

개인정보보호법의 개관 및 개정방향에 관한 연구[☆]

Overview of Personal Information Protection Act in Korea

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요 약

2011년 3월 제정된 개인정보보호법은 동 법의 적용대상을 공공·민간부문의 모든 개인정보처리자로 하고 개인정보의 수집, 이용, 제공 등 단계별 보호기준을 마련하였다. 프라이버시 영향평가를 도입하여 일정한 경우 개인정보처리자가 자동적으로 영향평가를 수행하도록 하고 있는 등 개인정보보호법의 전체적 취지와 내용은 높이 평가할 수 있으나, 여전히 전체적으로 어렵고 이해하기 쉽지 않다는 문제점을 안고 있다. 특히 법조문의 불명확성이나 해석, 개인정보보호법상 추진체계 등에 문제가 있으므로, 본고에서 이러한 문제점 등에 대해 고찰해 본다.

☞ 주제어 : IT, 개인정보, 개인정보보호법, 개인정보자기결정권, 전자정부

ABSTRACT

The Personal Information Protection Act enacted in March 2011 stated that the application target of this law includes all personal information processors in the public and private sector, and established the protection standard by phase such as collection, use and provision of personal information. There was an introduction of the Privacy Impact Assessment system that enables personal information processors to perform impact assessment autonomously if there are great concerns over the fact that making and expanding personal information files will influence the protection of personal information, while also making impact assessment compulsory for public institutions in specific reasons with great concerns for violating the rights of the subjects of information. This Act still has the problem that it is generally difficult to understand. This paper deals with the Korean legal practices about the personal information protection with regard to ambiguity and promotional system.

☞ keyword : IT, Personal Information, Personal Information Protection Act, Right to Informational Self Determination, E Government

1. Introduction

The Personal Information Protection Act(PIPA) enacted in March 2011 in Korea covers all personal information processors in public sector and private as well. And it establishes the protection standards when collecting, using, supplying of personal information. The limitations on processing personal identification information were strengthened, and grounds to restrict installation of image information processing devices were provided in the Act. When personal information processor decides whether creating and expanding personal information files may influence the

protection of personal information, he(or she) was authorized to perform impact assessment autonomously. However, the Privacy Impact Assessment system was applied if there were certain reasons for public institutions to believe violation of rights of the information holders. Moreover, the subjects of information are given the claim for inspection of personal information, claim for correction and elimination, and claim for discontinuance of procession, regulating methods to exert such rights. Furthermore, the collective alternative dispute resolution system and class action are implemented for the effective protection of personal information[1].

The Personal Information Protection Act in Korea had been traditionally dualized into the public and private sector, between which the legal grounds and promotion systems were different. With regard to this fact, there was a conflict between the view of claiming the general law special law system grounded on the fundamental law consisting of the

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“Fundamental Law of Personal Information Protection Act + Personal Information Protection Act in the public sector + Personal Information Protection Act in the private sector”, and the view of claiming the “General Law of Personal Information Protection Act + (Special Law of) Personal Information Protection Act in discrete sections” [2].

The newly enacted Personal Information Protection Act adopted the latter view, with the character of being applied to both the public and private sector. Only, the general law of personal information protection includes principles, standard and application cope of personal information protection as well as the general contents that regulate individual rights. Therefore, it must be acknowledged that special laws on personal information protection must be enacted at the same time in order to protect personal information in each field. In the end, the general law of personal information protection must accept the general broad principle that enables unified and systematic application, while special or individual laws are to be enacted when there is a need for expertise or specificity. Thus, the exception to the principles of the fundamental law shall be acknowledged only in special cases, and the escape clauses scattered in individual laws minimized, thereby starting to organize the legal system to secure legal stability and effectiveness of law enforcement. In the dull process of discussions on the enactment of the Personal Information Protection Act since 2004, many laws have been made with no consistent principles and standards with regard to the protection and use of personal information in the public and private sector. Now is the time to start reexamining the existing laws in accordance with the newly enacted Personal Information Protection Act.

2. History of the Personal Information Protection Act

2.1 Background

States have enacted laws to protect the privacy of individuals in the information society since the late 1960s. Each state has its own historical, political and legal traditions, and thus they have different measures to cope with it. In particular, most countries in Western Europe as well as the United States

enacted personal information protection acts between the 1970s to mid 1980s, after which they intensively revised these laws in the late 1980s.

Korea faced strong criticisms on the concerns over infringement of an individual's privacy as the state began to dynamically focus on informatization of the state such as a national administration network project since the 1980s; thus, it finally began to promote legislation of acts concerning the protection of an individual's privacy in the 1980s. The Act on the Protection of Personal Information Maintained by Public Institutions was enacted and proclaimed in 1994.

The Personal Information Protection Act in the past in Korea was operated by dividing into the public and private sector. The public sector was regulated by the Act on the Protection of Personal Information Maintained by Public Institutions, while the private sector was regulated by the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. with regard to the general matters concerning personal information protection.¹⁾ The public sector thus far has been under the autonomous regulation of the relevant state agency including the Ministry of Security and Public Administration regarding protection and supervision of personal information, while the private sector has a reporting center for infringements on personal information under the Korea Internet Security Agency to be in charge of consultation and complaint settlement concerning personal information.

2.2 Issues and Problems

Collection and use of personal information have been universalized throughout the society by the creation of information society and the increase of economic value of personal information. However, a dead zone for personal information protection was created due to the lack of personal information protection rules and standards that regulate the

1) However, there was a controversy in the past over whether it is possible to characterize the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. as a general law on personal information protection in the private sector, because this Act, while comprehensively regulating the field using the information and communications network, did not cover all areas of the private sector that deal with personal information.

domestic society in general. Moreover, the anxiety of the people over infringement of privacy was fortified due to the increasing risks for data spills and frequent infringement accidents followed by the expansion of use of personal information and development of processing and hacking techniques. However, the Personal Information Protection Act in the past had limitations to respond data spills. The legal system for personal information protection is dualized into the individual laws of public institutions (Act on the Protection of Personal Information Maintained by Public Institutions) and information technology business operators (Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.) thus excluding constitutional institutions such as the court, offline business operators, and non profit organizations from the target of legal application. For example, business operators excluded from legal application consisted of 68.1% (23,948 cases) out of 35,167 cases of personal information infringement accidents reported in 2009, indicating that while there are laws concerning personal information protection, protection has not been carried out efficiently.

2.3 Legislating process

- 1) Restructuring of the informatization agencies and improvement of the laws under the Lee Myung bak government (3)

The function of information and communication was integrated into a reorganized government organization along with the emergence of the Lee government. The Ministry of Information and Communication was closed, and functions such as promotion of e government, general management and mediation of national informatization were transferred to the Ministry of Security and Public Administration (MOSPA), functions such as establishing infrastructures and policies such as information and communication networks were transferred to the Korea Communications Commission, and functions such as fostering the information and communication industry was transferred to the Ministry of Knowledge Economy. Accordingly, the government promoted restructuring of the legal system by merging the pre existing laws. One of the processes was a full revision of the Personal Information Protection Act [4].

- 2) Process to legislate the Personal Information Protection Act under the Lee Myung bak government

There were seven enacted and revised bills brought to the 281th National Assembly's (special session) 4th Public Administration and Security Committee meeting (February 20, 2009): 「Personal Information Protection Bill」 on August 8, 2008, 「Personal Information Protection Bill」 on October 27, 2008, 「Personal Information Protection Bill」 on November 28, 2008(submitted by the government), and 「Partial Amendment to the Act on the Protection of Personal Information Maintained by Public Institutions」 on August 21, 2008, on September 11, 2008, on November 3, 2008, and on December 4, 2008. These bills went through enunciation of the propositions, review report and first reading, after which they were referred to the Legislation and Judiciary Subcommittee. Two revised bills were brought in the 283th National Assembly's (special session) 3rd Public Administration and Security Committee meeting (July 7, 2009); 「Partial Amendment to the Act on the Protection of Personal Information Maintained by Public Institutions」 on March 16, 2009 and on March 31, 2009. These bills went through enunciation of the propositions, review report and first reading, after which they were referred to the Legislation and Judiciary Subcommittee. In the 284th National Assembly's (regular session) 10th Public Administration and Security Committee meeting (November 20, 2009), there was the 「Partial Amendment to the Act on the Protection of Personal Information Maintained by Public Institutions」 on November 4, 2009; and in the 289th National Assembly's (special session) 1st Public Administration and Security Committee meeting (April 14, 2010), there was the 「Partial Amendment to the Act on the Protection of Personal Information Maintained by Public Institutions」 on December 21, 2009. These bills went through enunciation of the propositions, review report and first reading, after which they were referred to the Legislation and Judiciary Subcommittee. 「Partial Amendment to the Act on the Protection of Personal Information Maintained by Public Institutions」 on July 30, 2010 and on August 2, 2010 were referred to the Legislation and Judiciary Subcommittee on September 14, 2010 according to Article 58, Clause 4 of the National Assembly Act.

After the comprehensive deliberation of the 13 aforementioned bills by the 294th National Assembly's (special session) 2nd Legislation and Judiciary Subcommittee meeting (September 28, 2010), the bills were decided not to be submitted for consideration in the general meeting. An alternative for a commission that integrated and mediated the above was to be proposed. Furthermore, it was resolved that the alternative for a commission was to be proposed in acceptance of the deliberation results of the Legislation and Judiciary Subcommittee in the 294th National Assembly's (special session) 3rd Public Administration and Security Committee meeting (September 30, 2010).

The contents of the alternative prescribed that the Personal Information Protection Act targeted all personal information processors in the public and private sector,²⁾ and established the protection standard by collection, use and provision of personal information.³⁾ Moreover, the limitations on processing personally identifiable information were fortified^[5], grounds to restrict installation of image information processing devices were introduced [6].

Privacy Impact Assessment system also was introduced. It enables personal information processors to perform impact assessment autonomously if there are great concerns over the fact that making and expanding personal information files will influence the protection of personal information, while also making impact assessment compulsory for public institutions in specific reasons with great concerns for violating the rights of the subjects of information^[7]. The claim for inspection of personal information, claim for correction and elimination, and claim for discontinuance of procession, regulating methods to exert such rights were established [8]. The collective dispute resolution system [9] and class action [10] were articulated for the effective protection of personal information.

2) Article 2 of the Act. Accordingly, those processing personal information to officially manage personal information files such as public institutions as well as non profit organizations shall abide by the regulations of personal information protection according to this Act, and the scope of protection includes handwritten documents aside from electronically processed personal information.

3) Articles 15 to 22 of the Act state that the approval of the subject of information shall be obtained when collecting using or providing personal information to a third party, and when personal information becomes unnecessary as its management purpose is achieved and by any other ground, this information shall be destroyed without delay.

3. Features and Characteristics of the Personal Information Protection Act

3.1 Main Features

1) Expansion of obligatory application target

The application target of this law includes all personal information processors in the public and private sector including the constitutional agencies such as the court, various organizations and offline business operators, and the scope includes a membership list of an alumni association, civil affair documents, entries for events and other handwritten documents aside from electronic files.

2) Collection use provision destruction

This law permits collection, use and provision of personal information by agreement of the subject of information or based on statutory provisions. It also clarifies the subject of information's right to inspect, correct or delete personal information, and strengthens technical and managerial protective measures by making in mandatory to notify the relevant party in case of data spill. In order to limit the extensive use of resident registration numbers and prevent indiscreet abuse and misuse, processing of sensitive information and personally identifiable information is prohibited by principle, with the exception of separate agreement of the subject of information or specific permission granted by the provisions. Self determination on informational of the people is strengthened in the process of personal information processing.

3) Reinforcement of relief procedures

To provide prompt relief measures in case damage or violation of rights of the subject of information occurs similarly to multiple subjects of information, the law established and operated the 「Personal Information Protection Commission」 and 「Personal Information Dispute Mediation Committee」, and expanded the scope of dispute mediation from the private sector to the public sector.

3.2 Main Characteristics

1) Lex specialis

According to the enactment of the new Personal Information Protection Act, there is the general law such as the Personal Information Protection Act and individual (special) laws such as the Electronic Government Act, Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., and Credit Information Act concerning personal information protection. In this case, the general law of the Personal Information Protection Act is in the general law special law relationship with other individual laws.

2) Single rules for public and private sectors

The current Personal Information Protection Act does not distinguish whether personal information processors are in the public sector (issue of whether they have the 'authority' to process personal information) or the private sector (issue of whether they have the 'right' to process personal information), but equally applies this law to all personal information processors.

3) Plurilateral System

The current Personal Information Protection Act is characterized by the plurilateral control system in which the Personal Information Protection Commission. There are independent external supervising agencies, the ministries and offices concerned (MOSPA, Korea Communications Commission, Korea Fair Trade Commission, Financial Services Commission, Ministry of Health and Welfare, etc.) simultaneously regulates matters concerning personal information protection.

4) Expansion of scope

This indicates that subjects of information, who had received application of different laws between the public and private sector, have now come to be regulated by an integrated general law. Through this, the subjects of information may solve the problem of how to exercise the rights given to them to prevent or minimize infringement when their information is violated regardless of the form of personal information processors, and receive prompt damage relief.

5) Conformity with the global standard

The most important issues at present are to enhance the transparency of information processing to the greatest extent possible and to continue ensuring the dignity and freedom of individuals, by normatively predicting technological development. The EU and each EU member states accord an importance to the protection of an individual's private life and personal rights. This protection is achieved through a variety of legal instruments. The protection of personal information is, in part, addressed through human rights law norms. These rights are obviously very abstract, and they require implementation, through specific laws dealing with the protection of personal information. Data protection was achieved by the legislations adopted by the EU as early as October 1995, when the EU adopted Directive 95/46/EC on the protection of individuals, with regard to the processing of personal data and on the free movement of such data. The Directive is designed to protect the basic rights and freedoms of the public in each EU Member States, to safeguard their privacy right associated with personal information and to promote free distribution of personal information among the EU states. While a variety of laws and orders governing the use of personal information do exist in the United States, they have a general tendency to deal with a specific industry, economic field or concrete issue in either the public or the private sector. The laws in these individual areas are applied to a user of specific information, in the context of the use of specific information, a specific information type or a specific use of personal information. They are seldom related to consistently protecting any personal information from its collection, treatment and deletion. In particular, they have an obvious tendency to prohibit the disclosure, rather than the collection, use and storage of personal information. Moreover, in the US, personal information relies, to a large extent, on the judicial relief measures, through which each citizen who thinks his rights are infringed files a lawsuit, without being protected by the control and supervision of the state or an independent public body.

Currently, Europe is the leader of the global trend regarding personal information protection. The personal data protection guidelines by the EU are especially important. The EU regards personal information protection as a part of protection of

human rights, not as a sub standard of consumer protection or electronic commerce. The EU's personal data protection guidelines prohibit the transfer of personal data to countries that do not meet the level of personal information protection. Accordingly, the U.S. has established the 'safe harbor rule (2002)' to devote itself to making the level of personal information protection meet the level similar to that of the EU, thereby exempted from restrictions such as prohibition of transfer of personal data. Efforts in Korea to enact the Personal Information Protection Act are also intended to reflect the global standard for personal information protection.

4. Evaluation of the Personal Information Protection Act

4.1 General evaluation

The main contents of the Personal Information Protection Act stated that the application target of this law includes all personal information processors in the public and private sector so that dead zones that did not apply the personal information protection laws can be resolved. Moreover, the Act also includes contents that have been claimed for protection of personal information, such as establishing the protection standard by phase such as collection, use and provision of personal information, reinforcing the limitations on processing personally identifiable information, establishing to restrict installation of image information processing devices, introducing the Privacy Impact Assessment system, and implementing the collective alternative dispute resolution system and class action.

Thanks to the learning effect of the discussion on the enactment of the Personal Information Protection Act, various issues could be organized within a short period of time and thereby enacting such a desirable Act. Like other bills, this enacted Act can be evaluated as an Act that took a major step forward, with various contents to minimize the people's damages due to data spills by sorting out issues on personal information protection discussed thus far and protect informational self determination in the information society.

4.2 Issues to be discussed

1) Ambiguity

As mentioned above, the newly enacted Personal Information Protection Act can be highly appreciated for its overall intent and content, but this Act still has the problem that it is generally difficult to understand. For example, this Act states that when personal information becomes unnecessary as its holding period expires, its management purpose is achieved and by any other ground, this information shall be destroyed without delay. But there is ambiguity regarding the period of time that can be considered as "without delay". Moreover, according to this Act, personal information processors shall clarify the purpose of processing personal information, and legitimately and fairly collect minimum personal information within the scope of such purpose. However, it can be criticized about whether it is actually possible for personal information processors in the private sector, which are responsible for evidence, to prove that they have collected only "minimum" personal information required for their purpose.

2) Potential conflicts among laws

Article 6 of the Act provides relationship with other Acts. The Act states that "Unless otherwise provided for in other Acts, the protection of personal information shall be governed by this Act." However, this regulation has a problem. When enacting the general law of the personal information protection in the process of enacting the Personal Information Protection Act, the Act on the Protection of Personal Information Maintained by Public Institutions was supposed to have been destroyed while deconstructing the content of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. that contain various regulations according to the content and deleting regulations concerning personal information protection. However, it is difficult to understand why the law that must have been destroyed still remain due to selfishness of certain government department. In the end, if the Act above is a general law on personal information protection, the regulation on personal information protection in the Act on Promotion of Information and Communications Network

Utilization and Information Protection, etc. is a special law on personal information protection, and thus this provision is preferentially applied in the relevant sector. However, if the extensive regulation on personal information protection in the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. remains as it is, the Personal Information Protection Act will ultimately lose its significance as a general law, reducing or eliminating the target or scope of application.

3) Further promotion system

There are many issues in the regulations of the Personal Information Protection Act concerning the status and functions of the personal information protection agency that had never raised conflicts or caused any trouble in the enactment process of the Personal Information Protection Act. The function and role of the Personal Information Protection Commission regulated by the current law are insufficient in terms of independence and authorities of protection agencies compared to the international standard or level of discussion. The Commission thus cannot play a sufficient role as an independent agency for efficient protection of personal information, and is merely a 'product of compromise' that cannot be seen as a personal information protection agency in a systematic and consistent form. Therefore, systemization, clarification and reorganization are required with regard to the above.

5. Concluding Remarks

The main arguments, in pursuing a new Personal Information Protection system, were focused to seek an adequate law, which could ensure the protection of personal information. Those debates were related to philosophical discussions on the personal information law itself. It would be addressed by finding the Act set up the relationship between protection of personal information and the use of it, as well as legal issues concerning the proper forms and structure for the new law. Compared to the laws that have been discussed before, the Personal Information Protection Act in 2011 is considerably advanced act that minimizes the risks incurred from various types of infringements of personal information. It introduced

various devices and means to protect the self-determining right to personal information. It is the main function of the Act to secure the legitimate use of personal information. The 2011 Act proved that Korea has settled this issue successfully in some extent, which is of common interest to all countries in the current global information society. The Act meets the global standards set by the EU personal information protection laws. It means that Korea has an appropriate national legal framework to cope with these issues. Furthermore, it would be a significant development for Korea that the Act can be a pathway to communicate with other nations on these issues at the international level.

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