

Brazilian Data Protection Authority's Most Relevant Publications To Date



The Brazilian Data Protection Authority (ANPD) has issued important guidance covering a variety of privacy aspects including security measures, determining controller and processor capacities, and how the ANPD administrative process will be applied to investigating companies and imposing penalties. We have gathered those we consider the most relevant.

Ordinance No. 11 of 2021

Publicizes the Brazilian National Data Protection Authority's (ANPD) regulatory agenda for the biennium 2021-2022.

A first glimpse into ANPD's activities plan. The agenda includes a number of issues as well as the ways through which the ANPD aims to discuss and disseminate them (resolution, guide or ordinance).

Some publications are still scheduled for 2022, including resolutions on data subjects' rights, on the personal data protection officer (DPO) and international data transfers, as well as a best practices guide relating to the legal processing of personal data in the Brazilian General Personal Data Protection Law (LGPD).

Ordinance No. 1 of 2021

Establishes the ANPD's internal regulations

A thorough document for those who want to understand the authority's procedures and limitations, which are all internal regulations. The ANPD has a complex organizational structure that includes various boards with different areas of activity and competences. The internal regulation released by Ordinance No. 1/2021 covers the ANPD's whole organizational structure.

The ANPD is described in Article 1 of the internal regulations as "a body of the Presidency of the Republic." The ANPD is now a special autarchy, with increased autonomy and procedural ability, thanks to Provisional Measure No. 1.124/2022. It is worth mentioning that the provisional measure has not yet been transformed into legislation and is presently being debated in Congress.

SEPTEMBER 2021

The National Consumer Defense Council's Data Protection Center's guidance, developed in collaboration with ANPD and SENACON

Simplifies the LGPD's most important aspects for consumer awareness. Also includes guidelines for public and private organizations' activities in regards to personal data processing in order to avoid violating consumer rights.

An essential guide that symbolizes the ANPD's collaborative activity with consumer protection organizations, taking into account the Technical Cooperation Agreement between the ANPD and SENACON.

OCTOBER 2021

Information Security Guide for Small Processing Agents

Version 1.0

Directs small processing agents to preserve the bare minimum of information security, taking into account the processing agent's economic capabilities while applying legal requirements.

Used as a general guide that establishes the minimum requirements for information security measures in Brazil, which must be surpassed by "medium" and "large" processing agents—which will not be defined by the ANPD.

Resolution CD/ANPD No. 1 of 2021

Approves the Regulation of the Supervision Process and the Administrative Sanctioning Process in the scope of the ANPD.

The Regulation on the Application of the LGPD for Small Processing Agents is approved. Once more, the ANPD tailors the LGPD criteria to the economic capabilities of each processing agent.

Under current legislation, the resolution defines small processing agents (Article 2, I) as: micro companies, small-size companies, startups and legal entities of private law, including non-profit enterprises.

The main impact of Resolution CD/ANPD No. 2 for other processing agencies is the definition of high-risk processing in Article 4. As a result, controllers were able to learn what is considered as high-risk processing activity, especially for the purposes of carrying out Data Protection Impact Assessments (DPIA).

Guide: Personal Data Processing by Public Authorities

Intends to specify criteria that can offer legal certainty to operations that assist public organizations and bodies in the adaptation and implementation of activities arising from the LGPD, particularly related to the execution of policies and the provision of public services.

An interesting guide for private parties because it specifies legal bases, such as consent and legitimate interest, and presents the ANPD's perspective on their application.

Resolution CD/ANPD No. 2 of 2022

The Regulation on the Application of the LGPD for Small Treatment Agents is approved. Once more, the ANPD tailors the LGPD criteria to the economic capabilities of each processing agent.

Under current legislation, the resolution defines small-size treatment agents (Article 2, I) as: micro companies, small-size companies, startups and legal entities of private law, including non-profit enterprises.

The principal impact of Resolution CD/ANPD No. 2 for other processing agencies is the definition of high-risk processing in Article 4. As a result of this resolution, we know what the ANPD considers high-risk processing, and we can more quickly determine when a Data Protection Impact Assessment (DPIA) is required.

APRIL 2022

Guide: Personal Data Processing Agents and Data Protection Officer Definitions

Version 2.0

This handbook contains a high level of practical application to which all processing agents (controllers, processors and joint controllers) are susceptible and provides a great support in assessing each processing capacity. It outlines the obligations and procedures of the agents more thoroughly than the LGPD and specifies who can fulfill each function.

Furthermore, it introduces the capacity of joint controllers, which is not directly addressed in the LGPD.

Guide: Application of the LGPD in the electoral context by data processing agents

Given that 2022 is an election year in Brazil, the ANPD has decided to produce a guide related to such circumstances and how the LGPD shall apply.

It contains highly important information and security suggestions, mentioning the Information Security Guide for Small Processing Agents and reinforcing the assumption that it brings the criteria recognized as ANPD minimums.

In addition, this guide covers the collection of cookies and how the legitimate interest may serve on a lawful basis for such processing activity.

Regulation of Dosimetry and Application of Administrative Penalties

The ANPD has submitted for public consultation the draft resolution that approves the Regulation of Dosimetry and the Application of Administrative Penalties.

The authority's aim is to promote the effectiveness of administrative sanctions foreseen in the LGPD by establishing a methodology to apply the sanctions, with clear parameters and criteria.

The methodology adopted by the ANPD for the application of sanctions is crucial to understand the infractions which the agency considers most serious as well as the most important compliance measures for businesses.

Guide: Preliminary Study of Processing Children's and Adolescents' Personal Data

The ANPD has submitted a preliminary study for public consultation regarding the legal bases applicable for the processing of children's and adolescents' personal data, as the lack of clarity of Article 14, Section 1, of the LGPD allowed for different interpretations on whether consent would be the only lawful basis for processing the personal data of minors.

Based on the findings of the preliminary study, the ANPD asserts that the processing of children's and adolescents' personal data can be performed due to the legal bases provided for in articles 7 and 11 of the LGPD, observing the applicable legal requirements and the best interest principle.

OCTOBER 2022

Guide: Cookies

The Brazilian Data Protection Authority (ANPD) issued a non-binding guidance on cookies with several recommendations for controllers regarding this issue.

Controllers are advised to implement a Cookies Notice and first-and second-level Cookies Banners. Special attention should be given to assessing the lawfulness of processing personal data obtained from cookies.

The ANPD also stressed accountability requirements related to cookies, such as managing and documenting consent, as well as carrying out a legitimate interest assessment as needed.

NOVEMBER 2022

Guidance No. 33/2022

ANPD put into public consultation a non-binding template for the Records of Personal Data Processing Activities (ROPA) only for small processing agents, as defined under Resolution No. 2 of the ANPD, whether controllers or processors. ROPA is a required document for all processing agents under the LGPD.

This is another ANPD regulation that only applies to small processing agents, despite the fact that the ROPA is required for all processing agents under the LGPD. It is, however, useful for other processing agents and can be used as a minimum standard in the design of their ROPA.

Guidelines on Security Incident Notice

New guidance on information security incident notification, which is required whenever the incident is likely to create risks or cause significant damage to data subjects. The new form, that must be used to provide a notice to the ANPD, came into effect as of January 1, 2023. The ANPD made clear that the obligation to notify security incidents falls exclusively on controllers. On the other hand, processors should promptly notify controllers whether they discover an incident.

Only incidents that have been confirmed internally need to be notified. Also any additional notification must be submitted as soon as possible and no later than 30 calendar days from the initial (preliminary) communication. This guidance also established the topics that must be addressed in communications to the affected data subjects, such as summary and date of occurrence of the incident, risks and other consequences to the data subjects and measures taken by the controller and measures that the data subjects should take to mitigate the effects of the incident, if applicable. The communication to affected individuals must be made individually and directly to the affected data subjects, as a rule and can be sent by any means (email, SMS, a mail letter or any electronic message).

The Regulation of Dosimetry and Application of Administrative Sanctions has been recently issued by the Brazilian Data Protection Authority (ANPD).

The purpose of the Regulation is to establish parameters and criteria for the application of administrative sanctions by the ANPD, as well as the dosimetry for calculating the fines. The Guidance established three different levels of severity for infractions and several aggravating and attenuating factors that may increase or decrease fines, respectively.

The regulation came into force on February 27, 2023, so therefrom all sanctions provided for in the LGPD can be applied, namely publishing violations, blocking personal data, eliminating personal data, fines of up to 2% of annual turnover in Brazil or BRL 50 million whichever is higher, among others.

TAUIL | CHEQUER

MAYER | BROWN