

November 2022



## The Draft Digital Personal Data Protection Bill, 2022

The draft Digital Personal Data Protection Bill, 2022 (“**Draft Bill 2022**”) was released by the Ministry of Electronics and Information Technology (“**MeitY**”) on November 18, 2022. The Draft Bill 2022 was preceded by the Personal Data Protection Bill, 2019 (“**2019 Bill**”) and the Draft Data Protection Bill, 2021 contained in the Report of the Joint Parliamentary Committee (“**2021 Bill**”). The Draft Bill 2022 will replace the existing data protection provision (Section 43A) of the Information Technology Act, 2000. Key elements of the proposed framework under the Draft Bill 2022 are discussed below.

### Background

The Draft Bill 2022 has been released after the 2019 Bill was withdrawn from the Indian Parliament and aims to establish a comprehensive legal framework governing personal data (“**PD**”) protection in India. Key concepts in the Draft Bill 2022 are as under:

### Key Highlights of the Draft Bill 2022

- **Scope of the Draft Bill 2022:** The Draft Bill 2022 is similar in scope to the 2019 Bill and focuses on PD. It does not deal with ‘non-personal data’, unlike the 2021 Bill.
  - However, the scope of the Draft Bill 2022 has been limited to ‘automated’ processing of digital PD. The Draft Bill 2022 will apply to processing of digital PD: (a) within the territory of India where such PD is collected from data principals online and PD collected offline, if digitized; and (b) outside the territory of India, if the processing is in connection with any profiling of, or activity of offering goods or services to data principals within India.
  - The Draft Bill 2022 has also included the instances in which it will not be applicable – these are: (a) non-automated processing of PD; (b) offline PD; (c) PD processed by a natural person for personal / domestic purposes; and (d) PD contained in a record that has existed for at least 100 years.

- **Key Definitions:**

- The definition of PD has been revised to refer to data about an individual who is identifiable by or in relation to such data. Unlike previous versions, the Draft Bill 2022 does not create tiered categorisations of PD (such as sensitive PD or critical PD). In other words, obligations under the Draft Bill 2022 apply to processing of digital PD as a whole and are not based on categories of PD.
- ‘Automated’ refers to any digital process capable of operating automatically in response to instructions given or otherwise for the purpose of processing data.
- The definitions of ‘data fiduciary’ and ‘data processor’ have been simplified and refer only to their respective functions. For instance, the category of social media intermediary / platform has been done away with.
- ‘Data principal’ now specifically includes parents / lawful guardians in case of processing of children’s PD.
- ‘Loss’ and ‘Gain’ have been newly defined and envisaged in terms of loss / gain in property, supply in services and remuneration.
- The definition of ‘harm’ is no longer subject to further expansion by the Central Government.

- **Data Transfer and Localization:** In comparison to the 2019 Bill and 2021 Bill, the data transfer provisions have been simplified. The Central Government may, after an assessment of necessary factors, notify countries or territories outside India to which a data fiduciary may transfer PD, along with certain terms and conditions. This indicates that data transfer may only be allowed to certain countries subject to the Central Government’s terms and conditions.

- **Grounds of Processing:** PD may be processed only in accordance with the provisions of the Draft Bill 2022 and rules, for a lawful purpose for which the data principal has given or is deemed to have given consent. Despite industry requests



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- to include 'contractual necessity' as additional grounds of processing PD (similar to the GDPR), the Draft Bill 2022 does not specifically include this ground.
- The standard of consent in respect of all PD appears to have been raised by the Draft Bill 2022 as it now refers to any freely given, specific, informed and unambiguous indication of the data principal's wishes provided through a clear affirmative action in respect of all PD (i.e., the same standard of consent applies for all types of PD, given the lack of tiered data categories).
  - **Deemed consent:** A new concept of 'deemed consent' has also been brought in, including for the following instances:
    - where the data principal voluntarily provides PD to the data fiduciary and it is reasonably expected that such PD would be provided.
    - in case of providing emergency services.
    - for purposes related to employment, including prevention of corporate espionage, recruitment, termination of employment, etc.
    - fair and reasonable purpose as may be prescribed by the Central Government, including based on legitimate interests of the data fiduciary etc.
  - **Exemptions:** The Draft Bill 2022 contemplates exemptions:
    - The Central Government may exempt any instrumentality of the State (which could include entities that are financially, functionally and administratively dominated by or under the control of the Central Government) from compliance with this law in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence relating to any of these.
    - Additionally, certain exemptions (from provisions relating to consent, notice, obligations of data fiduciaries, rights of data principals, etc.) have been contemplated in respect of processing PD: (a) for enforcing any legal right or claim; (b) by any court / tribunal for performing judicial or quasi-judicial functions; (c) in the interest of prevention / detection / investigation or prosecution of any offence; and (d) of data principals not within the territory of India pursuant to any contract entered into with any person outside the territory of India by any person based in India.
  - **Notice:** In addition to complying with notice requirements prior to obtaining consent from data principals, data fiduciaries will also be required to give itemised notice to data principals, as soon as reasonably practicable, in respect of consent obtained before the commencement of the Draft Bill 2022. This notice should be in clear and plain language containing a description of PD of the data principal collected by the data fiduciary, with the purpose for which such PD has been processed. All forms of notice are to be made available in English or languages specified in the Eighth Schedule to the Constitution of India.
  - **Significant Data Fiduciary ("SDF") and Data Protection Officer ("DPO"):** An SDF is a special category of data fiduciary designated by the Central Government based on certain factors (which remain largely unchanged from the 2019 Bill). SDFs have incremental obligations under the law such as carrying out data audits, data protection impact assessments, appointing a DPO, etc. However, the DPO is to now be based in India and will be responsible to the board of directors / governing body of the SDF. The DPO is also required to be the point of contact for the grievance redressal mechanism set up by the SDF.
  - **Data Fiduciary Obligations:** Data fiduciaries continue to have obligations in respect of implementing security safeguards and appropriate technical and organizational measures, PD retention limitation, making available the right to correction and erasure, etc. In a substantial deviation, data fiduciaries are no longer required to ensure portability of data.
  - **Data Principal Rights:**
    - The Draft Bill 2022 retains the key rights made available to data principals under the 2019 Bill and 2021 Bill. In addition, data principals are now explicitly provided the right to grievance redressal, including readily available means of registering grievances and registering complaints with the Data Protection Board of India ("**Board**"). To this end, the data fiduciary is required to provide business contact information of the DPO (if applicable) / a person who is able to answer processing related questions that a data principal may have.
    - The right of data principals to nominate an individual to exercise their rights now also extends to the event of their incapacity (in addition to their death).
  - **Data Principal Duties:** The Draft Bill 2022 introduces the concept of "duties" of data principals which include complying with the provisions of the Draft Bill 2022, not registering false / frivolous complaints with the data fiduciary or the Board, not furnishing false particulars, etc.
  - **Data Processor Obligations:** Similar to data fiduciaries, data processors may now be required to notify the Board and each affected data principal about data breaches, as prescribed by the Central Government.



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- **Board:** The Board replaces the Data Protection Authority envisaged under the 2019 Bill and the 2021 Bill and appears to have different composition, powers and functions. Significantly, the Board does not appear to have the ability to initiate subordinate legislation.
  - While the Board is meant to function as an independent body, the exact composition and other aspects of the Board are to be prescribed by the Central Government.
  - The Board's functions now include: (a) determining non-compliance with the Draft Bill 2022; (b) conducting enquiries; (c) imposing penalties; (d) directing parties to resolve complaints through alternative dispute resolutions methods; and (e) directing the adoption of response measures in case of PD breaches.
- **Processing PD of Children:** The definition of 'child' remains unchanged, aligned with the age of majority being 18 years. Data fiduciaries processing children's PD are:
  - required to obtain verifiable parental / guardian's consent prior to processing such PD;
  - barred from, tracking and behaviourally monitoring children, and directing targeted advertising at them; and
  - not permitted to undertake such processing of PD that is likely to cause harm to a child, which the Central Government may further lay down through rules.
- **Delegated Legislation:** Conceptually, specifics of several provisions of the Draft Bill 2022 will be clarified through delegated legislation, including form and manner of notifying PD breaches, manner of obtaining parental consent in respect of processing children's PD, composition of the Board, etc.
- **Penalties:** Criminal penalties have been done away with and only monetary penalties have been stipulated by way of a Schedule. Penalties range from INR 10,000 to INR 250 crores.
- **Transitional Provisions:** As with the 2019 Bill and the 2021 Bill no specific transitional provisions such as timelines for issuance of rules and notifications have been provided in the Draft Bill 2022. Instead, the Central Government has the power to notify different provisions at different times.

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*SAM Co. is a leader in the data protection field in India. The Firm's technology practice specialises in issues relating to emerging technology including internet regulation, intermediary liability, digital payments, cybersecurity, and unmanned aviation. The Firm has also represented several clients in landmark privacy and data protection litigation before various courts in India and regularly provides legal, and public policy inputs to leading foreign and Indian businesses.*

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