

Amended Act on Protection of Personal Information

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On May 30, 2017, amendments to the Act on the Protection of Personal Information (the “Act”) came into full effect, and the Act became applicable to business operators who acquire personal information in relation to the supplying of goods or services to a person in Japan if they handle such personal information in a country outside Japan (Article 75 of the Act). For example, online service providers outside Japan who sell goods or provide services through the Internet to an individual located in Japan and who acquire such individual’s personal information from the individual (not from a third party) will need to comply with certain obligations under the Act, even if such service providers are located outside Japan.

The entire Japanese text of the Act, the Cabinet Order to enforce the Act (the “**Cabinet Order**”), the Enforcement Rules for the Act (the “**PPC Rules**”), and various policies, guidelines, etc., can be found at <https://www.ppc.go.jp/personal/legal/>.

Some English translations of these materials can be found at <https://www.ppc.go.jp/en/legal/>, and a tentative translation of the amended Act is accessible at

https://www.ppc.go.jp/files/pdf/Act_on_the_Protection_of_Personal_Information.pdf.

Under the amended Act, the Personal Information Protection Commission (the “**PPC**”; <http://www.ppc.go.jp/en/>), a cross-sector, independent governmental body, has been newly established in order to oversee the Act, and the PPC has published some important guidelines which may be found (in Japanese) at <https://www.ppc.go.jp/personal/legal/>,

including:

- (i) the General Guidelines on the Act on Protection of Personal Information (<https://www.ppc.go.jp/files/pdf/guidelines01.pdf>; the “**General Guidelines**”);
- (ii) the Guidelines on Provision to Third Parties Located Abroad (<http://www.ppc.go.jp/files/pdf/guidelines02.pdf>; the “**Guidelines on Cross Border Transfers**”);
- (iii) the Guidelines on Confirmation and Recording Obligation Relating to Provision to Third Parties (<https://www.ppc.go.jp/files/pdf/guidelines03.pdf>); and
- (iv) the **Guidelines on Anonymized Information** (<http://www.ppc.go.jp/files/pdf/guidelines04.pdf>); although no English translations of these various Guidelines have been published by the PPC as of yet.

1. Scope of Personal Information

Under the Act, “**Personal Information**” is defined as information related to a living individual that can be used to identify a specific individual by name, date of birth or other description contained in such information, whether written, recorded or otherwise expressed using voice, movement or other methods in documents, drawings or electronic records (Article 2.1). Information that, by itself, is not personally identifiable, but which may be easily linked to other information and thereby used to identify a specific individual is also regarded as Personal Information.

Another important definition under the Act is “**Personal Data**,” which is defined as Personal Information comprising a Personal Information Database (Article 2.4 of the Act), which means a collective body of information comprising Personal Information which is systematically organized so as to be able to (manually or electronically) easily searched for particular Personal Information (Article 2.6 of the Act).

The amended Act has clarified the definition of Personal Information by expressly including as such an “**Individual Identification Code**” which is defined as “any character, letter, number, symbol or other code (as prescribed by the Cabinet Order): (a) that is converted from a partial bodily feature of a specific individual so that it may be used with a computer, and that can identify the specific individual, such as fingerprint data or facial recognition data; or (b) that is officially (under the present Cabinet Order) allocated to an individual, or that is recorded in cards or other documents issued to an individual or by electromagnetic format, and that can identify the applicable individual through the allocation of such code, or the like, so as to differentiate among said applicable individuals, such as a driver’s license or a passport number” (Article 2.2 of the Act).

2. Sensitive Personal Information

Under the amended Act, the acquisition of **Sensitive Personal Information** (Article 2.3 of the tentative translation of the amended Act refers to “special care-required personal information,” which includes race, creed, social status, medical history, criminal record, physical / intellectual / mental / developmental disabilities, medical check-up or other examination results, guidance for improvement of mental/physical conditions, medical care and/or prescriptions, and the fact of arrest, detention or other criminal procedures as a suspect or defendant) without obtaining consent from the relevant individual in advance is generally prohibited (Article 17.2). Since it is not required that such consent be explicit, it is deemed that such consent has been obtained if the Sensitive Personal Information is received from the relevant individuals themselves. On the other hand, for example, collecting Sensitive Personal Information posted on the Internet by an unauthorized person and storing such information

as part of the information of the relevant individual are prohibited.¹

Further, as explained below, Sensitive Personal Information is not to be provided to third parties by using an opt-out mechanism; however, Sensitive Personal Information may be received by third parties within the scope of Article 23.5, such as through entrustment, mergers, and joint use, without needing to obtain the consent of the relevant individual. For more details regarding Article 23.5, please see Section 4 below.

3. Notice Requirements for Third Party Provision Using Opt-out Mechanism.

Under the amended Act, business operators who handle a Personal Information Database for business use (“**PI Database Users**”, referred to as “personal information handling business operators” in Article 2.5 of the Act) who provide Personal Data to third parties under an opt-out mechanism are required to submit a notification of certain matters to the PPC. The “opt-out mechanism” is a special exception provided under the Act allowing for the provision of Personal Data (excluding Sensitive Personal Information) to third parties without obtaining the individual’s consent, provided that such PI Database Users are prepared to cease such provision upon request from the relevant individual and that certain information regarding such provision is notified or made easily accessible to the individual, such as by posting on the PI Database User’s website, prior to such provision (Article 23.2 of the Act). In Japan, use of the opt-out mechanism is not particularly popular, as many individuals are opposed to their personal information being provided to third parties without their consent.

4. Record-keeping Obligations upon Provision to Third Parties

¹ Pages 35 to 36 of the General Guidelines.

PI Database Users are required: (i) to keep records on the items set forth in the first following chart when they have provided Personal Data to a third party (excluding the cases under Article 23.1 (based on laws, etc.) and Article 23.5 (entrustment, mergers, and joint use), although the record-keeping obligations may be applicable, if Personal Data is transferred outside Japan pursuant to Article 23.5); and (ii) to confirm and keep records on the items set forth in the second following chart when they have received Personal Data from a third party:

Record-keeping Obligations upon Provision to Third Parties (for Providers)²

	Provision under Opt-out Mechanism	Provision by Obtaining Consent of Relevant Individual
Date of Provision	○	
Recipient's Name, etc.	○	○
Relevant Individual's Name, etc.	○	○
Categories of Personal Data	○	○
Fact that Consent of Relevant Individual Has Been Obtained		○

Confirmation and Record-keeping Obligations upon Provision to Third Parties (for Recipients)³

	Provision under Opt-out Mechanism	Provision by Obtaining Consent of Relevant Individual
Date of Provision	○	
Recipient's Name, Address, Representative's Name, etc. (Confirmation Obligation)	○	○
Circumstances for Acquisition (Confirmation Obligation)	○	○
Relevant Individual's Name, etc.	○	○
Categories of Personal Data	○	○
Fact of Disclosure by PPC	○	
Fact that Consent of Relevant Individual Has Been Obtained		○

² Pages 19 to 22 of the Guidelines on Confirmation and Recording Obligation Relating to Provision to Third Parties

³ Pages 11 to 14 and 23 to 26 of the Guidelines on Confirmation and Recording Obligation Relating to Provision to Third Parties

Please note that under Article 23.5 of the Act the following situations are not deemed to constitute the provision of Personal Data to third parties under the Act, and accordingly PI Database Users are not required to follow the record-keeping obligations:

(a) PI Database Users entrust (outsource) the handling of Personal Data in whole or in part within the scope necessary to achieve the purpose of utilizing the Personal Information (which must be specified and notified or disclosed to the relevant individual under the Act);

(b) Personal Data is provided as part of a business succession caused by a merger or other similar reason; or

(c) Personal Data is to be jointly used with a specified entity by informing the relevant individual (or disclosing it in a manner where the individual can become easily aware of such joint use) of certain prescribed facts, such as the fact of such joint use, the categories of the jointly used Personal Data, the scope of joint users, and the joint users' purpose for such joint use.

5. Cross-Border Transfers.

Under the amended Act, if Personal Data (but not Personal Information) will be transferred to third parties (including affiliates) in a country outside Japan, a requirement is imposed to obtain the prior consent of the relevant individual for such cross-border transfer, except in cases where: (i) the third party is located in a foreign country that the PPC determines and prescribes by its rules as providing an equivalent level of protection of Personal Information as Japan; (ii) the relevant third party has established, and continues to utilize, an equivalent level of protective measures as those which are required to be established by PI Database Users under the amended Act; or (iii) Article 23.1 (provisions based on laws, etc.) is applicable (Article 24 of the Act).

The PPC has yet to release any determination regarding the countries that meet the equivalency test. Accordingly, even EU countries are not viewed as providing “equivalent” protection (item (i) in the paragraph above) at this time.

According to the Guidelines on Cross Border Transfers, foreign businesses which are certified under the APEC Cross-Border Privacy Rules (CBPR System) will be deemed to have established measures equivalent to those which are required to be established by PI Database Users under the amended Act (item (ii) in the paragraph above) (Article 11 of the Ordinance for Enforcement of the PPC).

In addition, the Guidelines on Cross Border Transfers indicate that the equivalency test may be deemed to be met by: (a) putting in place internal policies or privacy policies which provide for requirements to be established by PI Database Users under the amended Act that are applicable to the data provider and the data receiver in the case of transfers of data among group companies; or (b) entering into appropriate agreements between the data provider and the data receiver, which provide for requirements to be established by PI Database Users under the amended Act. It is necessary for such policies and agreements to be prepared in line with the various Guidelines published by the PPC. Therefore, if Personal Data needs to be transferred to any country outside Japan, the transferor should be sure to meet either (a) or (b) above unless the transferor obtains the prior consent of the relevant individual to such cross-border transfer.

In this regard, Article 23.5 as described above (such as entrustment, mergers and joint use) which provides for exceptions to the restrictions regulating the provision to third parties does not, however, provide any exceptions to the restrictions regulating cross-border transfers under the Act, and accordingly if PI Database Users

provide Personal Data to third parties located outside Japan in accordance with Article 23.5 without having taken measures of establishing internal or privacy policies or putting agreements in place as stated in (a) and (b) in the prior paragraph, such PI Database Users are required to obtain the relevant individuals’ consent for such cross-border transfer of their Personal Data, and to keep records of their provision of such information.

6. **Anonymized Information.**

The amended Act has introduced the concept of “**Anonymized Information**” (Article 2.9 of the tentative translation of the amended Act above refers to “anonymously processed information”); namely, information relating to an individual that can be produced from processing Personal Information so that one can neither identify a specific individual by taking certain prescribed action nor restore such Personal Information. Anonymized Information that complies with the requirements of the techniques and processes for anonymization under the Act is not considered to be Personal Information; therefore, no consent is required to transfer Anonymized Information to third parties or to use the same for any purpose other than the purposes of use specified for the Personal Information.

However, PI Database Users which produce Anonymized Information must publicly announce the categories of information related to individuals contained in such Anonymized Information. Further, in order to transfer Anonymized Information to third parties, it is necessary to publicly announce, prior to the transfer: (i) the items of information related to the individual within the Anonymized Information which will be provided to third parties; and (ii) the method through which such information will be provided. At the same time, it will also be necessary to notify such third party that the

information being provided is Anonymized Information (Article 36.4 of the Act).

The Guidelines on Anonymized Information provide examples of how anonymization may be accomplished. For example, when using tentative IDs, it is better to use methods such as hash functions in addition to adding other descriptions (such as random digits) to the original data such as the name and address, to ensure that it is not possible to re-identify the original data.⁴

Please note that the Anonymized Information as set forth under the Act is a very limited concept, and will only be applicable in cases where such information is produced (anonymized) from processing Personal Information with the intention to produce Anonymized Information by certain means in compliance with the Act, and in particular with the intention to handle such information as Anonymized Information under the Act (such as for the purpose of transferring Anonymized Information to third parties or the purpose of using the same for any purpose other than the purposes of use specified as at the collection of the Personal Information, without the consent of the data subject)⁵. Therefore, even if someone deletes or replaces names in the Personal Data with other descriptions as part of security control measures without the intention of producing Anonymized Information, such person will still not be required to comply with the obligations as described above. On the other hand, however, if each individual's information contained in such Personal Data can be used to identify a specific individual (whether or not by means whereby it may be easily linked to other information and thereby used to identify a specific individual), such information even without each individual's name will still constitute and should

be treated as Personal Data.

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⁴ Page 10 of the Guidelines on Anonymized Information

⁵ Page 9 of the Guidelines on Anonymized Information

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