
DATA PROTECTION AND PRIVACY IN INDIA

Insider threat to data security

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Background

The Data Protection regime in India is not provided under a specific legislation, rather finds place under the Information Technology Act, 2000 (IT Act).

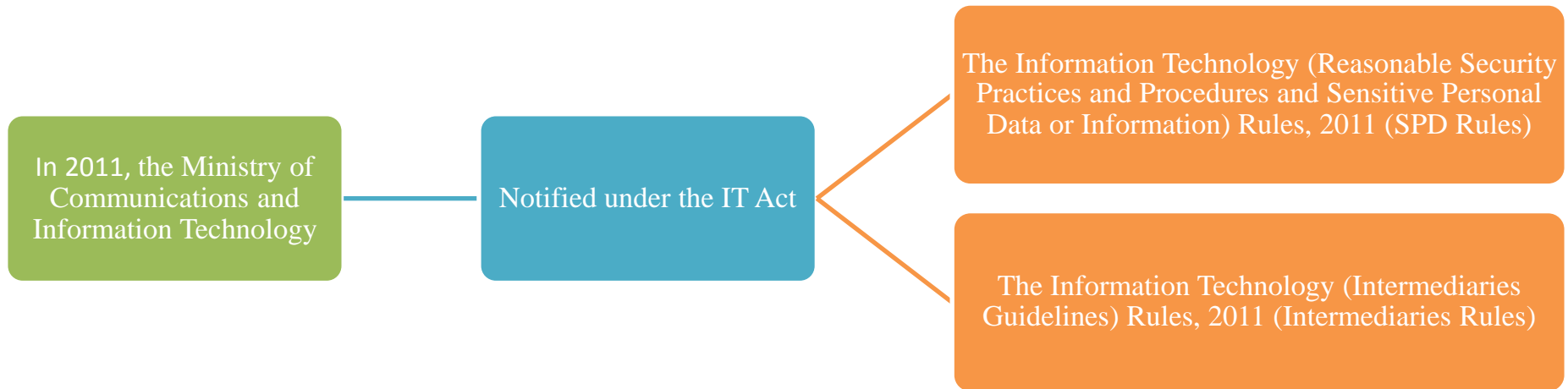
Under the Indian legal regime, the right to privacy has been sourced from the Constitution of India through Articles 19(1) i.e. Freedom of Speech & Expression and Article 21 i.e. Right to Life & Liberty.

The extensive use of the internet results in the exorbitant rise in data transfer, which brews concerns regarding 'Data Privacy' & 'Data Protection', in the absence of a specific legislation.

The disputes relating to Data Protection have been decided on the provisions of IT Act, Indian Contract Act, 1872 and rules framed there under.

The Regime

Number of bills introduced for data protection in India such as *The Personal Data Protection Bill, 2006* introduced in the Parliament in December 2006. Many consultations initiated, but nothing materialized.



The Rules

The SPD Rules

- Lays down the data protection regime for India.
- Defines “Sensitive Personal Data”.
- Prescribes the “Reasonable Security Practices” required to be followed by body corporates / entities handling SPD.
- Describes the conditions of procuring, usage, disclosure and transfer of SPD in India and outside India.
- Provides that entities to provide for policy on privacy and disclosure of information collected in the course of business

The Intermediaries Rules

- Defines “Intermediaries” handling data belonging to others.
- Prescribes the Due Diligence standards to be complied with by Intermediaries.
- Limits and restricts the transfer of data by Intermediaries.

Sensitive Personal Data – SPD Rules

Personal Information is any information relating to a natural person, which is capable of identifying such person, either directly or indirectly or in combination with other information available or likely to be available

Sensitive Personal Data or Information includes personal information of a person, consisting of:

- ❖ password;
- ❖ financial information such as Bank account or credit card or debit card or other payment instrument details ;
- ❖ physical, physiological and mental health condition;
- ❖ sexual orientation;
- ❖ medical records and history;
- ❖ Biometric information;
- ❖ any detail relating to the above clauses as provided to body corporate for providing service; and
- ❖ any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract.

Collection of Information

The Body Corporate / Entity:-

- that collects, receives, possess, stores, deals or handles information, shall provide a ***Privacy Policy*** for dealing in Personal Information (incl. SPD). Privacy Policy to be made available for view to persons providing such information under lawful contract.
- shall obtain prior written consent from the SPD provider regarding purpose of usage.
- shall not collect the same unless for a lawful purpose connected with one of its function or activity.
- while collecting information directly from the person concerned, is to ensure that the person concerned has knowledge of-
 - ✓ the fact that information is being collected,
 - ✓ the purpose for which the information is being collected,
 - ✓ the intended recipients of the information,
 - ✓ the name and address of the agency that is collecting the information,
 - ✓ and the agency that will retain the information.

Disclosure and Transfer of Information

Disclosure of SPD by the body corporate to any 3rd party:

shall require prior permission from the person who provided such information under lawful contract or otherwise, unless –

- disclosure been agreed to in the contract between body corporate and provider information, or
- disclosure is necessary for compliance of a legal obligation.

Transfer of SPD:

The body corporate may transfer the SPD to –

- any other body corporate, or
- a person
 - in India, or
 - located in any other country,

that ensures the same level of data protection as is adhered to by the body corporate under the SPD Rules.

Transfer be allowed only if –

- necessary for performance of a lawful contract between the body corporate and provider of SPD, or
- where such SPD provider has consented to the data transfer.

Reasonable Security Practices and Procedures

Body corporate shall be considered to have complied with the SPD Rules in implementing **Reasonable Security Practices and Procedures** if:-

- implemented such security practices and standards; and
- have a comprehensive documented information security programme and information security policies.

The International Standards i.e. IS / ISO / IEC 27001 are one such standard, which could be implemented by a body corporate for compliance of the SPD Rules.

In case following standards other than IS / ISO / IEC 27001 for data protection, the body corporate needs to get the codes approved by the Central Government.

Penalty for violation of SPD Rules

The IT Act provides for penalty in case of violation of the SPD Rules (Section 43A)

If a body corporate possessing, dealing or handling SPD is:

- negligent in implementing or maintaining Reasonable Security Practices or Procedures, and
- such negligence results in wrongful loss or wrongful gain to any person,

then such a body corporate would be liable to pay damages to the affected person.

Penalty for Breach of Confidentiality & Privacy

Section 72 of the IT Act provides for a penalty for breach of confidentiality and privacy.

If any person who has secured access to any electronic record, book, register, correspondence, information, document or other material (in pursuance of powers conferred under the IT Act, or rules or regulations made there under), *discloses* such data / record, without the consent of the concerned person to any other person

amounts to an offence under Section 72 and is punishable with imprisonment for a term which may extend up to 2 years, or with fine which may extend to INR 100,000, or with both.

The IT Act was amended in the year 2008 to include the provisions for a contractual breach of privacy and confidentiality under Section 72A.

Any disclosure of information to any 3rd party, intending to or knowing the likeliness of causing any wrongful loss or wrongful gain,

- without the consent of the person concerned, or
- in breach of a lawful contract

Constitutes an offence under the IT Act and is punishable with imprisonment for a term extending up to 3 years and fine of up to INR 5,00,000.

Interference by the Government with Data

Section 69 of the IT Act is an exception to the Right of Privacy envisaged under the fundamental rights endowed by the Constitution of India.

Empowers the Controller to direct any subscriber to extend facilities to decrypt, intercept and monitor information.

The permission is to be judged on account of:

- interest of sovereignty or integrity of India,
- security of the State,
- friendly relations with foreign States,
- public order
- preventing incitement to the commission of any cognizable offence relating to above
- investigation of any offence

If satisfied, the controller can direct any agency of the government to intercept any information transmitted through any computer resource. The reasons need to be recorded in written.

Interception and monitoring along with decryption for the purpose of investigation of activities of cyber-crime fall under the ambit of Section 69.

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