Philippines: National Privacy Commission issues comprehensive guidelines on consent

The National Privacy Commission recently issued Circular No. 2023-04, which provides guidelines on the use of consent as a lawful basis for processing personal data, including default formats for privacy notices and rules on withdrawal of consent.

In brief

The National Privacy Commission (NPC) recently issued NPC Circular No. 2023-04 ("**Circular**"), which sets out guidelines on the use of consent as a lawful basis for processing personal data, including default formats for privacy notices and rules on withdrawal of consent.

The Circular takes effect on 29 November 2023.

In more detail

Minimum specific information for data subjects

The Circular requires a personal information controller (PIC) to disclose the minimum specific information to data subjects whenever data subjects are asked to give consent. "Minimum specific information" refers to the least amount of information specific to a particular processing activity that must be disclosed to the data subject at the point where they are asked to give consent. This pertains to key information such as the identity of the PIC, its Data Protection Officer (DPO), and a brief description of how the information will be processed.[1]

Moreover, in compliance with the principle of transparency, the following information should also be provided to data subject in a concise statement at the moment when consent is obtained:[2]

1. A description of the personal data to be processed

2. The purpose, nature, extent, duration and scope of processing for which consent is used as basis

3. The identity of the PIC

4. The existence of the rights of the data subject

5. How these rights can be exercised

In this issue

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[1] Circular, Sec. 2.

[2] Sec. 3(B) of the Circular provides that this information may be provided at set-up, just-in-time, or be context-dependent. "At set-up notice" refers to a privacy notice shown before a data subject installs a mobile application or a software. "Just-in-time notice" refers to a privacy notice that provides information on how personal data will be processed at the point in time when the PIC is about to process such information. Lastly, "context-dependent notice" refers to a privacy notice activated by certain aspects of the data subject's context, such as location or persons who will have access to the information or warnings about potentially unintended settings. (Circular, Sec. 2)

Further information or additional details should be made available to the data subject by means of a Layered Privacy Notice. "Layered Privacy Notice" refers to a short privacy notice that provides key privacy information and directs the data subject to more detailed information on the personal data required by the PIC, as well as the processing of such information. Layering can be done with the use of hyperlinks.

Moving forward, the usage of just-in-time and layered notices in presenting the relevant information to the data subject shall be the default format.[3]

Guidelines for drafting a privacy notice and consent form

The Circular notes that a privacy notice is required in any instance of processing,[4] whether based on consent, other lawful criteria for processing under Sections 12 or 13 of the DPA, or where processing is under a special case pursuant to Section 4 of the Data Privacy Act of 2012 ("**DPA**"). As such, PICs should observe the following guidelines in creating a privacy notice[5]:

1. The information should be provided in the simplest manner possible and avoid using complex sentences or language structures.

2. For electronic processing of personal data where the surrounding circumstances and particular medium utilized may limit the manner in which a notice is presented, a link to a more comprehensive notice should be readily available.

3. A privacy notice must provide information that is concrete and definite. Vague, circuitous or overbroad language should not be used. The information must be provided in a manner that is easy to access, taking into consideration user experience and user interface.

4. A PIC may use creative options such as dynamic or interactive infographics, auditory notices through announcements or pre-recorded audios, or short videos. The information may also be delivered by a scripted spiel delivered on or before entry into the system.

As an exception, a separate privacy notice is no longer necessary when a consent form already provides the essential information relating to the specific processing activity that enables the data subject to make an informed decision.[6]

A consent form should contain all the information required in a privacy notice and indicate that consent is the lawful criteria for processing relied on. In essence, the consent form contains a PIC's proposal to the data subject asking for the latter's consent to the processing of personal data pursuant to the terms stated in the consent form. The data subject's acceptance of the provisions of the consent form creates a contract between the data subject and a PIC on the terms of processing of the personal data.[7]

Requisites for obtaining valid consent

A PIC shall obtain the consent of the data subject in a manner that complies with all the requisites for valid consent.[8] In practice, this means the following:

1. Consent must be **freely given**. A data subject must have a genuine choice and control over their decision to consent to the processing of their personal data.[9]

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[3] Circular, Sec. 9(C).

[4] Circular, Sec. 3(D)(5)(a). The Circular defines "Privacy Notice" as a unilateral statement that contains essential information on a specific processing activity of a PIC that involves the data subject.

[5] Circular, Sec. 3(D).

[6] Circular, Sec. 3(D)(5)(b).

[7] Circular, Sec. 4(b).

[8] Circular, Sec. 12.

[9] Circular, Sec. 11.

- Deceptive design patterns should not be used to obtain consent.[10] "Deceptive design patterns" refers to design techniques embedded on an analog or digital interface that aim to manipulate and deceive a data subject to perform a specific act relating to the processing of their personal data, including "dark patterns."[11] However, incentivizing consent by offering benefits to the data subject and similar actions of a PIC shall not be automatically construed as a deceptive method, coercion or compulsion that renders the consent as not freely given.

2. Consent must be **specific** and **granular**.[12]

   - In cases where personal data is processed for multiple but unrelated purposes, a PIC shall present to the data subject the list of purposes and allow the data subject to select which purposes they consent to, instead of requiring an all-inclusive consent to the processing for multiple purposes. Vague or blanket consent is prohibited.[13]

3. Consent must be **informed**.[14] Information about processing must be easily understood by an average member of the target audience to ensure that the data subject has sufficient understanding of what they are consenting to.

   - A PIC shall minimize the risk of consent fatigue of its target data subjects. "Consent fatigue" refers to a situation where consent questions are no longer read as a result of multiple consent requests received by a data subject on a daily basis that require answers or decisions.[15]

4. Consent must be expressly given through a clear assenting action.[16]

   - Assenting actions are those that indicate agreement to processing activity as described in the information provided by the PIC.[17]

   - Provided that all the elements of consent are present, and the PIC provides the data subject with information on the processing of personal data for a specific service, the continued use of the PIC's specific service is an assenting action signifying consent.[18]

5. Consent must be evidenced by written, electronic or recorded means. There is no preference among the three formats.[19]

   - However, while there is a requirement to be able to demonstrate that the PIC has obtained consent, this should not in itself lead to additional or excessive personal data processing. A PIC should only keep enough data to show that consent was obtained in relation to a specific processing.[20]

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[10] Circular, Sec. 7(A).

[11] Circular, Sec. 2(C).

[12] Circular, Sec. 8.

[13] Circular, Sec. 8(b).

[14] Circular, Sec. 9.

[15] Circular, Sec. 2(B).

[16] Circular, Sec. 10.

[17] Circular, Sec. 10(B)

[18] Circular, Sec. 10(C).

[19] Circular, Sec. 11.

[20] Circular, Sec. 12.

Consent obtained pursuant to a contract

The processing of sensitive personal information through a contract between a PIC and a data subject is understood to be processing based on the consent of the data subject under Section 13(a) of the DPA, as long as the contract entered into complies with the requirements for consent under the DPA.[21]

However, where a data subject enters into a contract and subsequently cancels, terminates or unsubscribes from it, the consent given to process personal data for that purpose shall also be terminated. Processing of personal data may only continue should there be another lawful basis for processing the personal data, based on Sections 12 and 13 of the DPA, except for the purposes of direct marketing.[22]

Withdrawal of consent

Consent can be withdrawn at any time and without cost to the data subject, subject to certain limitations as may be provided for by law, regulation or contract.[23] The Circular presented the following general considerations for the withdrawal of consent:

1. A PIC shall ensure that withdrawing consent is as easy as, if not easier than, giving consent. A PIC is obliged to implement simple procedures to enable the data subject to exercise the right to erasure, including to suspend, withdraw or order the blocking, removal or destruction of personal data from the PIC's repository.[24]

2. A PIC shall avoid utilizing or switching to another interface for the sole purpose of consent withdrawal since this would require undue effort from the data subject, unless it will result in an easier manner to withdraw consent. If a PIC uses a service-specific user interface for obtaining consent (e.g., an application or a log-in account), then such interface should also be the one used for withdrawing consent.[25]

3. A PIC shall provide the data subject with adequate information on the scope and consequences of the withdrawal of consent at the beginning of the processing and at that point when the consent is to be withdrawn.[26]

Effectivity

The Circular takes effect on 29 November 2023. All affected PICs shall be given a period of 180 calendar days from the effectivity of the Circular, or until 27 May 2024, to comply with the following requirements:

4. The minimum specific contents of a privacy notice in Section 3(D)[27]

5. The default usage of just-in-time and layered notices under Section 9(C)

The guidelines on withdrawal of consent under Section 13 of the Circular

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[21] Circular, Sec. 19.

[22] Circular, Sec. 21.

[23] Circular, Sec. 13.

[24] Circular, Sec. 13(A).

[25] Circular, Sec. 13(B).

[26] Circular, Sec. 13(C).

[27] Section 3(D) also defines various privacy-related documents such as Privacy Statement, Privacy Policy or Privacy Manual, and Privacy Notice. The Circular defines "Privacy Statement" as a general statement on a PIC's personal data processing practices across the entire organization. On the other hand, "Privacy Policy" (also known as "Privacy Manual") refers to a set of policies that governs a PIC's personal data processing practices and which provides guidance to internal relevant parties such as officers and employees who are involved in any personal data processing activity. Lastly, "Privacy Notice" is a unilateral statement that contains essential information on a specific processing activity of a PIC that involves the data subject.

Recommended actions

Clients are advised to take note of the minimum specific information that must be included in privacy notices and consent forms. Existing notices and forms must be revised to comply with the Circular ahead of the deadline in May 2024. Clients must also use just-in-time and layered notices by default.

Moreover, clients must review existing mechanisms of withdrawing consent to ensure that these are compliant with the Circular.

Clients are likewise encouraged to stay tuned to further updates from the NPC on its implementation of the Circular.

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