



# 1 Privacy and Secrecy of Information as the General Rule



The BR Constitution grants Brazilian citizens and foreigners residing in the country the fundamental rights to intimacy, privacy, and secrecy of correspondence and of telegraphic data and telephone communications.<sup>1</sup>

Also, data protection – including in digital means – has been recently incorporated in the list of fundamental rights established in Constitution.<sup>2</sup>

In addition, the Brazilian Internet Act (Law 12,965/2014, “MCI”), which sets forth principles, guarantees, rights, and duties for the use of internet in Brazil, also grants internet users privacy and secrecy and information rights.<sup>3</sup>

Therefore, under BR Constitution and the MCI, secrecy of data and communications is a general rule, which may only be exempted by other specific legal provisions.

# 2 Possibilities of Lawful Data Sharing

Despite secrecy of data and communications being a general rule, specific circumstances may authorize Internet Service Providers (“ISPs”) to disclose users’ information upon Law Enforcement authorities’ request.

The MCI establishes specific rules and conditions for disclosing users’ information. Such rules and conditions vary from the category of information involved in the request and how the request is made, as detailed below.



Please note that there are two types of requests that ISPs may receive from Brazilian authorities:

- **Direct requests:** requests directly sent by LE authorities (e.g. police officers, public prosecutors); and
- **Court orders:** decisions from the Judiciary.



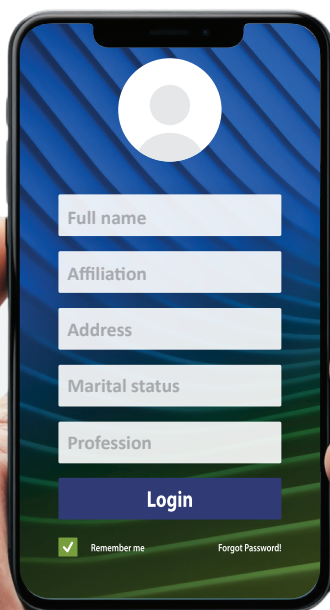
<sup>1</sup> **BR Constitution, Article 5.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (...) X – the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured; (...) XII – the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts;

<sup>2</sup> **BR Constitution, Article 5, LXXIX.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (...) LXXIX – under the terms of the law, the right to data protection, including in digital means, is ensured.

<sup>3</sup> **MCI, Article 7.** Internet access is essential for the exercise of citizenship, and users have the right to: I – privacy and private life (...); II – confidentiality of communications made via the Internet, which may only be disclosed by judicial order in the manner provided for by law; III – confidentiality of stored private communications, which may only be disclosed by judicial order; (...)VII – non-disclosure of their personal data to third parties, including connection registries and Internet application access registries, except with their free, express, and informed consent or in the cases provided for by law.

## 2.1 Registration Data

According to the MCI and its regulation, registration data means: **full name, affiliation, address, marital status, and profession.**<sup>4</sup>



However, LE authorities may understand that registration data encompasses all information provided by the user when registering. Also, when requesting registration data, LE may expect to receive the IP address associated with the creation of the account.

The MCI and its regulation establish that registration data may be requested by LE authorities directly to ISPs, without a court order.<sup>5</sup>

## 2.2 Access Registries

Under the MCI, users' access registries mean: a record of information regarding the date and time when a given Internet application was accessed from a certain IP address.<sup>6</sup>

Although the MCI does not include TCP ports information specifically in the definition of "access registries", the Brazilian Superior Court of Justice has established precedent stating that, if the IP address alone is not enough to identify a specific user, ISPs should also preserve and disclose TCP port information. Even though the STJ precedents are not binding, they carry a very strong persuasive authority.

Some LE authorities in Brazil may be under the expectation of receiving access registries (including IP addresses and TCP port information associated) upon direct requests to ISPs, but, in general, this kind of information may only be disclosed after a court order.<sup>7</sup>



to user registration data. (...) § 2. The following is considered user registration data: I – the names of the user's mother and father; II – the user's address; and III – the user's personal qualifications, which are his or her family name, first name, civil status and profession.

<sup>4</sup>Decree 8,771/2016, Article 11, § 2. The administrative authorities referred to in article 10 §3 of Law 12,965/2014 will state the legal provisions that expressly give them powers to access the data, and the reasons for the request for access to user registration data. (...) § 2- The following are considered registration data: I- affiliation; II- address; and III- the personal qualification, understood as name, first name, marital status and profession of the user.

<sup>5</sup>MCI, Article 10, §3. Retention and disclosure of Internet connection registries and Internet application access registries contemplated in this Law, of personal data, and of the content of private communications must, respect the privacy, private life, honor, and image of the parties directly or indirectly involved. (...) §3. The provision of the head of this article does not prevent access to users' registration data that inform personal qualifications, affiliation and address, by administrative authorities holding powers under the law to request that information.

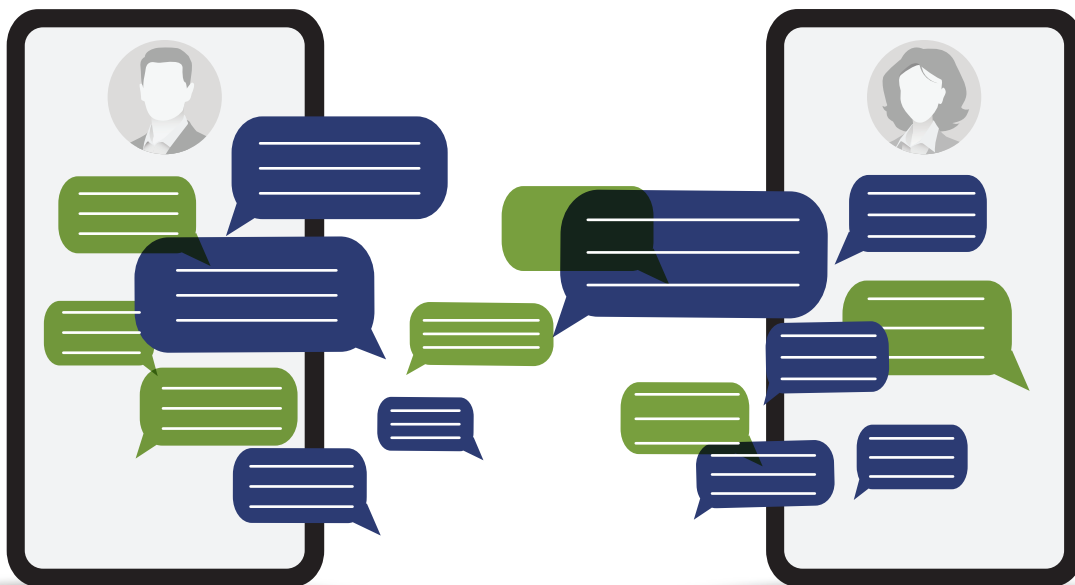
<sup>6</sup>MCI, Article 5, VIII. For the purposes of this Law, the following terms have the meaning ascribed to them below: (...) VIII – Internet application access registries: a record of information regarding the date and time when a given Internet application was accessed from a certain IP address.

<sup>7</sup>MCI, Article 10, §1. Retention and disclosure of Internet connection registries and Internet application access registries contemplated in this Law, of personal data, and of the content of private communications must, respect the privacy, private life, honor, and image of the parties directly or indirectly involved. §1. The provider responsible for maintaining the registries may only be required to make those registries available, either alone or together with personal data or other information that could help to identify a user or terminal, by judicial order as contemplated for in Section IV of this Chapter, subject to the provisions of article 7.

MCI, Article 15, §3. Internet applications providers that are legal entities providing applications in an organized, professional manner, for profit, must keep access registries to Internet applications for a period of six months, under strict confidentiality and in a controlled and secure environment, in the manner provided for by regulation. (...) §3. In all cases, judicial authorization must be obtained before registries are made available to the requesting authority, in compliance with Section IV of this Chapter.

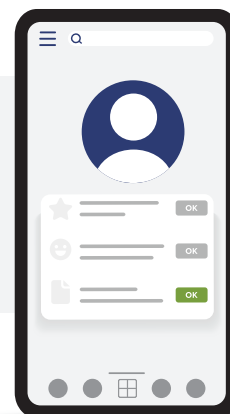
## 2.3 Private Communications

In general, the content of private communications may only be disclosed upon a court order.<sup>8</sup>



## 2.4 Other Data

Brazilian legislation does not establish a specific framework for disclosing personal data that is not encompassed in the categories listed above. In view of that, the general rule of confidentiality applies to such information, which, in general, may only be disclosed upon a court order.



## 2.5 Emergency Requests

Exceptionally, ISPs may disclose access registries, content of private communications and other data to LE authorities without a court order, at their sole discretion, in emergency requests – whenever the request indicates that it is aimed to the protection of minors or imminent threats (normally a risk involving danger of death or serious harm) requiring immediate action or that may be avoided with the disclosure of the information.

Despite the general rule of confidentiality, ISPs may disclose users’ information – if they wish so – in response to emergency requests, considering a state of necessity.<sup>9</sup>

<sup>8</sup>**BR Constitution, Article 5.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (...) XII – the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts;

**MCI, Article 7, II and III.** Internet access is essential for the exercise of citizenship, and users have the right to: I – privacy and private life (...); II – confidentiality of communications made via the Internet, which may only be disclosed by judicial order in the manner provided for by law; III – confidentiality of stored private communications, which may only be disclosed by judicial order.

**MCI, Article 10, §2.** Retention and disclosure of Internet connection registries and Internet application access registries contemplated in this Law, of personal data, and of the content of private communications must, respect the privacy, private life, honor, and image of the parties directly or indirectly involved. §2. The content of private communications may only be disclosed by judicial order, in the cases and in the manner provided for by law, subject to the provisions of article 7(II) and (III).

<sup>9</sup>**BR Constitution, Article 227.** It is the duty of the family, society, and the State to ensure children, adolescents, and young people, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression.

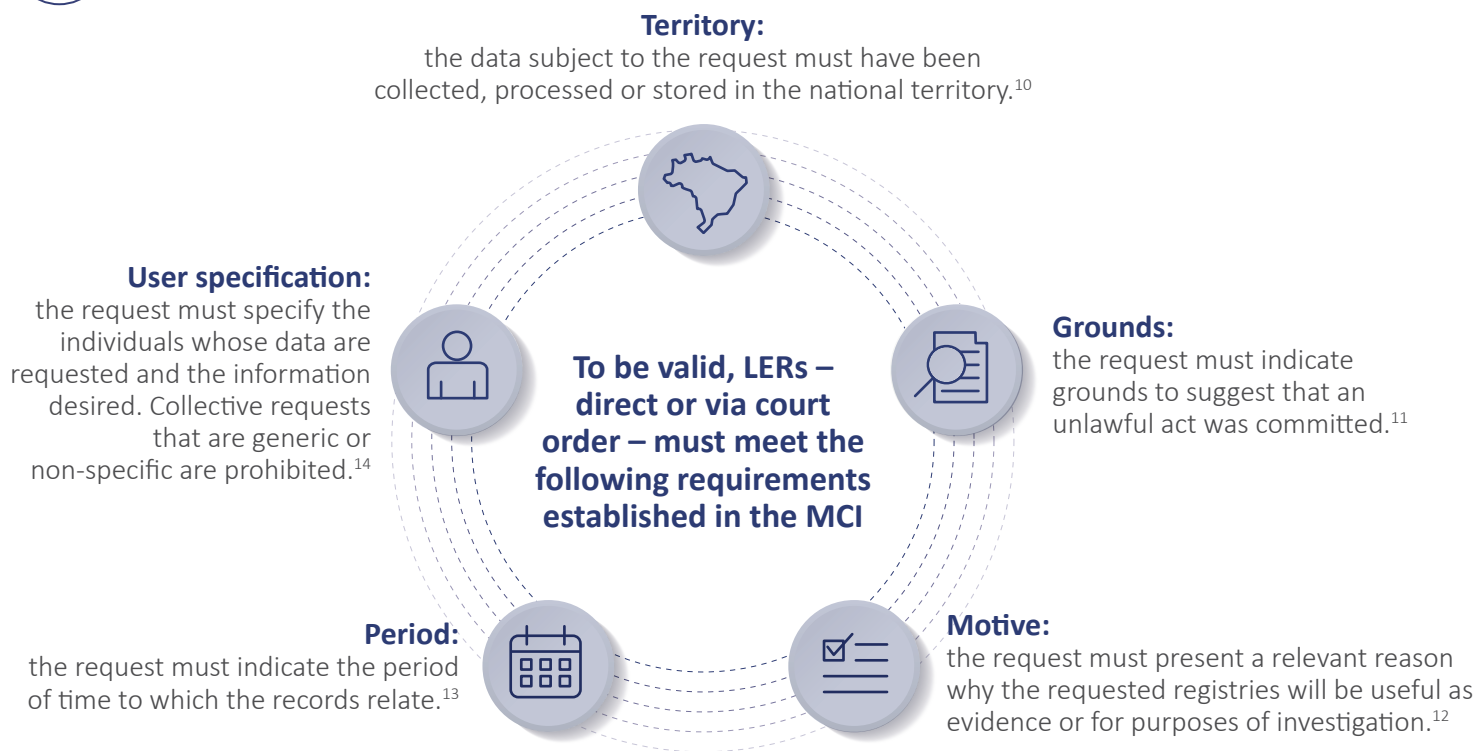
**BR Penal Code, Article 23, I.** There is no crime when the agent practices the fact: I- in a state of necessity.

**BR Penal Code, Article 24.** It is considered in a state of necessity who practices the act to save from current danger, which he/she did not provoke by his/her will, nor could he/she otherwise avoid, his/her own right or that of others, whose sacrifice, in the circumstances, it was not reasonable to require.

## 2.6 Comparative Chart

	Registration data	Access registries	Private communications	Other data
What it encompasses	<ul style="list-style-type: none"> <li>• Full name</li> <li>• Address</li> <li>• Affiliation</li> <li>• Marital status</li> <li>• Profession</li> </ul>	A record of information regarding the date and time when a given Internet application was accessed from a certain IP address	Content of private communications history	Other user information that is not encompassed in the previous categories
Appropriate means for requesting	<ul style="list-style-type: none"> <li>• Court order; or</li> <li>• Direct request by LE authority</li> </ul>	<ul style="list-style-type: none"> <li>• Court order; or</li> <li>• Exceptionally, without a court order, in response to emergency requests</li> </ul>		

## 3 Requirements for LER



<sup>10</sup>MCI, Article 11. All operations involving the collection, storage, retention or processing of registries, personal data, or communications by Internet service and applications providers must comply with Brazilian law and the rights to privacy, protection of personal data, and confidentiality of private communications and records, if any of those acts occur in Brazilian territory. §1. The provisions of this article apply to all data collected in Brazilian territory and to the content of communications if at least one of the terminals is located in Brazil.

<sup>11</sup>MCI, Article 22, I. In order to obtain evidence for use in civil or criminal proceedings, the interested party may apply to the court, as an incident to a main proceeding or in a separate proceeding, for an order compelling the party responsible for retaining Internet connection registries or Internet applications access registries to produce them. Sole paragraph. In addition to other legal requirements, the request will not be admissible unless it contains the following: I – good grounds to suggest that an unlawful act was committed.

<sup>12</sup>MCI, Article 22, II. In order to obtain evidence for use in civil or criminal proceedings, the interested party may apply to the court, as an incident to a main proceeding or in a separate proceeding, for an order compelling the party responsible for retaining Internet connection registries or Internet applications access registries to produce them. Sole paragraph. In addition to other legal requirements, the request will not be admissible unless it contains the following: II – good reason to believe that the requested registries will be useful as evidence or for purposes of investigation.

<sup>13</sup>MCI, Article 22, III. In order to obtain evidence for use in civil or criminal proceedings, the interested party may apply to the court, as an incident to a main proceeding or in a separate proceeding, for an order compelling the party responsible for retaining Internet connection registries or Internet applications access registries to produce them. Sole paragraph. In addition to other legal requirements, the request will not be admissible unless it contains the following: III – the period to which the records relate.

<sup>14</sup>Decree 8,771/2016, Article 11, § 3. The administrative authorities referred to in article 10 §3 of Law 12,965/2014 will state the legal provisions that expressly give them powers to access the data, and the reasons for the request for access to user registration data. (...) § 3. The requests referred to above must specify the individuals whose data are requested and the information desired. Collective requests that are generic or non-specific are prohibited.

## 4 Preservation Requests

As per the MCI, ISPs have the duty to preserve only access registries, and for the period of six months. However, LE authorities may require – directly, without a court order – that such registries be preserved for a longer period as a matter of precaution.<sup>15</sup>

There is no legal obligation to preserve other data besides access registries, such as content of private communications, other personal data and user’s content. However, LE authorities may require so, which may be done at the ISPs’ sole discretion.



## 5 User Notification



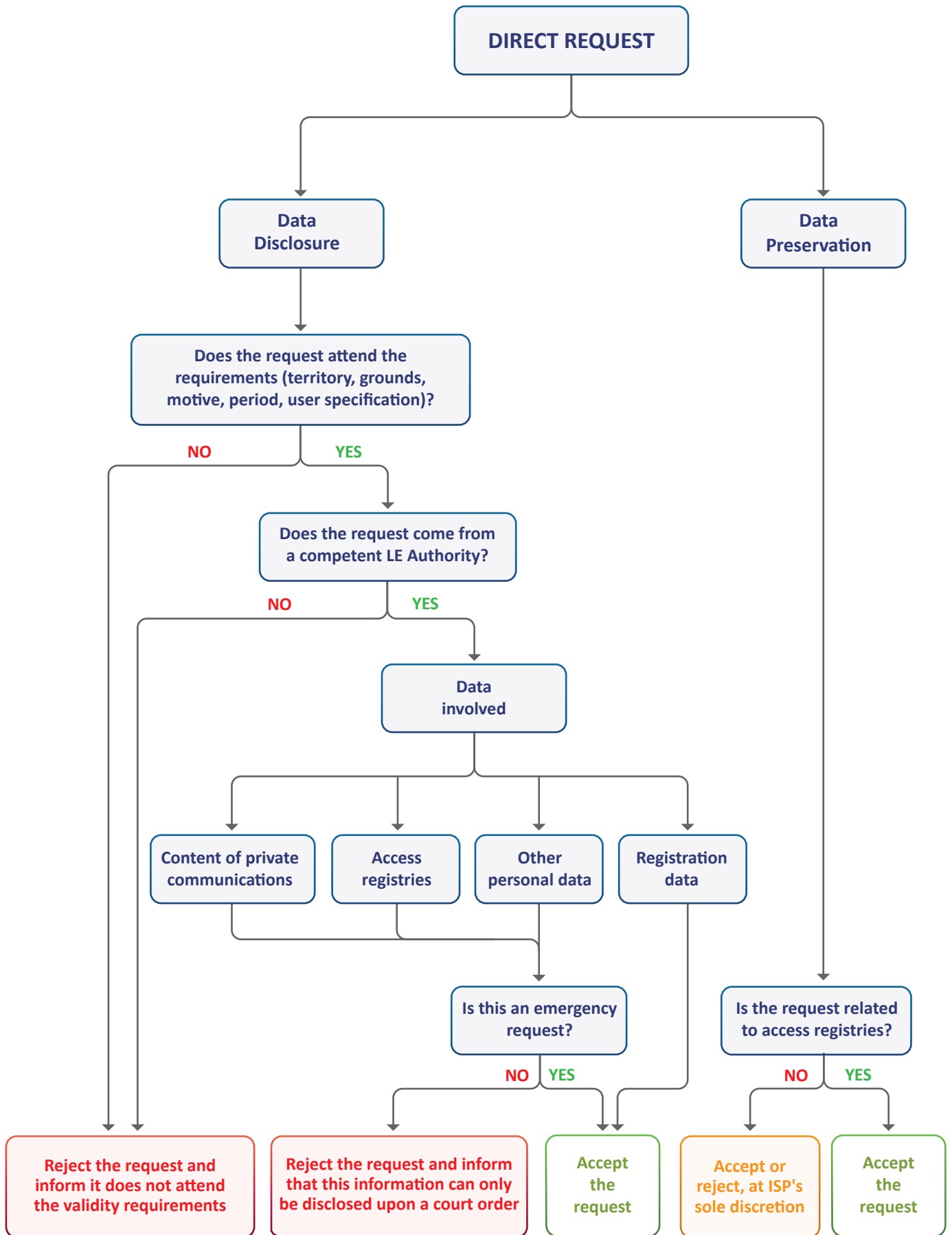
Users shall not be notified that their information is being disclosed by ISPs to LE authorities whenever the request arises from a criminal investigation or a non-criminal proceeding that is under seal, to prevent them from harming the investigation/proceeding.

The user may be notified if the request arises from a non-criminal proceeding that is not under seal. In this sense, ISPs may ask the requesting LE authority to confirm if the non-criminal proceeding is under seal or not to define if the user may be notified.

<sup>15</sup>MCI, Article 15, head and §2. Internet applications providers that are legal entities providing applications in an organized, professional manner, for profit, must keep access registries to Internet applications for a period of six months, under strict confidentiality and in a controlled and secure environment, in the manner provided for by regulation. (...)

§2. The police or administrative authorities or the Public Prosecutor’s Office may require any Internet application provider, as a precaution, to keep Internet application registries, and to keep them for a period longer than the period established in the head of this article, subject to the provisions of article 13 §3 and §4.

# 6 Summarized Workflow



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