particular, in the resolution, the Municipality invited "the person in charge of disciplinary proceedings to activate a disciplinary procedure by applying, if necessary, an exemplary sanction".

As reported in the complaint, on XX, the complainant was notified of the initiation of disciplinary proceedings for the alleged illegitimacy of the refusal to perform the required tasks and on XX the resolution was published on the Municipality website. full version.

On XX, following an express request by the complainant to cancel the resolution from the aforementioned site, the head of the disciplinary proceedings office communicated to him the archiving of the disciplinary procedure and ordered the removal from the Municipality site "of the part of the resolution deemed harmful to the image of the person ".

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 Town Council, […] with resolution no. XX of the XX, published in the praetorian notice for 15 days from the XX, invited "the person in charge of the disciplinary proceedings to activate a disciplinary procedure [against the complainant] applying, if necessary, an exemplary sanction";

- “the Head of Disciplinary Proceedings with a note dated XX then effectively communicated the disciplinary charge [… to the employee] for refusing to perform the duties expressly provided for by art. 6 of the individual employment contract, as in the target project only the tasks already performed during one's work shift were required. Against this communication, the employee on XX sent a "defense brief" [...] in which the initiation of the procedure was contested and, as a result, the disciplinary procedure was filed ";

- “following the defense brief […], on XX the same resolution was modified by the excerpt of the contested period […] (which appears with the wording“ omitted ”). On the 20th, the entire resolution was removed from the institutional site no longer visible even in the historical section of the Register. Therefore it is confirmed that this resolution is no longer visible on the site, not even in its "obscured" version;

- "Moreover, having performed technical checks, the Entity is able to demonstrate that the number of accesses to the institution's website in the" resolutions "section is really low: we are talking about 2,421 accesses from the date the site was created and put online in 2007 […] The deliberations of the Board have been published since 2013 and in all about 750

resolutions have been published: according to these data we can confidently deduce an average of 3 views per resolution ";

- "Finally, [the Municipality] confirms that the Entity has appointed [the Data Protection Officer] with a service contract starting from 01.07.20 and that it has subsequently (on XX date) communicated to you Guarantor the identification data of the same with the appropriate procedure made available on the website ".

With a note of the twentieth prot. n.XX, the Office, on the basis of the elements acquired, the checks carried out and the facts that emerged as a result of the investigation, notified the Municipality, 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 5, par. 1, lett. a) and c), 6, paragraph 1, lett. c) and e), 2 and 3, lett. b) and 37 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, of the law of November 24, 1981, n. 689).

The Municipality has sent its defensive briefs with note prot. n. XX of the XX, representing that:

- "the resolution of the City Council no. XX of the XX was published in the online Praetorian register for 15 (fifteen) days starting from the XX at 8.05. After 15 days, the resolution remains visible in the historical register of the institution. Following the defense brief of the Attorney [...], on XX the same resolution was modified by the excerpt of the contested period ";

- "on the twentieth date the entire resolution was removed from the institutional site no longer visible even in the historical section of the Register. Therefore it is confirmed that the resolution is no longer visible on the site even in its obscured version ";

- "the resolution in its full version remained published in its complete version for 15 days in the praetorian register and for another 25 days in the historical section. A very short time. Moreover, having carried out technical checks, the Entity is able to demonstrate that the number of accesses to the institution's website in the "resolutions" section is really low. There is talk of 2,421 accesses from the date the site was created and put online in 2007 ";

- "the very limited dissemination of the resolution (an average of 3 views per resolution), the limited duration in time (15 days in the praetorian register and another 25 days in the historical section) and a single subject potentially injured by non-existent and non-existent damage demonstrated are elements that this Distinguished Authority must take into due consideration ";

- "with regard to the appointment of the DPO [...] the undersigned Body [...], despite having tried to adapt promptly to the

GDPR [...] is aware that [...] has belatedly fulfilled the obligation to appoint the Data Protection Officer . This delay is to be justified by a particular contingent situation that has arisen in the Municipality […]. The body [...] has in fact been the subject of a heavy turnover over the last two years ";

- "it is confirmed that the Body has appointed the DPO with a service contract from the date of the XXth and that he has subsequently communicated the identification data of the same to you with the appropriate procedure made available on the website";

- “what happened is the only fruit of a lightness. No economic advantage has been received by the Body for the violations it has incurred in particular for the publication of the de quo resolution concerning the complainant. keep in mind that the writing Municipality boasts a population of 3,300 inhabitants ”.

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 their duties as employers, may 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, par . 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).

In compliance with the principle of "data minimization", even in the presence of a publication obligation, the subjects called to implement it cannot in any case disclose excess or irrelevant personal data (see "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 no. 134 of 12/6/2014 and in www.gpdp.it, doc. web n. 3134436, second part, paragraphs 1 and 3.a.).

3.2 Dissemination of personal data

First of all, it should be noted that the Municipality has not proved the existence of a specific rule of law that establishes the publication of the Municipal Council's determination, containing information regarding the intention to initiate disciplinary proceedings against an employee. Moreover, even in the presence of a law that provides for the publication of deeds and documents of the public administration (see Article 124 of Legislative Decree no. 267 of 18 August 2000) - which in any case must also be implemented with with regard to the period of publication established by this - the principles of data protection must be respected, among which the principle of "data minimization" (art. 5, par. 1, lett. c), of Regulation; cf. part II, par. 3 (a), of the Guarantor's Guidelines cited above).

In this case, resolution no.3 of 7 January 2019 of the Municipal Council, containing the personal identification data of the complainant, as well as the information of a request for the initiation of disciplinary proceedings, including assessments on the work of the same in the context of carrying out the work activity, was published in a manner that does not comply with the principle of "minimization". Therefore, if the Municipality had wanted to publish the determination, which was not obliged to publish, pursuant to Legislative Decree no. 33/2013, should have "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). In the resolution being published, therefore, identification data of the interested party such as the surname and name or other data that could have allowed the identification of the same in the reference context should not have been reported.

Furthermore, it is noted that this resolution was published beyond the time span provided for by the sector regulations (see art. 124, legislative decree 18 August 2000, n. 267 concerning the publicity of the acts of local authorities on the praetorian register, as well as art. 32, law 18 June 2009, n. 69). This time limit, in fact, also includes the publication period of the resolution in the historical section of the Praetorian Register, noting, in this case, a diffusion well beyond the 15-day deadline provided for by the law. circumstance that further connotes the unlawfulness of the dissemination of the personal data contained therein. (see Civil Cassation, section II, ord. n. 18292 of 3 September 2020).

4. Conclusions.

In light of the aforementioned assessments, it is noted that the statements made by the data controller during the investigation the truthfulness of which one may be called to respond 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.

The processing of the data of the interested party, which occurred in violation of the regulations on the processing of personal data, began with the publication of the resolution of the municipal council no.3 of 7 January 2019, in full force of the provisions of the Regulations and of the Code , which therefore constitute the provisions applicable to the case in question (Article 1, paragraph 2, of Law no. 689 of November 24, 1981).

Therefore, the preliminary assessments of the Office are confirmed and the unlawfulness of the processing of personal data carried out by the Municipality is noted, for having disclosed personal data relating to the complainant, contained in the resolution of the municipal council no.3 of 7 January 2019, in absence of suitable regulatory conditions, in violation of art. 6 of the Regulation and 2-ter, paragraphs 1 and 3, 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 Regulation, pursuant to art. 58, par. 2, lett. i), and 83, par. 3, of the same Regulation and 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 resolution in question on the website of the Municipality has ceased, the conditions for the adoption of further corrective measures referred to in '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, the period of time in which the personal data were disseminated was considered; this also in light of the indications that, since 2014, the Guarantor has provided to all public entities in the Guidelines on the processing of personal data, also contained in administrative documents and deeds, carried out for the purpose of advertising and transparency on the web. by public entities and other obligated entities, mentioned above.

On the other hand, it was favorably acknowledged that the Municipality had a particularly collaborative conduct with this Authority in order to remedy the violation and mitigate its possible negative effects, in particular it promptly acted to remove personal data from the administrative acts subject to publication. There are no previous relevant violations committed by the data controller or previous provisions pursuant to art. 58 of the Regulation and, in any case, the damage caused is minor.

On the basis of the aforementioned elements, evaluated as a whole, it is believed to determine the amount of the pecuniary sanction, in the amount of € 1,000.00 (one thousand) for the violation of Articles 5, 6, of the Regulations, as well as art. 2-ter of the Code, as a pecuniary administrative sanction, pursuant to art. 83, par. 1, of the Regulation, effective, proportionate and dissuasive.

Taking into account the time frame during which the aforementioned data were disseminated, 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 concerning internal procedures with external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

WHEREAS, THE GUARANTOR

pursuant to art. 57, par. 1, lett. f), of the Regulations, declares illegal the conduct of the Municipality of Cogollo del Cengio, described in the terms set out in the motivation, consisting in the violation of articles 5, 6, of the Regulations, as well as art.

2-ter of the Code, in the terms set out in the motivation

ORDER

to the Municipality of Cogollo del Cengio, in the person of the pro-tempore legal representative, with registered office in Piazza della Liberta ', 1 - Cogollo del Cengio (VI), C.F. 84009900246, pursuant to art. 58, par. 2, lett. i), and 83, par. 5, of the Regulation and 166, paragraph 2, of the Code, to pay the sum of Euro 1,000.00 (one thousand) as a pecuniary administrative sanction for the violations indicated in the motivation;

INJUNCES

to the aforementioned 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. 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, June 24, 2021

PRESIDENT

Stanzione

THE RAPPORTEUR

Cerrina Feroni

THE SECRETARY GENERAL

Mattei