

## Asia-Pacific E-Commerce & Privacy Forum Policy Advisory

### Japan's Personal Information Protection Act and its Key Guidelines to be Revised

#### Introduction

The private sector provisions of Japan's Personal Information Protection Act ("PIPA") have been in effect for 18 months. Now, the Japanese government is poised to review the law in order to assess and ensure its effectiveness. The review is not only mandated by the Japanese Diet, but there is also a clear public need for the Japanese government to provide explicit guidance for the PIPA requirements. This need stems partially from ambiguous definitions in the law, and from a complex implementation mechanism. The vagueness in PIPA has caused an overreaction by Japanese industry and consumers to the law, undermining the economic value of using personal information in many instances. In spite of the existence of the law and the government's public education efforts to promote it, there has been an increase in the number of cases of security breaches. The Japanese government conducted hearings and research, which indicated the need to address these issues, resulting in the development of new government instruction on PIPA requirements.

#### Background

Japan has a unique personal information protection regime that reflects the country's intricate local government structure. PIPA, which came into full force on April 1, 2005,<sup>1</sup> is a national omnibus law that governs the handling of personal information. The main agency in charge of PIPA is the Cabinet Office. However, the Cabinet Office does not enforce the law. The ministries and agencies that are legally mandated to oversee certain industries are the PIPA enforcers. Each relevant ministry and agency issued Guidelines that interpret PIPA requirements for the industry that it oversees. As of October 16, 2006, there are 34 Guidelines issued for 22 business fields. Guidelines issued by the Ministry of Economy, Trade and Industry ("METI"), Financial Services Agency ("FSA"), Ministry of Internal Affairs and Communications ("MIC"), and Ministry of Health, Labour and Welfare ("MHLW") are the most frequently referenced PIPA Guidelines for businesses. Ultimately, the Cabinet Office makes final decisions on PIPA interpretations, and coordinates differences among Guidelines issued by relevant ministries.

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<sup>1</sup> PIPA was promulgated on May 30, 2003, but only Chapters 1 through 3, which cover the public sector, took effect on that date. Chapters 4 through 6, which apply to the private sector, took effect on April 1, 2005.

## Challenges

Despite efforts by the Cabinet Office and other relevant ministries to promote understanding of PIPA rules, there has been confusion among the private sector organizations and among consumers as to what the real PIPA requirements are. Misunderstanding of PIPA provisions is causing overreaction to the law, and consequently the value of data use is undermined. Since PIPA took effect, citizens are more frequently exercising their right not to provide their personal information to businesses for fear that information will be misused. As a result, organizations that collect personal information for legitimate purposes are facing significant operational difficulties. Also, private organizations are increasingly reticent of collecting or disclosing personal information, even if their use of this information meets PIPA requirements. Due to the lack of consistent guidance for safeguard measures in the Guidelines, many entities are overly protective of the personal information they use. Because of this, the business community in Japan is seeking proper and clear guidance for personal information usage by PIPA authorities.

## Revision Process

The PIPA and its Guideline review process have already been set in motion. Businesses operating in Japan should be aware of PIPA's two-track review process. The law itself and its Guidelines are reviewed separately. The Cabinet Office, which is mandated to review PIPA three years after its full enforcement,<sup>2</sup> leads the process with the input from multiple stakeholders. The PIPA Guidelines, however, are reviewed by their respective ministries and agencies, which also have an input role in the review of the law itself. Each ministry and agency has a different review cycle, and some even review only whenever they consider such review necessary.

So far, the Cabinet Office has conducted seven rounds of hearings for industry and consumer organizations, and has led the Inter-ministerial Task Force for Personal Information Protection. On the other hand, METI has taken accelerated steps to review its Guidelines. To start the process, METI has established the Guidelines Review Committee, which consists of academics, business, and consumer advocacy groups. Selected committee members are serving as the Guidelines Review Working Group members and are drafting a detailed report to be submitted to the Committee. The committee will aggregate the materials submitted by the Working Group and the results of industry hearings conducted by the METI officials earlier this year. This scramble of multiple review processes is confusing, but businesses operating in Japan should be cognizant of them as they are closely intertwined.

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<sup>2</sup> The *Basic Policy on the Protection of Personal Information* requires that "the Cabinet Office should review the enforcement status of the Act approximately three years after the full enforcement of the Act, and take necessary measures based on the results of such review." Cabinet Decision, *Basic Policy on Protection of Personal Information*, available from <http://www5.cao.go.jp/seikatsu/kojin/kihonhoushin-kakugikettei.pdf> (in Japanese).

## Issues under Consideration

On July 28, 2006, the Cabinet Office announced a list of items to be considered in reviewing PIPA. This list was based on the research and the hearings conducted by the Cabinet Office's Social Policy Council. The following discussion points have not been fully articulated, but they may be incorporated in the Cabinet Office's comprehensive report, which will be the basis for the amendment to PIPA

- Overreaction: Further articulation that PIPA does not require individuals or entities to obtain consent upon providing personal information to third parties if they meet certain conditions.<sup>3</sup>
- PIPA application scope: Expand the scope to any entities that handle personal information, instead of limiting it to those that use the personal information of more than 5,000 individuals.
- Harmonization of the content of the Guidelines: Harmonize the rules in the PIPA Guidelines and create a common set of requirements.
- Safeguard measures: Alleviate the excess burden on small- and medium-sized enterprises and on employees.
- Termination of use or elimination of personal information: Allow data subjects to force entities to terminate the use of or eliminate his or her personal information even though the use does not violate PIPA requirements.<sup>4</sup>
- Cross-border data transfer: Set rules for transferring personal information outside of Japan.

## Timeline

The Cabinet Office intends to publish a final report on PIPA revisions in the summer of 2007. This report will be a basis for an amendment bill to PIPA, should the Cabinet Office determine it is necessary to make changes to the law. As a part of encouraging public involvement in this review process, the Cabinet Office is currently offering a public comment period on the identified

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<sup>3</sup> 2 of Article 23 in PIPA stipulates that entities may provide personal data to third parties in cases "where an entity handling personal information agrees to suspend the provision of personally-identifiable data at the request of the data subject and where the entity notifies the person in advance of the following information: (1) the fact that the provision to third parties is the purpose of use; (2) the items of the personal data to be provided to third parties; (3) the means or methods of provision to third parties; and (4) the fact that the provision of personally-identifiable data will be suspended at the request of the data subject."

<sup>4</sup> At the moment, only when an entity violates PIPA can the data subject force the entity to halt the use of or eliminate personal information.

items to be reviewed.<sup>5</sup> The submission must be made before October 27, 2006, and it must be in Japanese. METI's Guidelines review process is more accelerated than that of the Cabinet Office. In early December 2006, METI plans to offer a public comment period on the draft Guidelines revision developed by its Guidelines Review Committee.

## Conclusion

All businesses operating in Japan should pay attention to developments regarding PIPA and its Guidelines review. Some of the issues identified in the review process are unique to Japan, where privacy is seen as a social etiquette, not as a fundamental right of individuals. Many in Japan perceive PIPA as a means to police social manners in the use of personal information by companies. Due to the introduction of PIPA, many consumers have become more sensitive to businesses' etiquette. Therefore, a violation of PIPA, or perceived infringement of PIPA, can be fatal to companies operating in Japan, where a company's reputation carries heavy weight in business. Companies operating in Japan are encouraged not only to be familiar with the law and how it is implemented, but also with business customs and social expectations of businesses. Knowledge of local business customs and social expectations is essential because they influence how the law is revised and how it is applied to businesses in Japan.

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<sup>5</sup> <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=Pcm1010&BID=095060570&OBJCD=100095&GROUP> (in Japanese).

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