

[doc. web no. 9574764]

Injunction order against the Municipality of Cattolica - 25 February 2021

Register of measures

no. 73 of 25 February 2021

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by prof. Pasquale Stanzione, president, prof.ssa Ginevra Cerrina Feroni, vice president, dr. Agostino Ghiglia and the lawyer Guido Scorza, components and the cons. Fabio Mattei, 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 the "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 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");

HAVING REGARD to the documentation in the deeds;

HAVING REGARD TO the observations made by the general secretary 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, in www.gpdp.it, doc. web no. 1098801;

Speaker 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 deriving from the dissemination on the institutional website of the Municipality of Cattolica of his personal data and information was contested.

In particular, as also emerged from the preliminary verification carried out by the Office:

1. at the url <http://...> there was a web page relating to the «XX» in which there were two attachments:

- a) protocol XX of the XX, containing the questions posed to the administration in the question time presented by Mr. XX, with the relative personal data (date and place of birth, residence, pec, telephone number, handwritten signature) ([url http://...](http://...));
- b) protocol XX of the XX, containing the administration's reply with the identification data of Mr. XX (<http://...>).

2. at the url <http://...> there was a web page relating to the «XX» in which there were two attachments:

- a) prot XX of XX, containing the questions posed to the administration in the question time presented by Mr. XX, with the relative personal data (date and place of birth, residence, pec, telephone number, handwritten signature) (<http://...>);
- b) protocol XX of the XX, containing the administration's reply with the identification data of Mr. XX ([url http://...](http://...)).

The complainant, before submitting a complaint to the Guarantor, had already turned to the Municipality of Cattolica to request the removal of his personal data deemed excessive - such as address, mobile phone number and e-mail address - which however remained online, until invitation to adhere to the aforementioned request made by the Office to the data controller, pursuant to art. 15, paragraph 1, of the Guarantor's Regulation n. 1/2019.

2. Applicable law.

Pursuant to the legislation on the matter, "personal data" is "any information relating to an identified or identifiable natural person ("interested party")" and "an identifiable natural person is one who can be identified, directly or indirectly, with particular reference to a identifier such as a 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" (Article 4, paragraph 1 , n. 1, of the GDPR).

The processing of personal data carried out by public subjects 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 of to which the data controller is vested» (Article 6, paragraph 1, letters c and e, GDPR).

It is also foreseen that «Member States may maintain [...] more specific provisions to adapt the application of the rules of this regulation with regard to treatment, in accordance with paragraph 1, letters c) and e), by determining more precisely specific requirements for processing and other measures aimed at guaranteeing lawful and correct processing [...]» (art. 6, paragraph 2, GDPR), with the consequence that the provisions contained in 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) is permitted when envisaged «by a provision of law or, in the cases envisaged by law, of regulation", in compliance - in any case - with the principles of data protection, including that of "minimization", according to which personal data must be "adequate, pertinent and limited to what is necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter c, of the GDPR).

With particular reference to the case in question, in the context of the statutory and regulatory autonomy of local authorities (cf. art. 6 of Legislative Decree no. 267 of 18/8/2000; articles 114, paragraph 2, and 117 , paragraph 6, Cost), the Statute of the Municipality of Cattolica has provided that «In application of the principle of subsidiarity, the Municipality favors the autonomous initiatives of citizens, aimed at pursuing the general interest of the community» and that citizens can present to the Municipality which "[constitute] a formal written request, formulated by individuals or associates, addressed to the Mayor, with which the reasons for certain behaviors or aspects of the administrative activity are asked" (articles 63, paragraph 1; and 68 , paragraph 1).

In this context, the regulation of the Municipal Council regulated the institution of the «XX», through which any citizen is given the possibility to present questions to the Mayor and the Municipal Administration «on any subject» with the exception of some cases provided for in the regulation itself. These questions are presented and discussed in the session of the Municipal Council, following an assessment of admissibility by the Bureau (art. 45-bis, paragraphs 1-5, of the Regulations of the Municipal Council).

As regards the publicity regime for board meetings, state legislation for the sector provides that «Board and commission meetings are public except in the cases provided for by the regulation» (art. 38 of legislative decree no. 267 of 18/ 8/2000).

In relation to the Question Time institute, introduced in the Municipality of Cattolica, the administration has also provided for a further provision, in the regulation of the Municipal Council, sanctioning that «All the questions asked and the relative answers will be published in the digital praetorian register, in a special area called "XX", present on the website of the Municipality» (see

art. 45-bis, paragraph 10).

In any case, it should be remembered that, since 2014, the Guarantor has provided specific indications to the administrations on the precautions to be taken with regard to the dissemination of personal data contained therein with 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.gdpd.it, doc. web no. 3134436 (currently being updated, but still current in the substantial part).

In the Guarantor's Guidelines cited, it is expressly provided (second part, paragraph 1) that:

- «public administrations, before making administrative deeds and documents available on their institutional websites (in integral form or in extracts, including attachments) containing personal data, [must] verify[are] whether the sector legislation envisages expressly this obligation [...]»;
- «Where the administration finds the existence of a regulatory obligation which requires the publication of the deed or document on its institutional website, it is necessary to select the personal data to be included in these deeds and documents, verifying, case by case, whether the conditions exist for the blackout of certain information»;
- «This is also in consideration of the fact that, even in this case, public entities are required to minimize the use of personal data and identification data [cf. art. 5, par. 1, lit. c, of the RGPD], and avoid the related processing when the purposes pursued in individual cases can be achieved through anonymous data or other methods that allow the data subject to be identified only if necessary»;
- "Therefore, even in the presence of an obligation of publicity, the dissemination of only personal data is permitted, the inclusion of which in deeds and documents is really necessary and proportionate to the achievement of the purposes pursued by the deed".

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

With note prot. no. XX - ref.XX of the XX the Municipality of Cattolica has responded to the request for information from this Authority (prot. n. XX of the XX).

Following the checks carried out on the basis of the elements acquired and the facts that emerged following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the

aforementioned administration - by disseminating online personal data of the complainant (such as date and place of birth, residence, certified e-mail address, mobile phone number, handwritten signature) - carried out personal data processing that did not comply with the relevant regulations in on the protection of personal data contained in the GDPR. Therefore, with the same note, the Municipality of Cattolica was notified of the violations carried out (pursuant to article 166, paragraph 5, of the Code), 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 the Guarantor defense writings or documents and, possibly, 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 Article 18, paragraph 1, of Law No. 689 of 11/24/1981).

4. Defensive memories and hearing.

With the note prot. no. XX - ref.XX of the XX the Municipality of Cattolica sent its defense writings to the Guarantor in relation to the notified violations.

In this regard, it should be remembered that, unless the fact constitutes a more serious offence, anyone who, 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».

Specifically, it was highlighted, among other things, that:

- «The context in which the conduct subject to sanction by the Guarantor occurred is constituted by the so-called "question time". 72 of 20/12/2017 which introduced it, "is a tool adopted in many Italian municipalities which has the purpose, on the one hand, to encourage citizen participation in the life of the institution and on the other to allow those administrators to know the positions, the criticisms, the suggestions, the requests coming from the citizens"»;
- «It was already foreseen in the Municipal Statute of the Municipality of Cattolica
- in art. 63 paragraph 1 that "In application of the principle of subsidiarity, the Municipality favors the autonomous initiatives of citizens, aimed at pursuing the general interest of the community"
- [...] in art. 68 paragraph 1 [...] that "The Application constitutes a form of written request, formulated by individuals or associates, addressed to the Mayor, with which the reasons for certain behaviors or aspects of the administrative activity are asked"";

- «The foundations of this institution are, in the writer's opinion, to be found in the broad institution of "administrative transparency" (or rather, the right to administrative information) which constitutes [...] a general principle of the activity and public organisation, on the basis of which the public administration is required to ensure the visibility, knowledge and comprehensibility of the operating methods and organizational structures with which it operates in carrying out its tasks of concrete care of the public interest";
- «[in relation to] methods of processing requests/questions sent by citizens, art. 45 bis paragraph 6 of the Municipal Council Regulation provides that "the answer to the citizen's question will be publicly provided in the Municipal Council within the term of thirty days from the date of arrival of the request"; finally, paragraph 10 provides that "All the questions asked and the relative answers will be published in the digital praetorian register, in a special area called "XX", present on the Municipality website"";
- «the Administration has published the data of the complainant considering the pre-eminent interest of the community in full and exhaustive information also with reference to the identity of the person who used the institution of participation in the question time, including contact data that is represented, by the way, [...] by means of search engines are all fully and analytically traceable on third party sites other than that of the Municipality";
- «Having taken note of the different determination of the Guarantor, the Organization immediately took action to remedy the alleged violation of personal data and, with effect from 01/31/2020, deleted the online contents of the documents containing the personal data of the dr. XX. With the elimination of the contents, therefore, the possible negative effects of the disputed publication have been terminated. The Administration spontaneously joined the complaint procedure pursuant to and for the purposes of art. 15 paragraph 1 of the Regulation of the Guarantor for the protection of personal data n. 1/2019";
- «The Administration has already prepared a draft resolution with which to amend the Regulation of the City Council in force, and specifically Chapter III bis containing "XX", adding paragraph 11 to art. 45 bis, as indicated below "11 - The publication of the questions asked and the relative answers is carried out by reporting only the name and surname of the requesting citizen, adopting specific technical measures that prevent the indexing by generalist search engines of the contents therein published".

5. Evaluations of the Guarantor

The subject of the specific case brought to the attention of the Guarantor is the publication of the files identified above in paragraph 1, containing the documents concerning the questions posed to the administration in the question time presented by

the complainant and the answers provided by the administration. These documents contained personal data and information of the complainant, including, in addition to name and surname, also date and place of birth, residence, certified e-mail address, mobile phone number, handwritten signature.

In this regard, in the light of the regulatory framework described above (see par. 2), preliminary reservations are made regarding the possibility that Article 45-bis of the Regulations of the Municipal Council, referred to above, may constitute a suitable regulatory basis for the dissemination of personal data pursuant to art. 2-ter, paragraphs 1 and 3, of the Code, above all in the event that the questions asked are not then admitted and discussed during the Municipal Council.

In any case, beyond this circumstance, it must instead be taken into consideration that where the question is found in a public session of the Municipal Council - as in the case of the complainant who, as shown by the preliminary investigation documents, was given feedback during the session held on the XX date – the advertising regime provided for by art. is deemed applicable in any case. 38 of the legislative decree lgs. no. 267/2000.

Nonetheless, even in the presence of a specific advertising regime, the online dissemination of personal data and information must take place in compliance with the general principles regarding the protection of personal data of European origin, provided for by the GDPR, such as - among others - that of "minimization", according to which personal data - even contained in deeds or documents whose online dissemination is envisaged by a specific regulatory basis - must be not only "adequate" and "pertinent", but also "limited to what necessary with respect to the purposes for which they are processed" (Article 5, paragraph 1, letter c).

On the other hand, this is also confirmed by the personal data protection system contained in the GDPR, in the light of which it is in fact envisaged that the data controller must "implement adequate technical and organizational measures to ensure that they are processed, by default, only the personal data necessary for each specific purpose of the processing" ("privacy by default") and must be "able to demonstrate" - in the light of the principle of "accountability" - to have done so (articles 5 , paragraph 2; 24 and 25, paragraph 2, GDPR).

The framework described is also consistent with what was stated by the Guarantor, since 2014, with the Guidelines referred to above (par. 2), where it was indicated in the pp.aa. that - even in the event that there is an obligation for the administration to publish a deed or document on its institutional website, as in the case under examination - it is in any case necessary "to select the personal data to be included in such deeds and documents , verifying, case by case, whether the conditions for the

obscuring of certain information are met", as they are not necessary with respect to the purposes for which they are processed (see now the principle of "minimization" of data pursuant to art. 5, paragraph 1, letter c, of the GDPR, which replaced the principles of pertinence and non-excess, as well as necessity, pursuant to articles 3, 11, paragraph 1, letter d, of the previous Code and in art. 6, paragraph 1, letter c, of Directive 95/46/EC repealed by the GDPR).

From this point of view, the exception raised by the Municipality according to which "the Administration has published the data of the complainant considering the community's interest in full and exhaustive information as paramount" which would allow disclosure not only of the «identity of the person who used the institution of participation of the question time, [but also of] the contact data that is represented, by the way, [...] by means of search engines are all fully and analytically traceable on third-party sites with respect to that of the Municipality".

This is because for the stated purposes – i.e. to satisfy «the interest of the community in full and exhaustive information» – the online publication (which represents the widest form of dissemination of personal data) of the complainant's specific personal information – such as date and place of birth, residence, certified e-mail address, mobile phone number and handwritten signature - is completely superfluous and disproportionate; capable, however, of generating the risk of exposing the interested party to further unlawful forms of use of his data by third parties (e.g.: identity theft, illegal profiling, phishing, etc.).

Finally, as regards the circumstance (moreover not proven) that the aforementioned personal data were easily available online through search engines, it is not understood how this element could be useful for assessing whether the related processing by the Municipality is actually necessary for the exercise of its institutional functions and if the data are actually "limited to what is necessary with respect to the purposes for which they are processed" (articles 5., paragraph 1, letter, c; 6, paragraph 1, letter e, GDPR) .

6. Outcome of the investigation relating to the complaint presented

For all of the above, the circumstances highlighted in the written defense examined as a whole, certainly worthy of consideration for the purpose of assessing the conduct, are not sufficient to allow the dismissal of the present proceeding pursuant to art. 11 of the Regulation of the Guarantor n. 1/2019.

In this context, the findings notified by the Office with the note prot. no. XX of the XX and the non-compliance of the processing of personal data object of the complaint with the relevant regulations on the protection of personal data is noted, as - without prejudice to the publicity regime of the meetings of the municipal council (art. 38 of the legislative decree 267/2000) - personal

data of the complainant were disclosed online - such as date and place of birth, residence, certified e-mail address, mobile phone number, handwritten signature - not "limited to what is necessary with respect to the purposes for which they are processed », in violation of the art. 5, par. 1, lit. c) of the GDPR and the principle of "data minimization".

Considering, however, that the conduct has exhausted its effects, as the data controller has declared that he has taken steps to remove the personal data object of the complaint, without prejudice to what will be said on the application of the pecuniary administrative sanction, the conditions do not exist 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 administrative fine (articles 58, paragraph 2, letter i; 83 GDPR)

The Municipality of Cattolica appears to have violated art. 5, par. 1, lit. c) of the GDPR.

For the violation of the aforementioned provision, the application of the administrative sanction pursuant to art. 83, par. 5 of the GDPR.

The Guarantor, pursuant to articles 58, par. 2, lit. i) and 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 every single case". 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 whole 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 this sense, the detected conduct in violation of the regulations on the protection of personal data concerned the dissemination of personal data, for a long period of time (about a year and a half), although not belonging to particular categories or to criminal convictions or offenses (articles 9 and 10 of the GDPR) and referred to a single interested party. The conduct is negligent in nature. As a mitigating element, the context in which the processing took place, the principle of publicity of board meetings, the interpretative difficulty, deriving from the coexistence of numerous regulatory sources, not only European, but also state and local authorities (relating to tools of participation and active citizenship, such as question time) which, however, were not disapplicable autonomously by municipal officials. In any case, following the request for information

from the Office, the data controller intervened promptly, collaborating with the Authority during the investigation of this proceeding in order to remedy the violation by mitigating its possible negative effects. We do not know of any previous relevant GDPR violations committed by the aforementioned administration.

Based on the aforementioned elements, evaluated 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, in the amount of € 2,000.00 (two thousand) for the violation of art. 5, par. 1, lit. c), of the GDPR, as a pecuniary administrative sanction deemed effective, proportionate and dissuasive pursuant to art. 83, par. 1, of the same GDPR.

In relation to the specific circumstances of the present case, relating to the dissemination of personal data online in violation of the principle of data minimization (Article 5, paragraph 1, letter c, GDPR), it is also believed that the accessory sanction should be applied the publication of this provision on the Guarantor's website, pursuant to 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 forth in art. 17 of the Regulation of the Guarantor n. 1/2019.

ALL THIS CONSIDERING THE GUARANTOR

having detected the unlawfulness of the processing carried out by the Municipality of Cattolica in the terms indicated in the justification pursuant to articles 58, par. 2, lit. i) and 83 of the GDPR

ORDER

to the Municipality of Cattolica, in the person of its pro-tempore legal representative, with registered office in P.le Roosevelt n. 5 - 47841 Cattolica (RN) - Fiscal Code 00343840401 to pay the sum of €2,000.00 (two thousand) as an administrative fine for the violations referred to in the justification;

ENJOYS

to the same Municipality to pay the sum of € 2,000.00 (two thousand), 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.

It should be remembered that the offender retains the right to settle the dispute by paying - always according to the methods indicated in the annex - an amount equal to half of the fine imposed, within the term set out in art. 10, paragraph 3, of Legislative Decree lgs. no. 150 of 09/01/2011 envisaged for the lodging of the appeal as indicated below (art. 166, paragraph

8, of the Code).

HAS

- the publication of this provision on the Guarantor's website pursuant to art. 166, paragraph 7, of the Code and by art. 16, paragraph 1, of the Guarantor Regulation n. 1/2019;

- annotation in the Authority's internal register of the violations and measures adopted pursuant to art. 58, par. 2 of the GDPR with this provision, as required by art. 17 of the Regulation of the Guarantor n. 1/2019.

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, 25 February 2021

PRESIDENT

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THE SPEAKER

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THE SECRETARY GENERAL

Matthew