

## ARE YOU READY FOR INDIA'S DATA PROTECTION LAW?

The Personal Data Protection Bill, 2019 (“**PDP Bill**”) was introduced in Parliament on 11 December 2019. If passed, the law will require organisations to revamp their data-related processes and embed privacy within their systems and operations. Here is a brief introduction to the law with a rundown of action items for organisations.<sup>1</sup>

▪ **How will organisations be affected by the law?**

Any organisation that collects, uses, stores, shares or otherwise processes ‘personal data’ will be affected. An organisation will have to assess its existing data processing activities and implement changes to comply with the law. Additionally, the government may ask any organisation to provide its ‘anonymised’ personal data or ‘non-personal data’ for specific policy goals.

Action Item
Understand if you are an organisation that processes personal data. Ensure preparedness for the law being passed, through the following: <ul style="list-style-type: none"> <li>➤ Identify if you are a ‘data fiduciary’ or a ‘data processor’. A data fiduciary decides the purpose and means of processing. A data processor processes data on behalf of a data fiduciary.</li> <li>➤ Identify if you are a ‘significant data fiduciary’ (notified by the Data Protection Authority (“<b>DPA</b>”) to be established under the forthcoming law).</li> <li>➤ Make sure relevant teams within the organisation are aware of the law, including business, product, finance, legal/compliance/policy, human resources and communications/marketing/PR.</li> <li>➤ Prepare your board of directors about anticipated changes. Make sure they understand that implementing privacy programmes may involve significant investments but are also advantageous and increasingly important for businesses.</li> <li>➤ Prepare a comprehensive data inventory.</li> <li>➤ Assess if you need to hire trained privacy personnel.</li> </ul>

▪ **What data is covered by the law?**

Any data that can identify an individual, directly or indirectly, is covered. Examples: names, addresses, financial data and health data. IP addresses, web cookies and device IDs are also personal data if they can identify an individual. The individual is called ‘data principal’.

The PDP Bill has a separate category of data known as ‘sensitive personal data’ (“**SPD**”), for data that carries a higher risk of processing. Processing SPD has stricter compliance requirements. SPD includes financial data, health data, official identifiers and biometric data.

Action Item
Categorise all data collected and used by different departments of your organisation. Identify data that relates to individuals, directly or indirectly. Identify whether any of it is SPD.

▪ **What should an organisation do before collecting and using individuals’ data?**

To process any personal data (collect, store, use or disclose), data fiduciaries will have to ensure that the processing takes place under one of these grounds or bases:

1. Processing based on consent of the data principal
2. Processing under a law or a court order
3. Processing for purposes related to employment
4. Processing for a ‘reasonable purpose’ specified by the DPA. This may include the operation of search engines, fraud prevention, mergers and acquisitions, and credit scoring.

Action Item

<sup>1</sup> Note: This is based on the draft Personal Data Protection Bill, 2019 circulated to members of parliament.

Before processing personal data, make sure you have identified a ground or basis for processing. Your organisation should be able to justify any act of processing under one of the listed bases.

▪ **How should an organisation take consent of a data principal?**

Consent should be free, informed, specific, clear and capable of being withdrawn.

Action Item
<ul style="list-style-type: none"> <li>➤ Inform individuals why you need their data and how you will use it, through a privacy notice. Ensure the privacy notice is clear and concise, such that a lay person will understand it. Include (a) purpose of collection; (b) identity/ contact details of data fiduciary; (c) basis of processing; (d) recipients; (e) time period of storage; (f) source of collection and, (g) access and rectification rights, among other things. Consider getting creative about your privacy notices, for example, through infographics.</li> <li>➤ Get meaningful, affirmative action for consent.</li> <li>➤ Allow individuals to withdraw consent with ease.</li> </ul>

▪ **Are any other organisational measures/ controls required to be adopted?**

Organisations may have to:

- Prepare a privacy by design policy for a system-wide approach to data protection
- Undertake data protection impact assessments when using new technologies or processing that carries risk of significant harm
- Have organisational policies and conduct data audits annually
- Implement security safeguards
- Appoint a data protection officer

Action Item
<ul style="list-style-type: none"> <li>➤ Categorise all existing data and map data flows.</li> <li>➤ Identify privacy and security risks.</li> <li>➤ Frame policies to minimise those risks and embed privacy into organisational processes.</li> </ul>

▪ **What rights does a data principal have over her personal data? How should an organisation enable these?**

A data principal can:

- Seek confirmation that the data fiduciary is processing her personal data
- Seek their personal data held by an organisation and a summary of processing activities
- Seek a list of all data fiduciaries with whom the data is shared
- Obtain correction of inaccurate data or updating data that is out of date
- Ask for data in a machine-readable format and have it transferred to a different entity (data portability)
- Restrict or prevent disclosure of her personal data by a fiduciary

Action Item
Adopt processes and implement technical capabilities to receive, review and respond to such requests.

▪ **Can personal data be transferred outside India? Can it be stored anywhere?**

An organisation can transfer and store personal data outside India freely. However:

SPD must be stored only in India, though it can be transferred outside India in limited ways:

- through contracts or intra-group schemes approved by the data protection authority
- when the transfer is to a 'whitelisted' country/ sector/ international organisation, approved by the central government
- when the transfer is approved by the DPA

Critical personal data (a list to be specified by the central government) must be stored and processed only in India. It can only be transferred outside India:

- to a person engaged in providing health/ emergency services where the transfer is needed for prompt action
- to a country/ sector/ international organisation, approved by the central government

Action Item
<ul style="list-style-type: none"><li>➤ Identify whether any data held by your organisation is critical personal data or sensitive personal data.</li><li>➤ Identify whether the transfer is permissible under any of the bases.</li></ul>

▪ **Are there penalties for non-compliance?**

Significant penalties can be imposed for violations:

- Maximum penalty is INR 15 crore or 4% of total worldwide turnover of the organisation

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