



ALG INDIA LAW OFFICES LLP

Intellectual Property Lawyers

AAJ-4480 www.algindia.com ip@algindia.com +91.999.9086.519 / +91.892.9975.587

POSTAL ADDRESS : 244, Vedanta Apartments, Plot No. 6C, Sector 23, Dwarka, New Delhi - 110 077 | OFFICES : New Delhi | Hyderabad

January 31, 2020

Shri. Kris Gopalakrishnan
Chairperson,
Committee of Experts
Data Governance Framework

Sub: Revised Report on Non-Personal Data Governance Framework

Dear Shri Gopalakrishnan,

ALG India Law Offices LLP (“ALG”) submits these comments in response to the invitation for feedback on the Revised Report on Non-Personal Data Governance Framework, dated December 16, 2020 (“Revised Draft Report”), prepared by the Expert Committee (“Committee”) under your Chairmanship.

ALG represents several domestic and foreign companies having an interest in data governance. In the course of advising its clients, ALG has had the occasion to consider and reflect on the current legal landscape in India pertaining to data governance in general, and the aforementioned report in particular.

Our key comments and suggestions, discussed in detail in the enclosed Note, are summarized below—

1. Scope of definition, meaning and illustrations of non-personal data needs further clarification.
2. Lack of clarity on the framework by which the act of de-anonymization of non-personal data will be governed.
3. The Revised Draft Report does not mention any measures purported to be adopted for minimizing risk of de-anonymization of non-personal data.
4. There should be specific requirement for seeking consent for anonymisation of personal data (and use thereof) instead of an opt-out mechanism.
5. Non-personal Data Authority (“NPDA”) should be given the authority to adjudicate on validity of data sharing requests for sovereign purpose.
6. Request for access to the High-value Dataset should be permitted from non-registered Indian organisations and Indian nationals.

We appreciate the considerable effort that has gone into the Revised Draft Report. We recognize the time pressures and challenges and under which the Committee is working, particularly in COVID-19 times. We thank you for your time and consideration of these comments.

Respectfully submitted,
Gaurav Bhalla, Partner
Sri Lekha Rayapati, Associate
For ALG India Law Offices LLP



ALG INDIA LAW OFFICES LLP

Intellectual Property Lawyers

AAJ-4480 www.algindia.com ip@algindia.com +91.999.9086.519 / +91.892.9975.587

POSTAL ADDRESS : 244, Vedanta Apartments, Plot No. 6C, Sector 23, Dwarka, New Delhi - 110 077 | OFFICES : New Delhi | Hyderabad

NOTE CONTAINING ALG'S COMMENTS AND SUGGESTIONS ON THE REVISED DRAFT REPORT BY THE COMMITTEE OF EXPERTS ON NON-PERSONAL DATA GOVERNANCE FRAMEWORK

1. Scope of definition, meaning and illustrations of non-personal data needs further clarification.

1.1. ALG's Observations

1.1.1. The Revised Draft Report in Point No. 4.1 retains the definition 'non-personal data' as was contained in the original Draft Report. As per the Revised Draft Report, non-personal data is defined as – *“When the data is not ‘Personal Data’ (as defined under the PDP Bill), or the data is without any Personally Identifiable Information (PII), it is considered Non-Personal Data”*.

1.1.2. The Revised Draft Report further elaborates on the definition of non-personal data by bifurcating in into two types:

- i. *data that never related to an identified or identifiable natural person, such as data on weather conditions, data from sensors installed on industrial machines, data from public infrastructures, and so on.*
- ii. *data which were initially personal data, but were later made anonymous. Data which are aggregated and to which certain data transformation techniques are applied, to the extent that individual specific events are no longer identifiable, can be qualified as anonymous data.*

1.1.3. The Revised Draft Report further contains some illustrations of non-personal data which is collected by both public as well as private agencies. The illustrations of relevance (mentioned in the Revised Draft Report) are as follows:

- i. Police department collecting video footage about a public gathering from private news channels.
- ii. The municipality collecting data on the state of the city roads by seeking photos clicked using their phones.
- iii. A private mobile operator determining which subscriber has stepped outside a Government defined quarantine zone defined through virtual coordinates.

1.2. ALG's Recommendations

- 1.2.1.** While the definition of non-personal data seems fine textually, the illustrations (particularly the ones mentioned above) contained in the Revised Draft Report seems to be concerning. The illustrations mentioned in the Revised Draft Report seem to diminish the line between personal and non-personal data. Further, the Revised Draft Report fails to identify and address the privacy concerns arising out of collection of such non-personal data.
- 1.2.2.** The first illustration pertaining to '*video footage collected by the police department about a public gathering from a private news channel*' fails to explain how such data will qualify as non-personal data. It can be safely presumed that the video footage will consist of numerous identifiable individuals through their facial identifiers, thereby rendering the data as personal data (instead of non-personal data). The Revised Draft Report should clarify how such data will qualify as non-personal data.
- 1.2.3.** The second illustration pertaining to the '*municipality collecting data on the state of the city roads by seeking photos clicked using their phones*' fails to explain and elaborate on how the municipality will collect such data held by private individuals. The Revised Draft Report should clarify that this data will be submitted on voluntary basis and that no citizen will be compelled to submit such data. In line with this, the Revised Draft Report should further clarify that Government agencies will not extract data from the mobile phones of consumers without their consent.
- 1.2.4.** The third illustration pertaining to '*a private mobile operator determining which subscriber has stepped outside a Government defined quarantine zone defined through virtual coordinates*' also fails to clarify how such data will qualify as non-personal data. If a mobile subscriber provides data about specific individuals crossing the 'Government defined quarantine zones', this data does not seem to qualify as non-personal data. Accordingly, the Revised Draft Report should clarify on how the data pertaining to the aforementioned illustration qualifies as non-personal data.

2. Lack of clarity on the framework by which the act of de-anonymization of non-personal data will be governed.

2.1. ALG's Observations

- 2.1.1.** The Revised Draft Report in Point No. 5.1 (iv) reads as "*The non-personal data regime applies to all data that is not personal data under the PDP Bill or which does not have any personally identifiable information...*"
- 2.1.2.** Further, the Revised Draft Report in Point No. 5.2 (ii) reads as "*...if the individuals whose data constitute the anonymized dataset are re-identified in any manner...such data would no longer be characterised as anonymized data to which the provisions of the PDP Bill*

will not apply. The dataset will be deemed to have been re-identified and once again fall within the purview of the PDP Bill.”

- 2.1.3.** While the Revised Draft Report has addressed the overlap between PDP Bill and the Non-Personal Data Governance Framework as regards regulation of de-anonymized data and mixed datasets, there is lack of clarity on the framework applicable to an attempt to de-anonymize and/or an act of de-anonymization of non-personal data.

2.2. ALG’s Recommendations

- 2.2.1.** ALG recommends that while regulation of de-anonymized data would be under the purview of the PDP Bill (since the subject matter is essentially personal data), there needs to be specific penal consequences for the act of de-anonymization or attempting to de-anonymize non-personal data under the Non-Personal Data Governance Framework. In other words, the (proposed) instances of de-anonymization of non-personal data should be adjudicated and decided upon by the Non-Personal Data Authority under the provisions of the envisaged non-personal data governance statute.

3. The Revised Draft Report does not mention any measures purported to be adopted for minimizing risk of de-anonymization of non-personal data.

3.1. ALG’s Observations

- 3.1.1.** The Revised Draft Report in Point No. 5.4 (i) reads as - *“It is clear from industry feedback to the Committee and from its own research that large collections of anonymized data can be de-anonymized, especially when using multiple non-personal data sets. This risk is considered by this Committee to be a valid one. Hence the individual (data principal) needs more protection.”*
- 3.1.2.** As identified in Point No. 5.2 (i) of the Revised Draft Report, de-anonymization of non-personal data may occur either a) as a result of failure of the anonymization technology; (b) by virtue of the usage association and co-relation of the anonymized dataset with other anonymized datasets which could collectively result in re-identification; or (c) through any other means of conscious re-identification undertaken on part of the data fiduciary.
- 3.1.3.** The Revised Draft Report as well the previous Draft Report aptly recognize the threat of re-identification of anonymized non-personal data. While the Revised Draft Report identifies the techniques of anonymization for conversion of personal data to non-personal data, neither of the Draft Reports mentions any specific measures that may be adopted for minimizing the threat of de-anonymization of non-personal data.

3.2. ALG’s Recommendations

- 3.2.1.** The threat of re-identification of anonymized non-personal data being an aspect of paramount concern (owing to the possible consequences thereof), should be addressed

holistically. Accordingly, ALG recommends that it is imperative that deliberations with experts from relevant fields be held to identify measures that may be adopted for minimizing threat of de-anonymization of non-personal data.

4. There should be specific requirements for seeking consent for anonymisation of personal data (and use thereof) instead of an opt-out mechanism.

4.1. ALG's Observations

4.1.1. Point No. 5.4 (iii) of the Revised Draft Report mentions that “*...the Committee recommends that data collectors at the time of collecting personal data should provide a notice and offer the data principal the option to opt out of data anonymisation.*”

4.1.2. The Revised Draft Report recommends an opt-out mechanism for anonymization of personal data (and usage thereof). There seems to be a possibility that this opt-out mechanism could be similar to how click-wrap agreements are designed such that users do not pay attention to the minute details and proceed with agreeing to the terms and conditions.

4.2. ALG's Recommendations

4.2.1. Considering the comparatively low literacy and awareness levels among the Indian population coupled with the catastrophic negative consequences which can result out of de-anonymization of personal data, ALG recommends that an ‘opt-in’ mechanism be adopted (instead of an opt-out mechanism).

4.2.2. To further clarify on this, there should be an opt-in mechanism for anonymization of personal data (and usage thereof) at the time of collecting personal data from the data principal. The data principal should be given the option to voluntarily allow for anonymisation of her/his personal data. The default situation under this mechanism should be such that anonymisation of personal data will not be permitted unless specifically allowed by the data principal (instead of the other way round as suggested by the Revised Draft Report).

5. Non-personal Data Authority (NPDA) should be given the authority to adjudicate on validity of data sharing requests for sovereign purpose.

5.1. ALG's Observations

5.1.1. Point No. 8.1 (vi) of the Revised Draft Report mentions that “*NPDA will not adjudicate validity of data requests in case of data requests under sovereign purpose.*”

5.1.2. The Revised Draft Report fails to elaborate on the rationale behind exempting data sharing requests under sovereign purpose from the purview of adjudication by the envisaged Non-Personal Data Authority (NPDA).

5.2. ALG's Recommendations

5.2.1. ALG recommends that the authority of the envisaged Non-Personal Data Authority (NPDA) should encompass adjudicating on the validity of data sharing requests for sovereign purposes. There might be unforeseeable situations where the data requests (although for sovereign purpose) would not be justified for numerous reasons including that it could be violative of the privacy of any community, etc. Considering this, a blanket exemption for data sharing requests under sovereign purpose does not seem reasonable and should not be recommended.

6. Request for access to the High-value Dataset should be permitted from non-registered Indian organisations and Indian nationals.

6.1. ALG's Observations

6.1.1. Point No. 8.2 (v) of the Revised Draft Report mentions that *“Request for access to the High-value Dataset can be from any organisation registered in India. But not from an individual person.”*

6.1.2. Restricting requests for access to High-value Datasets only by registered organizations would mean that unregistered partnerships (which are permissible by law) would not have the right to place a request for accessing the High-value Datasets. Such a restriction would be violative of Article 14 of the Constitution of India as being an unreasonable classification.

6.1.3. Further, restricting requests from individuals (particularly Indian nationals) would also hamper the entrepreneurial opportunities which could be extremely useful for India's domestic manufacturing as well as the service industry.

6.2. ALG's Recommendations

6.2.1. ALG recommends that the restriction on unregistered organizations and individuals (specifically Indian nationals) to place requests for access to the High-value Datasets should be removed. A restriction of such a kind is not only violative of the constitution but would also result in hampering the entrepreneurial opportunities which would otherwise arise.

6.2.2. Instead, a restriction can be placed on the composition of the organization such that all members of the organization seeking request for access to High-value Datasets should be Indian citizens. This would also ensure the Government's objective of ensuring that the

benefit accruing from the data generated from Indian citizens should be primarily beneficial for India.