



Comments from BSA | The Software Alliance on the Interim Report on the Discussion of the So-called Every-Three-Year Review of the Act on the Protection of Personal Information

July 29, 2024

BSA | The Software Alliance (**BSA**)¹ appreciates the opportunity to submit the following comments to the Personal Information Protection Commission (**PPC**) in response to the public consultation² on the Interim Report on the Discussion of the So-called Every-Three-Year Review (**Interim Report**) of the Act on the Protection of Personal Information (**APPI**).

BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA members are enterprise software companies that create the business-to-business technology products and services that power other companies. BSA members offer tools including cloud storage and data processing services, customer relationship management software, human resource management programs, identity management services, cybersecurity services, collaboration systems, and are on the leading edge of providing AI-enabled products and services. Businesses entrust some of their most sensitive information — including personal data — with BSA members. Our companies work hard to keep that trust, and as a result, privacy and security protections are fundamental parts of BSA members' operations.

BSA appreciates the PPC providing an Interim Report that summarizes outcomes of discussions on amending the APPI and allowing stakeholders an opportunity to engage in this review process. We provide feedback on improving the APPI's approach to: (1) reporting data breaches, (2) supporting efforts to utilize data, (3) clarifying inappropriate uses and appropriate acquisition, and (4) enforcement.

¹ BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Asana, Atlassian, Autodesk, Bentley Systems, Box, Cisco, Cloudflare, CNC/Mastercam, Cohere, Dassault, Databricks, DocuSign, Dropbox, Elastic, ESTECO SpA, EY, Graphisoft, Hubspot, IBM, Informatica, Kyndryl, MathWorks, Microsoft, Nikon, Notion, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, Prokon, Rockwell, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Workday, Zendesk, and Zoom Video Communications, Inc.

² <https://public-comment.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=240000111&Mode=0>

Reporting Data Breaches

BSA welcomes the Interim Report's proposal to streamline the scope and contents for reporting data breaches.

Streamlining these obligations will help companies, regulators, and individuals focus on incidents that present the greatest risk. We therefore welcome the Interim Report's acknowledgment of the importance of narrowing the scope of reporting obligations to a reasonable range based on a risk-based approach. In particular, we support:

- **Revising requirements for reporting breaches that affect only a small number of individuals.** We agree with the Interim Report that when only a small number of individuals are affected and the individuals are properly notified, it may not be appropriate to require immediate reporting to the PPC. Rather, in such situations, it may be preferable for companies to submit reports at regular intervals that compile information about these incidents. However, the Interim Report suggests this streamlined process may only be appropriate if an organization's systems and procedures are confirmed by third parties such as an accredited personal information protection organization. Rather than requiring that companies participate in such processes, to benefit from streamlined reporting obligations, the PPC should adopt a streamlined approach more broadly to help rationalize the APPI's reporting obligations for cases with minimal impact on individuals.
- **Reviewing the "likely requirement."** We agree this requirement can result in over-reporting of incidents if the actual risk of harm to individuals has not been assessed. We therefore support the Interim Report's proposal to require reporting or notification when due consideration has been given to the possibility and risk of harm to individuals' rights and interests.

Supporting Efforts to Utilize Data

The Interim Report recognizes that a broad range of beneficial businesses and services are emerging with the advancement of digitalization and technology. We agree with the Interim Report that it is important to effectively use these new tools and services to increase the benefits that Japanese society enjoys and to improve productivity and economic growth while protecting the rights and interests of individuals.

We support the Interim Report's efforts to identify legal bases other than consent for which data can be processed for these beneficial purposes. We agree with the report that processing of personal data should be permitted on the basis of public interest activities or for research. However, we encourage the PPC to address efforts to support data utilization more broadly, because there are beneficial processing scenarios that may not fall within public interest or research activities.

Another way of supporting the utilization of data is by recognizing that companies may process data on the basis of legitimate interests. Incorporating a legitimate interests framework into the APPI could create a more flexible and adaptive framework, enabling companies to collect data that is necessary to support, deliver, and improve a variety of services for the benefit of individuals, businesses, and society while protecting the rights of individuals. For example, such a framework could be combined with requirements to conduct data protection impact assessments. These assessments can require companies to assess the impact of a particular use of data and the measures taken to ensure the protection of privacy related to that activity.

To move toward these goals, we support the Interim Report's recommendation to create a public forum for transparent stakeholder discussion. That forum can allow for a greater understanding of the

beneficial business operations that may create societal benefits but fall outside traditional concepts of processing based on public interest or research. The forum may also act as a means to exchange information on appropriate measures to protect privacy in these scenarios.

Clarifying Inappropriate Uses and Appropriate Acquisition

We agree with the Interim Report that clarifying the scope of actions prohibited by Articles 19 and 20 of the APPI would increase predictability for businesses. Article 19 bans the utilization of “personal information in a way that there is a possibility of fomenting or inducing unlawful or unjust act.” Article 20 bans the acquisition of “personal information by deception or other wrongful means.”

As the Interim Report notes, clarifying these obligations can create more certainty for businesses and clearer protections for individuals. Providing specific examples would be helpful. As the PPC works toward increased specificity, we recommend focusing on the degree of risk an activity presents to the rights and interests of individuals. We also support efforts by companies to clearly identify and mitigate such risks through related measures that align with the APPI’s goals, such as through the use of Privacy Impact Assessments for activities that present high risks to individuals’ privacy.

Enforcement

Effective remedies are important for ensuring that the privacy rights of individuals are sufficiently protected and companies are deterred from violating their obligations. We are concerned that aspects of the Interim Report may lead to an enforcement system that does not result in remedies that are proportionate to the harms the APPI seeks to prevent. We are particularly concerned about two areas:

- **Third parties.** The Interim Report suggests that PPC may take administrative measures not only against businesses that violate the APPI, but also against third parties involved in such handling even if those third parties did not violate the Act. This creates concerns because administrative measures by the PPC, such as recommendations and orders, can lead to a perception that the third party involved has committed a violation even when they have not. We recommend only allowing for administrative measures where a third party has engaged in unlawful acts.
- **Criminal Penalties.** In addition to imposing monetary penalties, the APPI provides for criminal penalties in certain circumstances. We have significant concerns with this approach. Criminal penalties simply do not have a useful role to play in privacy or data protection laws and are outside of international best practices. The substantive requirements of a privacy law, combined with monetary relief and remedies available through administrative or civil judicial processes, are sufficient to protect individuals’ privacy interests and deter future violations. In contrast, the risk of criminal liability can chill beneficial and harmless data practices. We strongly recommend that no further criminal penalties be considered for violations of the APPI.

Conclusion

BSA appreciates the opportunity to comment on the Interim Report. We hope that our recommendation will be useful as you continue to discuss the amendment of APPI. We appreciate the PPC taking steps to explain and involve stakeholders during the review process.

We are particularly encouraged to see the Interim Report’s statement that PPC is considering establishing a forum for continuous discussion with stakeholders in a transparent manner. BSA would welcome the opportunity to contribute to that forum, and we look forward to continuing

conversation in the future on these important topics. Please let us know if you have any questions or would like to discuss our feedback in more detail.