MAJOR LEGISLATION & TREATIES

Jan.–Dec., 2003

1. Constitutional Law

Personal Information Protection Act

Law No.57, May 30, 2003 (Partly Effective on the Promulgation Day and Partly on April 1, 2005). Six sections including fifty-nine clauses and seven supplementary clauses.

Background:

Personal information began to be processed by computer in the early 1970s, which caused people to become more concerned about violations of their privacy, and accordingly personal information protection laws have been enacted in many countries around the world. In Japan the law concerning protection for personal information held by administrative organs was enacted in 1988, in response to the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. More recently, as high-performance, miniaturized computers and the Internet have become easily available, many private companies began to gain and control personal information both on their customers and employees in their computer system, which enabled them to improve

corporate management and customer services by leaps and bounds. It is true that customers have been able to obtain quick and various services, but despite the great benefits, personal data held by companies' computers have undoubtedly become exposed to the risk of large-scale leakage and illegal trade, and indeed several such incidents have occurred. Under these circumstances, once personal information is handled improperly, people could be irrevocably damaged on their personality and property, and so it has become more and more necessary to prevent the risk in advance. "Juki Net", which began to operate under the Law Partially Amending the Basic Residential Register Law (Law No.133, August 18, 1999), has also stirred anxiety about threats to privacy among people.

In response to urgent demands for privacy protection, the Koizumi Cabinet proposed a Personal Information Protection Bill at the 151st ordinary session of the Diet in March 2001 for the purpose of codifying the general rules of proper treatment for personal information. The bill was, however, fiercely opposed by the media and journalists because they thought it would violate their freedom of speech. As a result it was shelved until December 2002 and eventually failed. In March 2003, the Cabinet again proposed a revised Bill together with other four related Bills and those were passed on May 23.

Main Provisions:

(1) The Structure of the Act

This bill consists of six sections, including fifty-nine articles and seven supplementary clauses. The first three sections which provide General Rules (Sec. 1), Duties of National and Local Government (Sec. 2) and Measures for National and Local Government (Sec. 3) establish basic rules, and the following three sections regulate individual entities using a personal information database or the like for their business.

(2) Purposes, Definitions and Basic Ideas

The purpose of the act is to "protect the rights and interests of individuals while due concern for the utility of personal information should be showed" (Art. 1). The balance between the protection of personal information and the utilization of it will be crucial. "Personal rights and interests" implies something broader than the conception of privacy. In

this way the "fair handling" of personal information based on the "respect for individuals" is a basic idea throughout the act (Art. 3).

"Personal information" means "information about a living individual that contains such items as the name, date of birth or other descriptions such as will enable the identification of the individual (including such information as will allow easy reference to other information and will thereby enable the identification of the individual)" (Art. 2.1). The act primarily aims at prevention of infringements of personal rights and interests through establishing and enforcing the rules of the fair handling of personal information processed by computer. Accordingly certain personal information which cannot be retrieved from computer database, if it concerns some kind of privacy, will not be covered by the act. That is why the act does not single out such sensitive types of information as thought, creed, medical history, material possessions, and debt, for the purpose of effective protection, and therefore it does not even use the term "privacy" in the act.

(3) Duties of Entities Handling Personal Information (Sec. 4)

Section 4 provides the duties of private sector businesses referred to as "entities handling personal information" (Art. 2.3) in detail. The most basic principle is that they must specify the purpose of collecting and using information (Art. 15.1) and use the information exclusively for the specified purpose or for another purpose that is reasonably related to it (Art. 16). In addition, they are obliged not to acquire information by fraudulent or other unfair means (Art. 17), to take reasonable steps to maintain the accuracy and currency of personal data (Art. 19), and to ensure that personal data are kept secure from loss and unauthorized access and disclosure (Art. 20). They must also refrain from supplying personal data to a third party without the prior consent of the individual concerned (Art. 23.1), and respond to data subjects (or specific individuals identified by personal information) requests for access to their personal data (Art. 25) and the correction of them (Art. 26) as well as for the cessation of using them altogether (Art. 27). Although they are general rules applied to normal circumstances, entities may be immunized from those duties where such requirements are highly likely to damage their ongoing business or are very difficult to meet.

In principle the troubles concerning personal information protection

against utilization should be resolved between the private actors concerned, but when it turns out to be impossible, "competent Ministers" (or certain Government Ministers with responsibility for supervising and enforcing compliance with the Act) can recommend proper advice (Art. 33) or issue a binding order (Art. 34).

(4) Entities Exempted from the Operation of the Act

The duties of Section 4 mainly target private business companies which handle enormous amounts of personal information processed by computer for their business use. Nevertheless other private sectors, such as broadcasting institutions and religious organizations, will use personal information for their distinct purposes as well. In those areas, however, their activities may be concerned with certain liberties protected by the Constitution of Japan, for instance freedom of speech and the press (the Constitution of Japan Art. 21) or freedom of religion (id., Art. 20), and thereby the Act might curb their guaranteed liberties.

For the purpose of precluding anxiety about potential infringements on their liberty, certain entities are exempted from the application of data-handling obligations under certain circumstances. These include ① broadcasting institutions, newspapers, news agencies and other reporting organs (including individuals—such as freelancers—whose business is reporting) using personal information for reporting purposes; ② authors using personal information for the purpose of producing literary works; ③ colleges, universities and other academic institutions using personal information for the purpose of academic studies; ④ religious organizations using personal information for the purpose of religious activities; ⑤ political organizations using personal information for the purposes of political activities (Art. 50.1). It will be noteworthy that the Act defines "reporting" as "informing the general public of objective facts as they are including making a comment on them" (Art. 50.2). This definition is inserted so that a competent Minister will not decide arbitrarily which activities will belong to reporting.

Editorial Note:

Three characteristics will be pointed out concerning the Personal Information Protection Act. Firstly, individual rights of and interests in personal information will be protected to the extent that it is weighed

against the efficient utilization of the information. In other words, personal information is not absolutely protected. It is true that people cannot lead a social life without allowing others to use their personal information. Nor can business companies generally carry on a business without information both on customers and their employees, since such information will be vital to the development of new products and services for customers and efficient management of the employees. In this way, the Act intends to balance the urgent need for protection of personal information required by ordinary people against those demands of business world. If that is true, it follows that the main purpose of the Act is not to protect personal information but to use it notwithstanding the title "Protection", and it is doubtful that the Act can actually protect personal information.

Such anxiety might be exacerbated on examining the nature of the information protected by the Act. Personal information referred to the Act is not coextensive with privacy. It is not yet settled whether the conception of privacy contains only sensitive types of information or both sensitive and non-sensitive ones, but it is by no means controversial that sensitive ones lie at the core of privacy. In contrast, personal information protected by the Act does not necessarily contain sensitive types of information probably because they will not be well indexed by computer. For that reason the Act will not effectively and actually protect privacy, and so we should not expect too much.

Secondly, given that the Act is designed to regulate private sectors, it is problematic that the companion Act (Law No.58, May 30, 2003) regulating administrative branches is not as strict as this act. Academics have been criticizing this point. In democracy people should and must be able to control public sectors by way of accessing the information held by them, and then, it will raise difficulties for public sectors to concentrate people's information and to manage them exclusively. Excessive information concentration in public sectors will pose such a menace to people that they would feel they are always supervised by invisible authorities beyond their control. That is why many people are still opposing the Juki Net which was already almost fully in operation in August 2003. It will be desirable that the strictness of the regulation concerning administrative branches should be higher than those concerning private sectors like this Act, and that must be a principle of democracy.

The final and perhaps most controversial point is the relationship between personal information protection and regulation of the freedom of speech enjoyed by the media in particular. As noted above, the Act exempts almost all reporting organs from the application of the data-handling duties (Art. 50.1). Nevertheless because the basic idea of the Act, fair handling of personal information, will apply to the media regardless of the escape clause, the risk of "chilling effects" on the media still remains. This anxiety, which arises out of concerns that allowing individuals access to their personal data and penalizing its unauthorized disclosure would deter journalistic sources from providing off-the-record information about politicians, is real in light of the intermittent political scandals in Japan. It is one of the cogent ideas that the media enjoy the freedom of speech because their mission is to regularly check governmental activities on behalf of the people, and that will be inconsistent with the idea implied in the Act that the government subject to the supervision of the media can define the media (Art. 50.1) and reporting (Art. 50.2) through the interpretation of the provisions by competent Ministers.

Considering the mission given to the media, they do not have the right of reporting whatever they want. They cannot report news arguably violating individual privacy except for the rare cases where public figures or public concerns are involved. In public sphere reporting organs should have their freedom of speech protected from undue interference by the government, but in the private sphere they would be on an equal footing with other private actors and could not insist on their privilege over them. This dichotomy corresponds to the two-faced government regulation. On the one hand, when the government intervenes in the public sphere speech, it will probably oppress the freedom of speech of the media, and when in the private sphere speech, it will often be the guardian of people's privacy against the prying media on the other. All things considered, the future of the Act might depend on the conviction of people that the media and the government certainly carry out their own business.