

Japan adopts a Personal Information Protection Law

Japan's new Privacy Law has the status of a basic law and signals a firm commitment by the government to drive forward a culture of privacy. **David E Case** and **Yuji Ogiwara** examine the new law and how it will affect the business community.

On May 23rd 2003, five bills were passed by the Japanese Diet relating to the use of personal information by government and private entities. This article focuses on the portions of the legislation applicable only to the use of personal information by private parties (the "Privacy Law").

On March 27th 2001, similar privacy legislation was introduced into the Diet for deliberation, but was finally left to expire in December 2002. The primary stumbling block was widespread criticism that the legislation would impair the freedom of journalists and academics. For a short while, it looked as if the legislation might not be passed by the end of the Diet session in mid-June, but a political compromise was reached and the legislation passed at the end of May.

The political compromise between the ruling parties led by the Liberal Democratic Party (LDP) and the Democratic Party of Japan (DPJ) that saved the new Privacy Law, should be of

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interest to privacy and data protection practitioners. First, the LDP and DPJ agreed to enact (or have promulgated by certain ministries) additional data protection laws and regulations targeting specific industries. Those industries selected are the medical, financial credit, and telecommunications sectors. The Privacy Law already applies to these industries, but it is presumed by people familiar with the new Privacy Law that the industry specific laws and regulations will provide additional detail as to how Personal Information (defined below) must be handled by companies in those industries. Second, the Privacy Law is totally open to revision in three years.

THE PRIVACY LAW

The new Privacy Law establishes fundamental rules and a basic policy regarding the collection and use of personal information by private parties and public entities. A stated goal of the Privacy Law is to protect individual's rights and welfare.

In its first article, the Privacy Law provides that the creation of an advanced information society in which personal information is used by public and private entities is a desired goal. The most striking feature of the Privacy Law is that instead of being a detailed framework of laws and regulations regarding the collection and use of personal information, its provisions are very general. Clearly, the Privacy Law is but a first step in the area of data protection law in Japan. Prior to the passage of the Privacy Law, the collection and use of personal information by the private sector was minimally regulated by some sectors' codes of practice.

FEATURES OF THE PRIVACY LAW

The Privacy Law is intended to set forth fundamental principles for collecting, using, handling and transferring personal information. Article 3 of the Privacy Law says:

"In view of the fact that Personal Information should be treated with care based on the philosophy of respect for personality of an individual, personal information must be treated appropriately."

Due to concerns by the media and academia, a set of basic principles (contained in the previous version that failed to pass in December 2002) regarding the use of personal information was deleted from this version of the bill. The basic principles in the lapsed bill stated that personal information be:

1. used to the extent necessary to achieve a specific and appropriate purpose
2. acquired through a legal and appropriate manner
3. held in correct and current form
4. handled with safety and care; and
5. handled in a way that the underlying person shall be involved in the handling process.

Instead, these same principles are addressed elsewhere in the Privacy Law. Features of the Privacy Law follow.

PERSONAL INFORMATION

The definition of personal information is similar to that of other jurisdictions. "Personal information" (*Kojin Joho*) is information that relates to living individuals and which can be

used to identify specific individuals by name, date of birth, or other description - including that which can be easily compared with other information to identify specific individuals. The individual identified by personal information is called a principal or "individual" (*Hon-nin*). A collection of personal information structurally constituted so as to permit specific personal information to be easily retrieved electronically is called personal data (*Kojin Deta*). These definitions are set out in Article 2.

COVERED PERSONS AND ENTITIES

The Privacy Law is applicable to private parties and both national and local public entities, but under a separate set of rules. At this point, government entities are only obligated under the Privacy Law to establish basic policies concerning the protection of personal information in the future. As a result, the bulk of the Privacy Law's articles apply to private parties. A private party (either a person or business) that uses personal information in a business operation is called a "Business Handling Personal Information" (*Kojin Joho Toriatukai Jigyo-sha*) or "business". The definition of a business is narrower than that of a "data controller" under the EU Data Protection Directive. The definition of a business expressly excludes:

1. organs of the national government
2. local public entities
3. certain independent administrative corporations; and
4. "persons designated by government ordinance as being little or no threat to the rights or welfare of individuals from the standpoint of the quantity of personal information handled and the method of use."

Any business that collects, handles or uses personal information, but holds fewer than 5,000 records, falls outside the law's coverage. One of the rationales behind this 5,000 record exemption was to permit small business owners, delivery truck operators and salespeople etc. that have programmed into their car navigation systems customer names, addresses and telephone information to continue to use such information without having to send to each individual a notice of what data has been collected and how it is used.

COLLECTION OF PERSONAL INFORMATION

Japan is an "opt-out" jurisdiction. It is up to individuals to limit or control the collection of their personal information. When collecting personal information, a business must describe to the extent possible (*dekiru kagiri*) its intended purpose of use for handling the personal information (the "purpose of use"). However, in Article 18, it states that a business need not inform the

individual of its purpose of use if the business fears that its rights or fair profits will be harmed by such notification or by public announcement of the purpose of use.

The notice must either be given directly to the individual or be such that it places the individual in circumstances where they can easily learn the identity of the business, the purpose of use and the business' contact information. The latter method could come by way of a public announcement prior to the collection. If personal information is collected in connection with the execution of a contract or other document (such as an electronic form or record), the business must disclose its purpose of use to the individual in advance of such collection. Businesses are also obligated to draft and publicly announce a privacy policy.

A business may collect any type of personal information, but may not collect personal information beyond that which is required to achieve the disclosed purpose of use. Although there was some discussion in Japan regarding the introduction of an opt-in regime for the collection of sensitive information, the current version of the Privacy Law makes no distinction regarding the type of personal information being handled by businesses.

USE OF PERSONAL INFORMATION

Actual use by a business may not exceed a scope reasonably recognised as having an appropriate connection with the original purpose of use (Article 15). If a business changes its purpose of use, it must either directly notify the individual or publicly announce its revised purpose of use. Most Japanese licensed attorneys familiar with the Privacy Law believe that the phrase "except where that purpose of use has already been publicly announced" in Article 18(1) may be satisfied, depending on

the situation, by publicly announcing such changes in a privacy policy on a website, by letter, or by announcement in a newspaper. Individuals may demand that a business cease using their personal data or stop providing personal data to a third party. But in either case, a business may refuse such a request if the cost or expense to do so is excessive.

If the business does not stop using the individual's personal information, substitute measures must be implemented to protect the rights and welfare of the individual. No guidance is given in the Privacy Law as to which rights of the individual must be protected. Generally though, the Privacy Law exempts a business' use or disclosure of personal information if pursuant to a law, ordinance or official order, or if necessary for the protection of human life, safety, or property, or if necessary to improve public hygiene or promote the health of children - provided that in these cases an exemption is used only when it is difficult to obtain the individual's consent (see, Article 16(3) of the Privacy Law).

Although, as a general rule, personal information may not be disclosed to third parties without the prior consent of the individual, the Privacy Law contains a series of generous exceptions that permits onward transfer in certain circumstances.

CONTROLLING PERSONAL INFORMATION

A business must "diligently" maintain personal data in an accurate and up-to-date form to the extent necessary to achieve its intended purpose of use. At any time, individuals may request that their personal data be corrected or updated. The procedure by which individuals may request personal data to be corrected may be established by the business. As with the use of personal information, a business need not correct personal data if the cost or expense is excessive, provided the business implements some safeguard to protect the welfare of the individual. A business must also adopt measures to prevent unauthorised disclosure, loss or destruction of personal information within its control. Measures must include the appropriate supervision of employees who have access to personal information so as to achieve its security.

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ONWARD TRANSFER

Although, as a general rule, personal information may not be disclosed to third parties without the prior consent of the individual, the Privacy Law contains a series of generous exceptions that permits onward transfer in certain circumstances. There are three exceptions to what might normally be considered a disclosure or transfer of personal information to a third party.

First, a business may delegate some or all of the personal data processing or fulfillment function to a service provider or subcontractor. The service provider or subcontractor may be located inside or outside of Japan and no special conditions or forms of agreement are required by the Privacy Law in either situation. If a business delegates all or a portion of the handling of personal data, it must provide necessary and appropriate supervision of the service provider or subcontractor regarding security. Provided the business meets its obligation to implement appropriate supervision measures of the service provider, the service provider and not the business would be liable in the first instance for any misuse of personal information.

Second, disclosing personal information to a successor company as part of a merger is not a disclosure to a third party that requires the prior consent of an individual. The successor would be bound by the declared purpose of use, but could modify it as discussed above.

Third, sharing and joint use of personal information by businesses in the same field within similar purposes of use is also permitted, provided that the individual is given notice that personal information will be shared, or they have been placed in circumstances whereby such matters can be easily learned. For example, companies in the financial credit area, or travel agencies etc. may share information in providing

their services. The purpose of use notice might be printed on the back of the ticket, for example. Another example is that a department store could send personal information to a shipping company in order for goods purchased by the individual to be delivered.

ENFORCEMENT

The obligations and penalties of the Privacy Law applicable to private parties will be enforced starting from a yet to be determined date set by government ordinance, but in any event no later two years from the Privacy Law's date of promulgation (*kofubi*). Depending on the type of business and the industry in which it operates, the ministry that typically has jurisdiction over the business activities of that business will also oversee compliance with the Privacy Law. No independent central agency has been appointed, although the Prime Minister may designate a specific minister or a committee of the National Public Safety Commission as the State Minister in Charge with respect to specific matters in handling of personal information by businesses.

PENALTIES

Finally, the Privacy Law has civil and criminal penalties ranging from admonishment orders, to fines of ¥100,000 to ¥300,000 (\$850 to \$2,600 or €720 to €2,150), and criminal sanctions. Penalties were absent from the previous version of the law and this was a source of much criticism.

CONCLUSION

Commentary written by Japanese scholars or attorneys regarding interpretation of the current version of the Privacy Law and its provisions will increase over the coming months. What is certain is that as various ministries draft industry-specific legislation and regulations, the privacy debate will heat up again in Japan. Details left out of the current Privacy Law will be filled in. Already, companies that extensively use or rely upon their customers' personal information to do business are approaching ministry officials with their concerns and suggested resolutions.



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