

FAQ on Draft Electronic Data Protection Act 2005

FAQ #1

Q: What is the aim of any Data Protection Law?

A: It seeks to strike a balance between the rights of individuals and competing interests of those with legitimate reasons for using personal information. The should allow for personal information to travel freely between Pakistan and the rest of the world, E.G the United States, member states of the European Union, etc. Data protection serves to protect us from our personal information being treated, used or applied in a harmful manner and in breach of the basic human right of privacy.

FAQ #2

Q: Does the act help me to do business with the U.S?

A: No. The law is very oppressive and overwhelming and as a result not making Pakistan a very attractive choice to bring in their business. This act will sharply increase costs of outsourcing in Pakistan and thus make this form of business unprofitable. Ensuring compliance with the data protection legislation will also result in increased administrative burden. The comments receive from the US Council for International Business state that “Such requirements serve no purpose and will only discourage companies from engaging in any processing activities in Pakistan.”

FAQ #3

Q. Does the act help me do business with the E.U?

A. No. Many problems arise if Pakistan wishes to enact this law and still transfer electronic data with the EU. The Electronic Data Processing Act 2005, introduces unique concepts, that if implemented would be present only in Pakistan. As stated by Robert Bond, Chairman of the ICC BCR Working Group, and a an expert and specialist in the UK Data Protection Act (worked on model contracts of EU Decisions/Directives on Data Protection) “Corporate data, for example is something which usually has not covered in legislation in other countries.” Not only will this ward off potential companies willing to do business in Pakistan but it will also create substantial problems for companies with already established businesses in Pakistan.

FAQ #4

Q. Is legislation a requirement, if Pakistan is to engage in activities that require the transfer of electronic data with the EU?

A. No. Legislation is not a necessity. E.U law states that member nations can only transfer data to other nations that maintain “an adequate level of protection.”

What constitutes an adequate level of protection is not defined. Article 25 of the EU Data Protection Directive 95/46/EC (“the Directive”) states that it must be “assessed in light if the circumstances”. Many countries have their own data protection laws, but very few have listed by the EU as to having adequate data protection laws. Adequate levels of protection can simply be achieved through contractual agreements as being done by India.

FAQ #5

Q. What alternatives are available to legislation?

A. Article 26.2 of the Directive authorise a trans border data transfer where the “data controller adduces adequate safeguards ... from appropriate contractual clauses.” Transfer of information to and from the European Union had been enabled through the establishment of the Transborder Data Flow Agreement based on the approved European Commissions

Model Clauses. The International Chamber of Commerce (ICC) EBITT Commission has also proposed standard contractual clauses which have been approved by the European Commission and simply the application of such model contracts will enable Pakistani companies to freely work with the EU in terms of data transferring.

“On December 27, 2004, the European Commission recognized a set of standard contractual clauses proposed by seven leading business associations (including ICC)¹ as providing an “adequate level of data protection” under the EU Data Protection Directive 95/46/EC for transferring personal data outside the EU. The Commission’s approval means that the clauses are officially recognized as granting full protection under EU data protection law for personal data that is transferred from all Member States of the European Union.”- ICC FAQ on Alternative Standard Contractual Clauses for the Transfer of Personal Data from the EU to Third Countries.

Thus, simply entering into these model clauses would be sufficient.

Legislation is not required, especially since the approval to be given by the EU to the Pakistani legislation remains in doubt and possibly an unnecessary expenditure of the Pakistani tax payer’s money.

FAQ #6

Q. What sanctions does the Electronic Data Processing Act impose if an individual is in breach of contract?

A. The Electronic Data Processing Act imposes a string of harsh and intolerant punishments for those who have breached any section of the Act. Sections 19 and 21 state that fines of up to 3 million rupees and punishments of up to 5 years are what can be imposed if their has been a breach.

Most importantly it makes any corporation or individual in the company liable to the same criminal penalties if a person, “who has a leading position within the company” or “acting either individually or as part of an organ” shows “lack of required supervision”. This is a corporate onus the language of which is unprecedented.

FAQ #7

Q. Should there be differences between foreign and local data?

A. Electronic data covers both foreign and local data. Local data is personal and corporate data collected within Pakistan and is processed within or outside Pakistan. Foreign data is personal and corporate data corrected outside and is sent to Pakistan for processing only. In section 6 and 7, there is an established difference between local and foreign data. It seems that now all Telcos, ISPs, Banks, Major Corporations etc. would be bound by the law. It would be suggested that the government would adopt a similar set of processing principles to that in the UK act.

FAQ #8

Q. Whether it is clear when consent is required under the Electronic Data Protection Act 2005?

A. No. It is not clear when consent is required. The obligations imposed by the law apply to all electronic data not just personal data. For example any consent that may be required must cover both personal and non personal data. This suggests that any data collected from a data subject is owned by the data subject, regardless of whether it is personal or not.

FAQ #9

Q. Will outsourcing in Pakistan be economical after the enactment of the Electronic Data Protection Act 2005?

A. As mentioned before, the costs of outsourcing in Pakistan will increase if the EDPA 2005 is promulgated. Outsourcing businesses come to Pakistan because of relative cost advantage, but if those costs rise, Pakistan will no longer be attractive to US (even EU) businesses choosing to outsource.

In fact in order to avoid the application of this law businesses would simply stop outsourcing and put up their own centers which would increase their costs also.

FAQ #10

Q. The legislation has given the session courts autonomous power to appoint any person to report on complaints made by data controllers. What will result from this?

A. The problem that arises from this section is that the Judge will have the authority to appoint absolutely anybody he or she chooses as mentioned in Section 18(3). There is no system regulating this and as a result people chosen to report on the complaints may be incompetent or corrupt and create problems as a result for the complainants. There arise serious security concerns for any International client of Pakistani BPO companies to the extent that this could bar business to Pakistan.

FAQ #11

Q. What are the rules by which the BPO will have to abide?

A. The Act simply states that the Government will have the power to prescribe Rules by which the controller and processor of data will have to comply. Any breach of such rules will lead to criminal sanction. It is unconstitutional to create criminal offences through rules and in any case this causes great uncertainty in the BPO business. It is not clear what the scope of the Rules would be or what areas they can cover. As such this is an extremely Draconian Act and an Act that will simply enable the Government to make any regulation with regard to Electronic Data.

The greatest worry is the definition of processing. It does not limit itself to processing as a business relationship or provision of service but encompasses any activity such as simply receiving and storing emails. The Act is thus, unclear and open to much abuse.

FAQ #12

Q. Does the law raise any security concerns for BPO or their clients?

A. Yes. Sections 15 and 16 create a major vulnerability to the security of business. When the complaints are lodged, the session judge may direct anyone (there is no criteria) to investigate on his behalf and report back to the court. In addition to requiring information and documents from the data controller, data processor, data operator, data subject or any third person, access to data filing systems may also be required by this 'anyone'. Comments received by US Council for International Business on the Act state that, "Requiring access to data systems by unauthorized data personnel would pose significant security risk."

FAQ #13

Q. Under the EDPA 2005, section 14 Disclosure or Dissemination of personal or cooperate data is permitted. Could this lead to manipulation of data?

A. The section allows for the disclosure or dissemination of data in case Government Rules allow such dissemination and disclosure. This means that irrespective of any Non-Disclosure Agreement it would be legal for outsourcers to disclose such data if the Rules allow it. Since Government Rules and Regulations are easily changeable it is doubtful that any US Outsourcer would feel comfortable with such a situation. This may lead to Government sanctioned breaches of confidentiality agreements and cause trust from companies in general to be lost. People would feel insecure and hesitant about providing personal information.

FAQ #14

Q. Whether the enactment is over expansive then other legislations?

A. The Electronic Data Processing Act is extremely broad in the sense that it applies to all electronic data processed in Pakistan, which include both personal and non personal data (corporate data). Therefore it would include corporate data that does not contain any personal information. This is not present in legislations in other countries and hence the law is over-expansive.

FAQ #15

Q. Are the exemptions stipulated in the in S.14 detailed or not?

A. The exemptions stipulated under the act are fewer and less detailed than those in the UK for example in areas such as health, education, social work and regulatory activity are omitted as is journalism, literature, art, research, history and statistics. Hence, the very propose of a Data Protection Law has been missed.

FAQ #16

Q. Can the Legislation be improved or should it be abandoned?

A. The act has many loopholes and has much room for improvement. The language is often unclear and ambiguous, the definitions not precise, and some sections seem overly harsh. Section 2J defines electronic data which means any information that is being processed by means of any information system, is recorded with the intention that it should be processed by such information system. Section 2Q states that any operation or set of operation, whether or not preformed by this operation. These sections contradict each other and as a result create a highly confusing law. The definition of processing is so all encompassing that it misses the very specific purpose for which this draft was initiated. However, rather than amend it, it would be recommended that very existence of this act be questioned. The purpose of the law can probably be achieved by creating and subscribing to available model laws accepted by other countries such as the EU. This will be more cost efficient, give business more flexibility and allow Pakistani business to be more accepted internationally as opposed to a legislation that may not satisfy all and need formal recognition by the EU (which is doubtful it will get) and increase the cost of doing business not to mention powers given to authorities that are wide-open to abuse and criminal penalties that arise simply by not supervising well. All that it is seeks to cover can be covered with equal if not greater ability through contracts specifically made to protect data.

There is no need to reinvent the wheel which is of a different shape – ie. square!

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