[doc. web no. 9438157]

Injunction order against the autonomous institute for social housing in the province of Isernia - 10 June 2020

Register of measures

no. 101 of 10 June 2020

THE GUARANTOR FOR THE PROTECTION OF PERSONAL DATA

IN today's meeting, which was attended by Dr. Antonello Soro, president, Dr. Augusta Iannini, vice-president, Prof. Licia Califano and Dr. Giovanna Bianchi Clerici, members and Dr. Giuseppe Busia, 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”);

HAVING REGARD TO Legislative Decree 30 June 2003, n. 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 of the Guarantor 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, doc. web no. 9107633 (hereinafter "Regulation of the Guarantor n. 1/2019");

Given the documentation in the deeds;

Given the observations made by the Secretary General pursuant to art. 15 of the Regulation of the Guarantor n. 1/2000 on the organization and functioning of the Guarantor's office for the protection of personal data, doc. web no. 1098801;

Speaker Dr. Giovanna Bianchi Clerici;

WHEREAS

1. Introduction

This Authority has received two complaints from Ms. XX and XX (hereinafter "the complainants") regarding the illegitimate dissemination of their personal data online by the autonomous institute for social housing in the province of Isernia.

In particular, from the preliminary verification carried out by the Office, it emerged that on the institutional website of the aforementioned Institute from the link located in the area dedicated to the Praetorian Register, in the section called "Administrative documents", on the page dedicated to the "View of administrative documents" , it was possible to freely view and download the following documents, at the urls indicated:

1. XX;
2. XX;
3. XX;
4. XX;
5. XX;
6. XX;
7. XX;
8. XX.

The documents cited above contained unencrypted personal data relating to the two complainants. Furthermore, the first three documents cited also reported data relating to the state of health of one of them, as they specified the circumstance of relative absence due to illness.

The autonomous institute for social housing in the province of Isernia responded to the request for information from the Office and with a note dated XX confirmed the removal from the website of the documents indicated above.

2. Applicable law.

Pursuant to the GDPR, the processing of personal data carried out by public entities (such as the Municipality) is lawful only 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 powers vested in the data controller" (Article 6, paragraph 1, letters c and e).

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 provision contained in art. 19, paragraph 3, of the Code, in force at the date of the facts, where it establishes that the operation of dissemination of personal data (such as publication on the Internet), by public entities, is permitted only when required by law or of regulation.

Furthermore, in any case, the data controller is required to comply with the principles of data protection, including that of "lawfulness, correctness and transparency" as well as "minimization", according to which personal data must be "processed in a lawful, correct and transparent manner in relation to the interested party" and must be "adequate, pertinent 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 the GDPR).

It is also envisaged 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), determining with greater precision specific requirements for processing and other measures to ensure lawful and fair processing […]" (art. 6, paragraph 2, GDPR).

In this context, the processing of "particular categories of personal data" listed by art. 9, par. 1, of the RGPD – which includes «data relating to health» or rather «personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information relating to his state of health» (art. 4, par. 1, n. 15; recital n. 35 of the RGPD) – unless one of the exceptions provided for in paragraph 2 of the aforementioned art. 9.

The aforementioned exceptions include the case in which "the processing is necessary for reasons of significant public interest on the basis of Union or Member State law, which must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for appropriate and specific measures to protect the fundamental rights and interests of the interested party" (Article 9, paragraph 2, letter g). In any case, «Member States may maintain or introduce further conditions, including limitations, with regard to the processing of […] data relating to health» (Article 9, paragraph 4, GDPR).

Therefore, in the present case, the provisions contained are applicable:

- in the art. 19, paragraph 3, of the Code, in force at the date of the facts, in the part in which it is established that the operation of dissemination of personal data (such as publication on the Internet), by public entities is only permitted when provided for by a law of law or regulation (the same provision is reproduced in the new article 2-ter, paragraphs 1 and 3, of the Code);

- in the art. 22, paragraph 8, of the Code, in force at the date of the facts, which provides that, in any case, the dissemination of data suitable for revealing the state of health of the subjects concerned is prohibited (the content of which has been reproduced in the new art. 2 - septies, paragraph 8, of the Code).

3. Preliminary evaluations 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 following the preliminary investigation, as well as the subsequent assessments, the Office with note prot. no. XX of the XX ascertained that the autonomous Institute for public housing in the province of Isernia, by disseminating the personal data of the claimants - contained in the documents previously identified in nos. from 1 to 8 published on the institutional website – has carried out personal data processing that does not comply with the relevant regulations on the protection of personal data contained in the RGPD. Therefore, with the same note the violations carried out were notified to the Institute (pursuant to article 166, paragraph 5, of the Code), communicating the initiation of the procedure for the adoption of the measures referred to in article 58, par. 2, of the GDPR and inviting the aforementioned Institute 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 dated XX, the autonomous institute for social housing in the province of Isernia 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, with regard to the disputed facts, the Institute highlighted that:

- in relation to the administrative deeds marked under nos. 1-3, the obligation to give reasons for the administrative acts entailed the need to give evidence of the absence due to illness of one of the complainants, but, in any case, no reference was made to the "nature of the disease, to pathologies found and/or diagnoses made";

- in relation to the administrative deeds marked under nos. 4-7, «the publication of the documents on the Entity's website took

place in compliance with the transparency obligations imposed on the Administrations by Legislative Decree no. 33/2013, which, in art. 18 establishes the publication of the list of assignments conferred or authorized to its employees, with an indication of the duration and remuneration due for each assignment, in art. 15 imposes the obligation to publish all information relating to the performance of duties or the performance of professional activities". In this regard it was added that «In any case, the publication also took place in the context of updating the information and data relating to its internal organization (Article 13) as well as in a relevant form with respect to the pursued purpose and certainly not excessive »;

- in relation to the administrative deed marked under no. 8, the relative "publication took place erroneously".

With regard to the conduct held, the Institute asked in any case to take into consideration that:

- "the disputed dissemination of data by the IACP-IS [...] did not concern, as seen, "particular" categories of data and where there was an indication referring to the "state of health" of an interested party, this is remained within the limits of generality and of the information deemed indispensable in order to deduce the situation of exceptional nature necessary for the assignment of the task to the outgoing XX";

- the complainants «had never manifested disturbances or prejudices of any kind related to the work of IACP-IS as outlined above, a circumstance that could possibly have allowed this, already affected by management difficulties and reorganization phenomena, a better definition of the procedures and a solution shared with the ongoing story»;

- «Following the report of the potential violation of the rules on privacy, which also occurred, it repeats, only by this Authority, IACP-IS immediately proceeded to remove the allegedly "harmful" acts from the website for the precise purpose to cooperate with the Guarantor Authority and in any case to reduce any risk factor and/or criticality";

- «IACP-IS has adopted, also through specific instructions to the staff, control measures on the personal data subject to publication»;

On 27/9/2019, the hearing requested by the autonomous institute for public housing in the province of Isernia was also held at the Guarantor pursuant to art. 166, paragraph 6, of the Code on the occasion of which it was represented, in addition to what has already been reported in the documentation sent, that:

- "the Entity is a small administrative entity, in the process of liquidation, characterized by organisational, managerial and financial difficulties, with repercussions on the relationship between the Entity and its personnel"

- "from a subjective point of view, the administration acted with the sole intention of complying with legal obligations, in the

absence of any form of fraud or intention to harm third parties";

- "the whistleblowers have never contacted the Body to request the removal of their personal data published online, having directly appealed to the Guarantor for the protection of personal data"

- «following the communication sent by the Guarantor, the Entity immediately took action to remove the documents subject to the report, which were in any case published on a website that is typically consulted by a small number of users».

- "the facts to be reported occurred in accordance with the previous legislation on the protection of personal data, or before the application of Regulation (EU) 2016/679".

5. Outcome of the investigation relating to the complaints presented

The autonomous institute for public housing in the province of Isernia both in the defense briefs and in the hearing confirmed the online dissemination of the complainants' personal data, presenting some observations which, although worthy of consideration, do not allow to completely overcome the findings notified by the Office with the act of initiation of the procedure.

In relation to the administrative documents marked under nos. 1-3 it is not possible to accept the exception for which particular categories of personal data would not have been disclosed as the aforementioned documents contained a generic reference to the absence due to illness of the interested party without indicating the pathology.

In this regard, since 2014 the Guarantor in its Guidelines on transparency has indicated that the dissemination of data capable of revealing the "state of health" is "always prohibited (art. 22, paragraph 8, of the Code [today art. 2-septies, paragraph 8, of the Code])» and that «In particular, with reference to data suitable for revealing the state of health of the data subjects, it is prohibited to publish any information from which it can be inferred, even indirectly, the state of illness or the existence of pathologies of the subjects involved, including any reference to the conditions of invalidity, disability or physical and/or mental handicap" (see part one, paragraph 2; part two, paragraph 1; as well as measures cited therein in the footnote No. 5).

For this reason, it is not possible to accept the exception for which - as an exception to the prohibition on the dissemination of health data - the obligation to give reasons for the administrative act could legitimize the dissemination of the news of the absence due to illness of one of the complainants .

In relation to what has been observed in relation to the administrative documents marked under nos. 4-7, it should be noted that the provisions, cited by the Institute, contained in articles 13, 15 and 18 of Legislative Decree lgs. no. 33/2013 do not provide for the publication of the personal data of the complainants contained therein, as the aforementioned deeds would

relate to the performance of the employment relationship of the personnel of the dissolved II.AA.CC.PP. at E.r.e.s. pursuant to regional law of the Molise Region n. 21 of 2/12/2014 referred to in the aforementioned decrees. This case is not comparable to contracts of "collaboration or consultancy" with subjects outside the public administration. o to assignments "conferred or authorized" to employees pursuant to articles 15 and 18 of Legislative Decree lgs. 33/2013. Furthermore, the relative publication does not fall within the publicity obligations pursuant to art. 13 which concerns information on the organization of a different type.

For these reasons, in relation to the conduct held, the arguments reported by the autonomous Institute for public housing in the province of Isernia are not sufficient to allow the filing of the present proceeding, as none of the cases provided for by art. 11 of the Regulation of the Guarantor n. 1/2019.

In this context, the preliminary assessments of the Office are therefore confirmed and the illegality of the processing of personal data carried out by the aforementioned Institute is noted, as:

- dissemination on the institutional website of the identification data of the claimant absent due to illness, contained in Decree no. XX and in executive Decisions n. XX and no. XX (previously identified under nos. 1 to 3), has caused the dissemination of data suitable for revealing the state of health of the interested party, in any case in violation of art. 22, paragraph 8, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-septies, paragraph 8, of the Code), and of the art. 9, par. 1 and 4, of the GDPR;

- the dissemination on the institutional website of the identification data of the complainants, contained in the Decrees no. XX, no. XX, no. XX and no. XX (previously identified under nos. 4 to 7) has caused the dissemination of personal data on the web in the absence of suitable regulatory conditions, in violation of art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3 of the Code), and of art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR;

- the dissemination on the institutional website of the identification data of the interested parties contained in the Executive Decision n. XX (first identified at n. 8) has caused a diffusion of personal data on the web in the absence of suitable regulatory conditions, in violation of art. 19, paragraph 3, of the Code, in force at the time of the unlawful conduct (now reproduced in the new art. 2-ter, paragraphs 1 and 3 of the Code) and art. 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b) of the GDPR.

The violation of the aforementioned provisions makes it applicable pursuant to art. 58, par. 2, lit. i), of the Regulation, the

administrative sanction provided for by art. 83, par. 5 of the Regulation, as also referred to by art. 166, paragraph 2, of the Code.

Considering, however, that the conduct has exhausted its effects, as the data controller has taken steps to remove the documents containing the personal data of the complainants described above from the institutional website, without prejudice to what will be said on the application of the administrative fine , the conditions for the adoption of further corrective measures pursuant to art. 58, par. 2 of the GDPR.

6. Adoption of the injunction order for the application of the administrative fine (articles 58, paragraph 2, letter i; 83 GDPR)

The autonomous institute for public housing in the province of Isernia appears to have violated articles 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b); 9, par. 1 and 4, of the GDPR; as well as the articles 19, paragraph 3, and 22, paragraph 8, of the Code, in force at the time of the unlawful conduct.

In this regard, the art. 83, par. 3, of the GDPR, provides that «If, in relation to the same treatment or related treatments, a data controller or a data processor violates, with malice or negligence, various provisions of this regulation, the total amount of the pecuniary administrative sanction will not exceeds the amount specified for the most serious violation".

In this case, the violation of the aforementioned provisions is subject to the application of the same pecuniary administrative sanction provided for by art. 83, par. 5 of the GDPR, which therefore applies to the present case.

It should also be taken into account that, although the resolutions and decrees subject to the complaint, published online, date back to the years 2016-2017, in order to determine the applicable rule, in terms of time, the principle of legality referred to in art. 1, paragraph 2, of the law no. 689/1981 which, in sanctioning as «The laws that provide for administrative sanctions are applied only in the cases and in the times considered in them». This determines the obligation to take into consideration the provisions in force at the time of the committed violation, which in the case in question - given the permanent nature of the disputed offense - must be identified at the time of cessation of the unlawful conduct, which occurred after the date of the XX in which the GDPR became applicable. Indeed, the preliminary investigation documents revealed that the illicit online diffusion ceased on July 20 (the month in which the autonomous institute for social housing in the province of Isernia confirmed that it had taken steps to remove the provisions previously indicated by the site institutional website).

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 relation to the aforementioned elements, the reported conduct in violation of the regulations on the protection of personal data involved the dissemination of personal data of two interested parties, also relating to the state of health (but without indication of the pathology) . The diffusion lasted for more than a year. The autonomous institute for public housing in the province of Isernia also highlighted that the institution "is a small administrative entity, in the liquidation phase, characterized by organisational, managerial and financial difficulties, with repercussions on the relations between the institution and its staff» and acted «in the absence of any form of willful misconduct or intention to harm third parties». The complainants appealed directly to the Guarantor and did not first apply to the Institute to request the removal of the published data. In addition, the administration has taken action to remove the personal data that is the subject of the complaint and has collaborated with the Authority during the investigation of this proceeding in order to remedy the violation by mitigating its possible negative effects.

In the response to the Guarantor, various technical and organizational measures implemented pursuant to articles 25-32 of the GDPR. There are no previous relevant GDPR violations committed by the aforementioned Institute.

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) euros for the violation of articles 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b); 9, par. 1 and 4, of the GDPR; as well as the articles 19, paragraph 3, and 22, paragraph 8, of the Code, 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 on the web of data on the state of health and identification data of the complainants in the absence of a suitable regulatory basis, it is also believed that the accessory sanction of publication on the website of the Guarantor of this provision, 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 forth in art. 17 of the Regulation of the Guarantor n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

ALL THIS CONSIDERING THE GUARANTOR

the illegality of the treatment carried out by the autonomous Institute for public housing in the province of Isernia has been detected pursuant to articles 57, par. 1, lit. f), and 83 of the GDPR, as well as art. 166 of the Code for the violation of the articles 6, par. 1, lit. c) and e); par. 2 and par. 3, letter. b); 9, par. 1 and 4, of the GDPR; as well as the articles 19, paragraph 3, and 22, paragraph 8, of the Code, in force at the time of the unlawful conduct.

ORDER

pursuant to articles 58, par. 2, lit. i), and 83, par. 5, of the RGPD, and 166, paragraph 2, of the Code, to the autonomous Institute for public housing in the province of Isernia, in the person of its pro-tempore legal representative, with registered office in Via Papa Giovanni XXIII, N. 113 - 86170 Isernia (IS) – Fiscal Code 00075330944 to pay the sum of 2,000.00 (two thousand) euros as an administrative fine for the violations indicated in this provision;

ENJOYS

to the same Institute to pay the sum of 2,000.00 (two thousand) euros, according to the methods indicated in the attachment, within 30 days of notification of this provision, under penalty of adopting 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 and believes that the conditions set out in art. 17 of the Regulation of the Guarantor n. 1/2019 concerning internal procedures having external relevance, aimed at carrying out the tasks and exercising the powers delegated to the Guarantor.

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, 10 June 2020

PRESIDENT

Soro

THE SPEAKER

Cleric Whites

THE SECRETARY GENERAL

Busia