Privacy Series

6 CONSENT

VEIRANO ADVOGADOS



This is the sixth chapter of the Data Privacy Series. Click here to access the chap. 5.



In 2023, the Brazilian General Data Protection Law (Law No. 13,709/2018 or "LGPD") celebrates 5 years of its publication - now also including the possibility of the application of administrative sanctions by the ANPD since August 2021. The Brazilian National Data Protection Authority ("ANPD") has been active in fostering discussions and disseminating concepts, practices and principles of privacy and data protection, through the publication of several materials for awareness and regulation of the LGPD since its creation.

Veirano Advogados has been following and participating in discussions regarding these issues. For this reason, our Data Protection & Privacy team has prepared the **Privacy Series**, in which we will periodically publish on different topics related to privacy, bringing not only LGPD concepts, but also ANPD publications on the subject, relevant considerations, among other contents.

Consent

As explained in the chapter 5 of this Serie, Consent is one of the legal bases provided by LGPD to justify and support the Processing of Personal Data by Processing Agents.

Under Brazilian law, it is not necessary to collect the Consent of the Data Subject for all Processing operations. The LGPD brings other hypotheses to enable the Processing, depending on whether the information is Personal Data or Sensitive Personal Data. Thus, Consent is only one of the situations in which it is allowed to Process Personal Data.

Despite being one of the legal grounds that authorizes both the processing of personal data and that of sensitive personal data, when using the data subject's consent to legitimize processing, several aspects established by the LGPD must be considered. Consent shall always be obtained:

- By means that can evidence the data subject's will;
- Before processing;
- Based on the data subject's freedom of choice;
- After the data subject has received clear information regarding the processing;
- Through a positive act by the data subject, indicating acceptance.

But what is deemed to be a valid consent? To demonstrate what the LGPD establishes as valid consent, we've prepared a few examples:

DO'S

- Blank checkbox requesting the data subject's consent for the processing of his/her personal data for purposes of direct marketing
- Message at the end of the marketing emails giving the data subject the option of revoking consent
- Requesting consent from the data subject to process specific data as per the data mapping
- Email to the guardians of the child to whom the personal data refers requesting authorization for processing

DON'Ts

- Pre-filled checkbox requesting the data subject's consent for the processing of personal data for targeted marketing
- Tie service offers or provision of information to the data subject's consent to processing of personal data
- Consent message included in the platform's Terms of Use, without emphasis and with "global" consent
- Mechanisms that hinder data subject's ability to revoke consent
- Request for data subject's consent "for any and all processing performed by the Controller"
- Obtaining consent directly from children, who are data subjects, involved in the processing activity

REMEMBER!

a. Consent **does not have to be obtained in writing**, however, the controller is responsible for evidencing that the data subject provided consent pursuant to the LGPD. Therefore, **prefer written consent**!

b. The data subject is entlited to revoke consent at **any time**, through a **free and simplified procedure**;

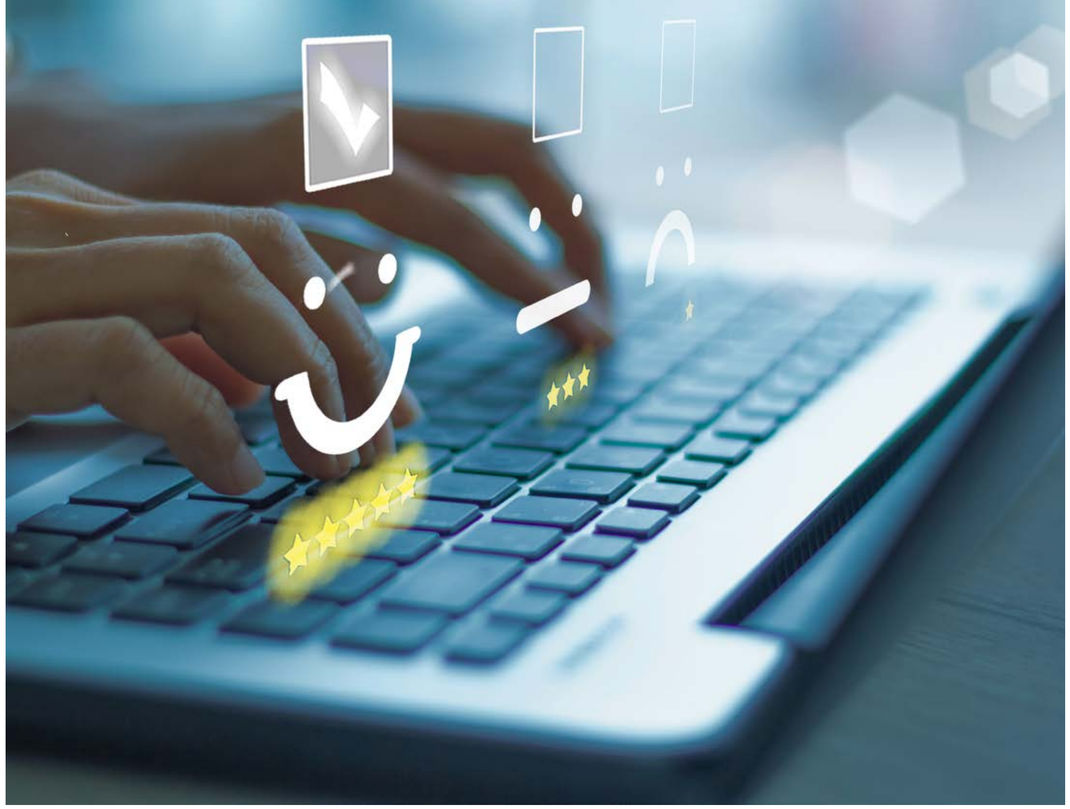
c. To adopt consent for marketing purposes, for example, you must use a consente management tool. That way, it will be possible to **ensure exercise of rights by the data subjects**;

d. Consent has to be freely given and, therefore, its best to use an opt-in to obtain it. That way, **pre-selected checkboxes are not valid** under the LGPD;

e. The data subject is entitled to receibe information on the possibility of not providing consent and the **consequences of such denial**;

f. When consent is required, it must be given **prior to the start of personal data processing**;

g. When data is related to a child, the processing agents must make every reasonable effort to confirm that consent was provided by the **child's guardian**, considering available technology;



h. Personal data **must never be used for discriminatory purposes** or processing may be deemed null, even when validly provided by the data subject;

i. If consenti is provided in writing, it must be presented in a **provision separate from the other provisions agreement**;

j. The LGPD **expressly prohibits generic authorizations** for personal data processing.

Consent for Processing Children's and Adolescents' Personal Data

The collection of Consent for Processing of Children's and Adolescents' Personal Data is also worth mentioning, given the specificities established by LGPD.

Firstly, it should be noted that article 14 of the LGPD provides that "*The processing of personal data of children and adolescents shall be carried out in their best interest, pursuant to this article and the relevant legislation*". Also, with regard to the Processing, specifically, of children, the LGPD established in the first paragraph of the aforementioned article that this must be done upon specific and outstanding Consent given by at least one of the parents or the legal guardian of the child.

In cases, however, where the collection of Children's Personal Data is necessary to contact their parents or legal guardian, or for the protection of the child, provided that they are used only once and without storage, the Consent mentioned in the above paragraph may be waived. Note, though, that in this case the Personal Data may not be passed on to third parties without the proper Consent from a parent or legal guardian of the child.

It happens that the interpretation that Consent should be the only legal basis applicable to the Processing of Children's and Adolescents' Personal Data has brought up several questions about this hypothesis and its practical implications.



It was based on this concern that the ANPD, in September 2022, made the taking of subsidies on this theme public which was open to contributions from society until October 7th of that year. The referred consultation was based on the Preliminary Study made by the Authority itself, in which 3 (three) alternatives for the legitimization of the Processing of children's Personal Data were addressed, and which resulted in an initial suggestion from the technical area for the elaboration of a statement on the issue.

The first alternative would be the restrictive and literal interpretation of article 14, § 1 of the LGPD, so that the Consent of parents and/or people responsible for the children would be the only legal basis for Processing the Personal Data of these individuals. The second alternative, in turn, understands that the Personal Data of children and adolescents can be equated with Sensitive Personal Data and, for this reason, the legal bases provided in article 11 of the Brazilian legislation can be applied. Finally, the third understanding is that the Personal Data of children and adolescents may be Processed through the application of any legal bases, whether those provided in article 7, or those provided in article 11, as long as the principle of the best interest is observed.



Based on the analysis of the arguments for and against each of these interpretations, presented and discussed throughout the study, the ANPD concluded that the third alternative expressed the best interpretation of the LGPD, so that, for this purpose, the following statement was created, with preliminary wording, in order to remedy the problem raised:

> "The processing of personal data of children and adolescents may be carried out based on the legal hypotheses provided for in art. 7 or, in the case of sensitive data, in art. 11 of the General Data Protection Law (LGPD), provided that their best interest is observed, to be evaluated in the specific case, pursuant to the caput of art. 14 of the Law."

It is important to emphasize that the Preliminary Study and the suggestion offered by the ANPD are not exhaustive and definitive on the subject, so that the Authority will still need to analyze additional technical and legal aspects to establish more conclusive interpretations and guidelines. Also, the Processing of Personal Data of children is one of the topics set forth in the Regulatory Agenda - 2023-2024 of the ANPD, and shall, therefore, include an assertive analysis on the legal basis to be used in this case, and is expected to be analyzed by November 2023.



The Veirano Experience has a holistic, multidisciplinary, and business-oriented approach. In order to cover all the needs related to Compliance with LGPD, our Data Protection & Privacy team have developed several project formats, which comprise different scopes of work and meet specific demands of each client, whether national or international:

1. Full Compliance

With the performance of a multidisciplinary team, this project is aimed for clients whose goal is to identify and assess all ongoing processing activities within the company and based on that, identify vulnerabilities and structure an action plan for the creation of an effective privacy and data protection program based on legal, procedural, information security, and corporate governance pillars.

2. DPO as a Service

In this model, we take on the role of Data Protection Officer (DPO) on behalf of the client. To this end, we allocate a professional to perform the activities of managing and monitoring the client's data protection and privacy program.

3. M&A Legal Assistance

Designed to assist clients in the legal due diligence of merger and acquisition transactions, in order to identify relevant legal issues (red flags) and mitigate potential risks related to data protection and personal data security issues of the target company.

4. LGPD Pocket

A “pocket” advisory service for the adequacy of the activities and/or products developed by the company, regardless of its size or field of business, considering a reduced number of deliverables.

5. LGPD on Demand

LGPD On Demand is aimed at organizations that wish to have multidisciplinary advisory service on legal, information security, and corporate governance issues, with specific and timely action related to the protection of personal data.

6. LGPD Legal Helpdesk

The Helpdesk is designed to assist clients with LGPD legal consultations and demands within a monthly package of hours, either before, during, or after the initial compliance process.

7. Task Force For Security Incident Assessment And Reporting (VA Cybersecurity)

Specific and multidisciplinary legal advice in aspects related to the suspicion or occurrence of a security incident, in accordance with the most updated instructions from the ANPD and other applicable laws and regulations.

8. Representation in Administrative and Judicial Actions Involving Data Protection

Representation of clients in any administrative and/or judicial actions or potential actions involving data protection.

9. Analysis of Administrative and Judicial Decisions on Data Protection Matters

Periodic monitoring of decisions rendered in judicial and administrative proceedings involving the company or not, in order to present the authorities’ understanding and the impacts for the company or economic sector to the client in a summarized format.

10. Development and Updating of a Data Protection Impact Report

The ANPD may request from the controller to prepare a personal data protection impact report ("RIPD" or DPIA). Our team has expertise on the subject and can assist the company with the preparation and updating of the RIPD.

11. Development of Workshops

Development and application of training about the main concepts related to privacy and data protection to train its employees.

12. Playbook for Negotiating Commercial Contracts

Creation of playbooks for the negotiation of commercial contracts, to facilitate and speed up internal processes of commercial, technical, and legal teams.

13. Handbook to Reply the Data Subjetcs

Development of materials to assist the companies in prompt answering the data subjects' requests, as well as in the procedure to be followed by the company when answering the data subject, according to the business model developed by the company.

14. International Data Transfer

We help clients to understand the context of the international transfer, adapt it to the applicable legal basis, assess data localization requirements, add contracts, draft and review intra-group data sharing agreements, and generally respond to queries related to the harmonization of foreign with Brazilian regulations.

15. Privacy and Data Protection Auditing

We conduct audits to evaluate the company's level of maturity, presenting recommendations for risk mitigation.

16. Development and Review of Documents Pursuant to the Financial Sector

Our team has expertise in drafting security policies in accordance with the Central Bank's specific information security regulations, and in answering questions on the subject.

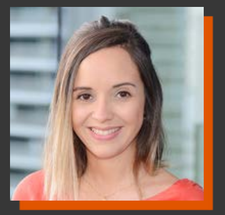
We are at your disposal in case of any questions or in the need of any additional information.



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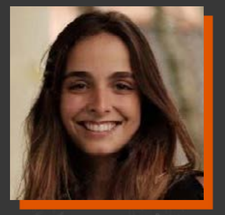
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For more updated information please contact us.