

MINISTRY OF JUSTICE STARTS PUBLIC CONSULTATION ON DATA PRIVACY LAW AND REGULATION OF INTERNET LAW

The Ministry of Justice launched two important public consultations on January 28, 2015. One seeks comments to a draft bill of law on data privacy, in a process very similar to the one that led to the Internet Law enacted in 2014 (Law No 12,985 of April 23, 2014). The other seeks comments to central matters of the Internet Law that depend on further regulation by the Federal Executive.

Data privacy

As drafted, the focus of the data privacy bill of law is consent. Free, express, specific and informed consent, by which the data subject agrees on handling of his personal data for a specific purpose, is set as a requirement for any handling of personal data¹. Consent must be given in writing or by any other means certifying it, separately from other contractual provisions, and it must refer to specific purposes (generic authorizations being deemed void). The entity holding such data has the obligation to prove that consent has been obtained in accordance with such requirements.

When requested to give consent, individuals must be informed about the following, in a clear, suitable and conspicuous manner: (i) the specific purpose for personal data handling; (ii) the means and duration of personal data handling; (iii) identification of the data controller; (iv) contact information on the data controller; (v) the persons or groups of persons to whom the underlying data may be disclosed, and the extent of such dissemination; (vi) the responsibilities of agents who will engage in handling the personal data; and (viii) the rights of the data subject, with express reference to the ability of (a) denying consent, also explaining the implications from such denial; (b) accessing or rectifying underlying data, or of withdrawing consent, free of charge and through simplified procedures; and (c) reporting any breach of this law to the competent body.

¹ For purposes of the law, (i) personal data is defined as "data relating to an identified or identifiable individual, including by reference to identification numbers, location data, or electronic identifiers", and (ii) handling is defined as the "set of actions comprising the collection, production, reception, classification, use, access, reproduction, transmission, distribution, transportation, processing, filing, storage, removal, assessment or control of information, change, blocking or disclosure of personal data to third persons, by communication, interconnection, transfer, dissemination or retrieval".

If there is any change in the information referred to in items (i), (ii), (iii) or (v) above, the entity holding the data (the data controller) must obtain a new consent, after specifically highlighting the tenor of any such changes. When continued collection of data occurs, individuals must be informed from time to time about this continued activity (in the manner to be defined by the competent body).

Consent can only be waived when data are already open to public unrestricted access, or when handling of the data is indispensable for: (i) fulfilling an obligation imposed on the data controller by operation of law; (ii) sharing the use and handling of data on exercise of rights or duties attributable to the public authority by operation of law or regulation; (iii) complying with pre-contract procedures or contract-related obligations to which the data subject is a party; (iv) conducting historical, scientific or statistic research or survey, subject to dissociation of personal data whenever possible; (v) exercising ordinary rights in the course of a judicial or administrative proceeding; (vi) protecting the life or physical integrity of the data subject or of a third person; or (vii) promoting health protection via procedures carried out by healthcare professionals or by public health entities.

Individuals cannot be compelled to give consent to handling of personal data as a condition for the supply of products or provision of services, or for exercise of a right, unless the underlying data is indispensable for those activities. Also, persons aged between 12 and 18 may consent to handling of personal data to the extent that such handling respects their special condition as developing persons; however, such consent may be revoked by the parents or tutors, in the data subject's best interests. For children aged less than 12, consent shall be given by the parents or tutors.

Other highlights of the draft are:

(i) the law applies to data of individuals only and to any handling of data by an individual, public authority or private entity, regardless of the country where those persons are based and of the country where the database is located, provided that (a) handling occurs within the Brazilian territory; or (b) the personal data has been collected within the Brazilian territory. Data will be deemed collected within the Brazilian territory when the respective data subject is located there at the time of collection;

(ii) handling of sensitive data² is prohibited, unless a special consent from the data subject is given in a personal statement made separately from any other consent to other (non-sensitive) personal data; and after receiving specific information on the sensitive nature of requested data and being warned about the

² Sensitive data is defined as "personal data revealing racial or ethnic origin, moral, religious or philosophical beliefs, political opinions, membership to trade unions or religious, philosophical or political organizations, data concerning health or sexual life, and genetic data".

risks involved in its handling;

(iii) in case of communication or interconnection³ of personal data, the transferee will be subject to the same legal and regulatory obligations as those applying to the transferor, thus being jointly and severally liable for any damage caused. Communication or interconnection of personal data between private entities will also be conditioned to free, express, specific and informed consent; and

(iv) as a rule, cross-border transfer of data is permissible only to countries where the level of protection accorded to personal data is comparable to that prescribed in the law. The level of data protection available in a given country shall be assessed by a competent body (not specified), which will take into account: (a) general and industry rules set out in the legislation effective in the recipient country; (b) the type of data; (c) compliance with the general principles on personal data protection prescribed in the law; (d) adoption of safety measures set out under applicable regulations; and (e) other circumstances specifically related to the transfer. When the level of protection offered by recipient countries is not comparable to that prescribed in the law, a special consent must be provided through a statement made separately from the consent given with regard to other handling activities, and with prior specific information on the cross-border nature of the activity, also warning about the risks involved vis-à-vis the vulnerabilities in the recipient country; and

(v) data breaches must be promptly informed to the competent body (not specified) including a description of the type of personal data concerned, information on the data subjects affected, a report on the safety measures adopted for protection of data, including encryption procedures, risks underlying the incident; and measures that have been or will be taken to reverse or mitigate the effects of the injury.

The data privacy bill of law is available at <http://participacao.mj.gov.br/dadospeessoais/>. Comments may be submitted until February 27, 2015 at the Ministry of Justice's website (<http://participacao.mj.gov.br/dadospeessoais/participe/>) or by social networks (Facebook and Twitter).

Internet Law

A draft of regulation of the Internet Law was not made available. Instead, the Ministry of Justice is asking for general comments on (i) exceptions to the net

³ For purposes of the law, communication is defined as "transfer of personal data to one or more specific persons other than the respective data subject, in any way" and interconnection is defined as "transfer of personal data between databases belonging to the same or another holder, for similar or distinct purposes".

neutrality rule, (ii) record-keeping of internet connection and application logs, (iii) privacy and (iv) any other item of the Internet Law that requires further regulation. These contributions will be used by the Brazilian President to issue a decree regulating the Internet Law. The President may choose to submit the decree itself for comments.

Comments may be submitted until February 27, 2015 at the Ministry of Justice's website (<http://participacao.mj.gov.br/marcocivil/>) or by social networks (Facebook and Twitter).

The Brazilian Internet Steering Committee (CGI.br) has also started a public consultation on the regulation of the Internet Law. Comments may be submitted until February 20, 2015 at <http://marcocivil.cgi.br/>. The National Telecommunications Agency – ANATEL has created a taskforce to issue its own public consultation on net neutrality, which should be published soon.

It is difficult to estimate how long it will take for these two initiatives to become legislation. It is likely that the Internet Law regulation is adopted sooner since it only depends on the Executive Branch, while the data privacy bill of law needs to be debated in and approved by the two Houses of the Brazilian Congress. The Executive Branch, however, is committed to push them forward.

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