



**LEGISLATIVE BRIEF
PERSONAL DATA
PROTECTION BILL 2021**

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LEGISLATIVE BRIEF

PERSONAL DATA PROTECTION BILL 2021¹

1. Scope of the Personal Data Protection Bill

The Data Protection Bill 2021 provides measures to safeguard personal data of individuals held by public and private entities. It regulates processing of personal data and strengthening the rights of data subjects including the right to:

- access, rectify or complete any inaccurate or incomplete personal data
- erase/delete personal data
- withdraw consent for the processing of personal data

A mechanism is further provided for data controllers and data processors for maintenance of transparency, accountability, integrity and confidentiality in processing data.

The bill proposes to designate a 'Data Protection Authority' responsible for holding inquiries, hearing and determining appeals, making determinations and orders, establishing standards in relation to data protection, making rules and issuing directives required and for the implementation of the bill.

The bill also introduces 'special categories of personal data' which requires an impact assessment by the data controller before processing. However, the Bill also sets certain legitimate conditions under which personal data may be processed, including legal obligations under the bill, emergencies, public interest and other recognized legitimate interests.

1. This brief is based on the draft Bill as at 1st of February 2021. However, care must be taken to ensure that the recommendations made here are carried through even in later drafts of the Bill.

2. Chronology of the Personal Data Protection in Sri Lanka

The Constitution of the Democratic Socialist Republic Sri Lanka 1978 does not expressly guarantee right to privacy as a fundamental right. Even though several laws such as the Computer Crime Act No. 24 of 2007, Electronic Transactions Act No.19 of 2006, Right to Information Act No. 12 of 2016, Banking Act No. 30 of 1988, Telecommunications Act No. 25 of 1991 and Intellectual Property Act No. 36 of 2003 regulate personal data, Sri Lanka has not had a specific law on protection of personal data. The initiative was taken in 2018 by the Ministry of Digital Infrastructure and Information Technology and the Legal Draftsman's Department to draft a Personal Data Protection Bill. The Bill is slated to be enacted in the near future.²

3. Summary of key recommendations on the Personal Data Protection Bill 2021.

No.	Concern	Recommendation
1.	In terms of Section 3 of Personal Data Protection Bill, the provisions of the Bill prevail over the provisions of any other written law, including the Right to Information Act, in case of any inconsistency. This can lead to derogation from the fundamental right to information.	Include a specific exception to ensure that the Right to Information Act is not overridden in case of an inconsistency.
2.	The Section 28 (1) of the Personal Data Protection Bill designates a 'government controlled' body as the Data Protection Authority and therefore the bill does not have sufficient safeguards against political interference or attempts at diluting its powers and functions.	Establish an independent data protection authority for the purpose of the Act. Independence of the data protection authority is crucial to balance data privacy rights as well as the right of the public to access information in an impartial manner.
3.	No harmonization on the definition of 'personal data' between the Personal Data Protection Bill and the Right to Information Act.	Make it mandatory for officials to consider the Right to Information law in defining 'personal data', and justify any refusals to disclose having specific regard to the RTI Act. This approach mitigates conflicts between the two laws when access to personal information is sought.

2. Dawood Y. (2021 May 16) "More hum and haw on Data Protection Act" The Morning <https://www.themorning.lk/more-hum-and-haw-on-data-protection-act/>

4.	<p>'Financial Data' and 'Personal Data Relating to Offences, Criminal Proceedings and Convictions' are included within the meaning of special categories of personal data under the Personal Data Protection Bill.</p> <p>Personal Data Protection laws of most jurisdictions do not recognize 'Financial Data' and 'Criminal Records' as 'sensitive data' while many other jurisdictions have at least excluded 'Financial Data' from the list of sensitive data.</p>	<p>Remove 'Financial Data' and 'Personal Data Relating to Offences, Criminal Proceedings and Convictions' from the list of special categories of personal data.</p> <p>This approach preserves citizens' ability to access information regarding corruption and other types of crime.</p>
5.	<p>The Personal Data Protection Bill does not recognize 'Journalistic Purpose' as a condition for processing data.</p>	<p>Recognize 'Journalistic Purpose' as a legitimate condition to process data.</p> <p>This ensures access to information for journalistic purposes is not unduly restricted.</p>

4. Recommendations on the Personal Data Protection Bill

The Personal Data Protection Bill fulfils the demand for legally protected privacy rights of data in Sri Lanka during this information age. However, it is essential that the bill is consonant with other legally protected rights. The worldwide debate on the balance of privacy rights and freedom of information has gained more attention as both RTI and privacy laws often complement and conflict with each other. The following recommendations are made to ensure balance between these two equally important rights.

1. Include a specific exception to ensure that the Right to Information Act is not overridden in case of an inconsistency.

In terms of the Section 35 (1) (e) of the Personal Data Protection Bill 2021, exemptions, restrictions or derogations to the provisions of the Bill are allowed for the protection of right to information. This provision attempts to guarantee the balance between the two rights. However, the Section 3 of the Bill states that in the event of any inconsistency between the provisions of the Bill and the provisions of any written law, the provisions Data Protection Bill prevail. Section 3 of the Bill can therefore repress the application of the RTI Act in case of a conflict between the two laws.

It can affect the procedures set out by the RTI Act to access information, ultimately restricting citizen's fundamental right to access information. Practically, it can also lead to a self-censoring at the Information Officer level due to the lack of absolute clarity on whether the provisions of the RTI Act can be applied without fear of impinging on data protection rights. This can also lead to an increase in refusals and in turn, appeals, which would increase the burden to the

State and detract from the principle of maximum disclosure upon with the right of access to information is founded. Therefore, it is recommended that the Bill should recognize application of the provisions of the RTI Act as a proviso to Section 3 of the Personal Data Protection Bill.

2. Establish an independent Data Protection Authority

Section 28 (1) of the Personal Data Protection Bill designates a public corporation, statutory body or any other institution established by or under any written law and controlled by the government as the “Data Protection Authority of Sri Lanka”. The proposed regulatory structure gives government significant control over the regulatory regime.

In terms of provision 117 of the General Data Protection Regulation³ (herein after referred to as GDPR) applicable in the European Union, establishment of supervisory authorities that are able to exercise their functions with complete independence is an essential component of the protection of natural persons with regard to the processing of their personal data. It further mitigates the conflicts that could arise between the Data Protection Authority and Right to Information Commission in balancing potentially competing interests. The globally accepted standard⁴ is either to have a single independent body to safeguard both rights or to have two separate independent bodies to balance the two rights. Accordingly, most of the countries with a personal data protection law in effect, including all countries under the European Union, Canada, Australia, Hong Kong, South Korea, China and Japan have guaranteed the independence of the Data Protection Commission. In this context, it is imperative that the Data Protection Bill 2021 of Sri Lanka establishes an independent Data Protection Authority.

3. Harmonize the understanding of ‘personal data’ between the Personal Data Protection Bill and the Right to Information Act

The Data Protection Bill defines ‘personal data’ as ‘any information that can identify a data subject directly or indirectly, by reference to

- (a) an identifier such as a name, an identification number, location data or an online identifier, or
- (b) one or more factors specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of that individual or natural person’.

According to the RTI Act, information on personal information that has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of an individual may be denied unless a larger public interest justifies disclosure. However, the Personal Data Protection Bill 2021 is not in synergy with the Right to Information Act in defining ‘personal data’.

3. The General Data Protection Regulation 2016/679 is the regulation on data protection and privacy for the European Union. It will be applied to other countries in cross boarder processing of data. However, GDPR is considered as a comprehensive piece of legislation and used as a modal by some countries outside the EU, incorporating GDPR provisions to their national legislations. i. e. Brazil, Australia, UK, Norway. Countries such as Hong Kong, Panama, China, Japan, South Korea and Thailand use GDPR as a good reference to develop their data privacy laws and data protection regime.

4. Many countries including Belgium, France, Canada, Portugal, New Zealand, Peru and Scandinavian countries have created separate bodies for enforcing RTI laws and Personal Data Protection laws. Countries including Estonia, Hungary, Malta, Mexico, Serbia, Thailand and the United Kingdom at the national level and many Canadian provinces, German länder, Mexican states, and Swiss cantons at the subnational level have created a single Commission to handle both access to information and data privacy protection. However, nearly in all countries either one Commission or both Commissions are independent. GDPR’s requirement of Data Protection Commission to be independent is one of the main reason for this.

This can lead to a discrepancy between the RTI law and Data Privacy law with both Data Protection Officers and Information Officers placed at a difficulty in deciding whether a particular piece of information is personal or not, before disclosure, upon receiving a request. Therefore, at the point of drafting, there is an invaluable opportunity to harmonize the definition of 'personal data' with the RTI Act.

4. Remove Financial Data' and 'Personal Data Relating to Offences, Criminal Proceedings and Convictions' from the list of special categories of personal data.

Unlike the GDPR and privacy legislations of other jurisdictions even outside EU such as the United Kingdom, South Korea, and Australia⁵, the proposed Data Protection Bill in Sri Lanka cites 'financial data' and 'personal data relating to offences, criminal proceedings and convictions' within the meaning of special categories of personal data. Processing data that are within the meaning of this category requires an impact assessment carried out by the data controller. This limits the public's right to access financial and crime related information of public officials and politically exposed persons⁶ who are exercising public functions in trust for the people. This could facilitate politically exposed persons to shield the misuse of public finance, other forms of corruption, as well as financial and other crimes using the Data Protection Law. In this context, 'financial data' and 'personal data relating to offences, criminal proceedings and convictions' need to be removed from the list of special categories of personal data, making the process to access such information less complicated.

5. Recognize 'Journalistic Purpose' as a legitimate condition to process data.

Section 6, 9 as well as Schedule II of the Personal Data Protection Bill sets out exemptions to the law in processing data. These provisions include archiving purposes in the public interest, scientific research, historical research or statistical purposes etc. The Bill nowhere recognizes 'journalistic purpose' as a legitimate purpose for processing data. The question arises whether media organizations that use personal data of individuals for reporting purposes on a daily basis would require consent of the data subjects, before reporting.⁷

Article 85 of the EU GDPR requires data to be protected with due regard to the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. Non-EU countries such as Singapore, Malaysia, India (proposed data protection Bill) and China (proposed personal information protection law draft) has adopted this approach.⁸ While news/media organization are responsible to process the obtained data with integrity and in accordance with media ethics, it is recommended that the Personal Data Protection Bill should explicitly recognize 'journalistic purpose' as an exemption.

5. Information Privacy Act of 2014 of Australia has excluded 'Financial Data' within the definition of 'Sensitive Data'.

6. A politically exposed person (PEP) is defined by the Financial Action Task Force (FATF) as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognised that many PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related offences, including corruption and bribery, as well as conducting activity related to terrorist financing (TF).

7. Natesan A, (2021 June 02) "Is the Proposed Data Protection legislation a cause for concern for journalistic expression?" Daily FT <<https://www.ft.lk/columns/Is-the-Proposed-Data-Protection-legislation-a-cause-for-concern-for-journalistic-expression/4-718683>>

8. ibid

5. Suggested Amendments to the Personal Data Protection Bill

1. Include a specific exception to ensure that the Right to Information Act is not overridden in case of an inconsistency.

The Provisions of this Act to prevail in case of inconsistency.

(3) The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law, relating to the protection of personal data of data subjects:

Provided however, where a public authority is governed by any other written law, it shall be lawful for such authority to carry out processing of personal data in accordance with the provisions of such written law and in the event of any inconsistency between the provisions of this Act and the provisions of such written law, the provisions of this Act shall prevail;

Provided however, the application of the provisions of this Act shall not derogate from the application of the provisions of the Right to Information Act No. 12 of 2016.

2. Establish an independent Data Protection Authority.

Establishment of the Data Protection Commission.

(11)(1) There shall be established for the purpose of this Act, a body called the Data Protection Commission.

(2) The Data Protection Commission shall act independently in the performance of its tasks or in the exercise of its powers pursuant to Section 30, 31 and 32.

(12) (1) The Commission shall consist of three persons appointed by the President upon recommendation of the Parliamentary Council. In making such recommendations, the Parliamentary Council shall recommend one person nominated by each of the following organizations or categories of organizations: -

- (a) Information and Communication Technology Agency
- (b) Chambers of commerce, business and industries
- (c) Bar Association of Sri Lanka

(2) In making recommendations under subsection (1) the Parliamentary Council shall ensure that the persons who are being recommended are persons who-

- (i) have distinguished themselves in public life with proven knowledge and experience in the fields of information technology, privacy, law and rights;
- (ii) are not connected with any political party;
- (iii) are not carrying out any business, holding any office for profit, or pursuing any profession.

3. Harmonize the understanding of ‘personal data’ between the Personal Data Protection Bill and the Right to Information Act.

Interpretation

(47) In this Act, unless the context otherwise requires-

“personal data” means any information that can identify a data subject directly or indirectly, by reference to-

- (a) an identifier such as a name, an identification number, location data or an online identifier, or
- (b) one or more factors specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of that individual or natural person.

(c) personal data within the meaning of the Right to Information Act No. 12 of 2016.

4. Remove Financial Data' and 'Personal Data Relating to Offences, Criminal Proceedings and Convictions' from the list of special categories of personal data.

Interpretation

(47) In this Act, unless the context otherwise requires-

'special categories of personal data' means the personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation, or personal data relating to a child;

5. Recognize 'Journalistic purpose' as a legitimate condition to process data.

Obligation to define a purpose for processing

(6) Every controller shall, ensure that personal data is processed for a -
(a) specified;
(b) explicit; and
(c) legitimate,

purpose and such personal data shall not be further processed in a manner which is incompatible with such purpose:

Provided however, subject to section 10 of this Act, further processing of such personal data by a controller for archiving purposes in the public interest, scientific research, historical research, **journalistic purposes** or statistical purposes shall not be considered to be incompatible with the initial purposes referred to in paragraphs (a), (b) or (c) of this section.

Obligation to limit the period of retention

9. Every controller shall ensure that personal data that is being processed shall be kept in a form which permits identification of data subjects only for such period as may be necessary or required for the purposes for which such personal data is processed:

Provided however, subject to section 10 of this Act, a controller may store personal data for longer periods insofar as the personal data shall be processed solely for archiving purposes in the public interest, scientific research, historical research, [journalistic purposes](#) or statistical purposes.

Schedule II

(h) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes, [journalistic purposes](#) or statistical purposes in accordance with law which shall be proportionate to the aim pursued,

protecting the data protection rights enumerated in this Act or any other written law and provide for suitable and specific measures to safeguard the rights and freedoms of the data subject.

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