

## Data Protection and Network Security

### The Third Draft of the Compilation of Personal Rights in the Civil Code Has Strengthened the Provisions on Personal Information Protection

On August 23 2019, the 12th Session of the Standing Committee of the 13th National People's Congress reviewed the *Compilation of Personal Rights in the Civil Code* (Draft), and on August 27 2019 released the third draft of the *Compilation of Personal Rights in the Civil Code* (Draft) ("**Third Draft**"), in which personal information protection was highlighted<sup>1</sup>. Compared with the current *General Provisions of the Civil Law of the People's Republic of China* ("**General Provisions of the Civil Law**"), the Third Draft further establishes the civil protection system for personal information, defines the scope of personal information, details the requirements for personal information protection, and clarifies the relevant responsibilities and obligations.

#### 1. Civil protection system for personal information

Article 111 of the General Provisions of Civil Law clearly stipulates that the law protects personal information. The Third Draft, based on Article 111 of the General Provisions of Civil Law, further

regulates the protection of personal information and privacy rights. Article 811 of the Third Draft clarifies that "privacy refers to private spaces, private activities or private information that individuals are not willing to disclose to others". Article 813 stipulates that personal information refers to various types of information that can be used to identify a specific person.

#### 2. The scope of personal information

The scope of personal information is not clearly defined in the General Provisions of Civil Law. However, the definition of personal information is scattered throughout the *Provisions on the Protection of Personal Information of Telecommunications and Internet Users*, the *Measures on Punishment for the Infringement of Consumer Rights*, *Cybersecurity Law* ("**CSL**"), and other laws and regulations.

Article 813 of the Third Draft complies with the definition of personal information in the CSL, which stipulates that "personal information refers to various types of information which are recorded in electronic or any other form and used alone or in combination with other information to

<sup>1</sup><http://nx.people.com.cn/GB/n2/2019/0827/c192490-33292117.html>

recognize the identity of an individual, including name, date of birth, ID number, biological identification information, address, telephone number and e-mail address, as well as the tracking information of the individual". Compared with the Compilation of Personal Rights in the Civil Code (second draft) released on April 26 2019, the Third Draft expands the scope of personal information, adding an "e-mail address" and "tracking information" into the scope. During the process of the Third Draft's review, the committee members suggested to continue to expand the scope of personal information protection based on the practice, and appropriately broaden the definition and scope of personal sensitive information that may affect the personal security and personal property safety<sup>2</sup>.

### **3. Requirements for personal information protection**

Article 111 of the *General Provisions of the Civil Code* only requires in general that "any organization or individual who needs to obtain the personal information of others shall obtain and ensure the security of the information according to the law, and shall not illegally collect, use, process or transmit the personal information of others, and shall not illegally buy or sell, provide or disclose others' personal information." The specific requirements for personal information protection and the rights of the individual are provided in various laws and regulations such as the *Decision of the Standing Committee of the National People's Congress on Strengthening the Protection of Network Information*, the *Provision on the Protection of Personal Information of Telecommunications and Internet Users*, and the CSL.

The Third Draft has detailed the rules on the conditions of personal information collection and

the rights of individuals through Articles 814 to 815.

Article 814 of the Third Draft stipulates there are four conditions for personal information collection and processes, which includes the need to obtain the consent of the person or their guardian, disclose the rules on the personal information collection and processing to the public, clearly indicate the purpose, method and scope of the collection and processing, in compliance with the laws and regulations, and in compliance with the agreement reached by the two parties.

Article 815 of the Third Draft clearly stipulates that individuals have the right to inspect, transcribe and copy their personal information; if the information is incorrect, they can make corrections; if the data controller's personal information collection and processing violates the laws, regulations or the agreements reached by the two parties, the individual has the right to request that the personal information controller delete his or her personal information in a timely manner.

### **4. Responsibilities and obligations of personal information protection**

Article 816 of the Third Draft clearly stipulates three situations in which individuals are not subject to civil liability in the collection and processing of personal information:

- (a) within the scope of consent from the individual or their guardian;
  - (b) the information has been disclosed voluntarily or has been legally disclosed to the public, except in the instance that the individual has explicitly refused such processing or the processing would infringe their interests;
  - (c) other acts performed in a reasonable manner in order to protect the public interest or the legitimate rights and interests of the individual.
- In the first situation, during the process of review, some members pointed out that the current scopes of personal information collected by

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<sup>2</sup><http://www.npc.gov.cn/npc/c30834/201908/05268bfc1b634ef6bcd2d0d6d9d5e84f.shtml>

many mobile apps are too broad and unnecessary. Although the consent from individuals or their guardians have been obtained in “a packaged way”, their rights have been seriously violated and this is against the comprehensive protection of their personal information. Therefore, it is proposed to amend the first situation to “acts performed within the scope of consent agreed to by individuals or their guardians, and such acts shall be in accordance with the functions of the software or the carrier that collects and processes personal information and shall be limited to the purpose of achieving this service”<sup>3</sup>.

Article 817 of the Third Draft clarifies that information collectors and controllers shall not disclose or tamper with personal information, and may not illegally provide personal information to others without the consent of the subjects. State departments and their staff shall not disclose or illegally provide an individual’s private and personal information to others. During the review process, some members pointed out that the Third Draft only stipulated the obligations of the personal information collectors, personal information controllers and state departments and their staff, but did not clearly stipulate the relevant legal liability. Therefore, for the purpose of strengthening the personal information protection, it is recommended to add the liability of personal information collectors and controllers for disclosing, tampering with, illegally providing personal information and the liability provisions for state departments and their staff for disclosing or illegally providing an individual’s private and personal information<sup>4</sup>.

## 5. Our observations

Prior to the *Compilation of Personal Rights in the Civil Code* (Draft), under the civil law system,

provisions relevant to personal information protection were mainly provided in Article 111 of the *General Provisions of Civil Law* and the relevant provisions of the *Law of the People's Republic of China on Tort Liability*. However, in practice, due to various factors such as the difficulty in producing evidence, the degree of personal information protection through civil litigation is very limited. The *Compilation of Personal Rights in the Civil Code* (Draft) has, under the civil law system, defined the scope of personal information, clarified the requirements for personal information protection, and stipulated the responsibility and obligation of personal information protection. However, it remains to be seen by us whether it will be an effective means of personal information protection and grant further possibilities on personal information protection for individuals in the future.

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<sup>3</sup><http://www.npc.gov.cn/npc/c30834/201908/4d538aecd038454282efcd77ec362e03.shtml>

<sup>4</sup><http://nx.people.com.cn/GB/n2/2019/0827/c192490-33292117.html>

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## 信息保护和网络安全法律热点问题

### 《民法典人格权编》三审稿加强个人信息保护条款

2019年8月23日，第十三届全国人大常委会第十二次会议对《民法典人格权编（草案）》进行审议，并于8月27日发布《民法典人格权编（草案）》第三次审议稿（以下简称“**草案三审稿**”），其中个人信息保护是《民法典人格权编（草案）》的一大亮点<sup>1</sup>。相较于现行的《中华人民共和国民法总则》（以下简称“**《民法总则》**”），草案三审稿进一步确立了个人信息的民事保护体系，定义了个人信息的范围，细化了个人信息保护要求，明确了个人信息保护的责任与义务。

#### 个人信息的民事保护体系

《民法总则》第111条明确规定个人信息受法律保护。草案三审稿在《民法总则》第111条基础之上，对于个人信息保护与隐私权保护分别作出进一步规范。草案三审稿第811条明确“隐私是自然人不愿为他人知晓的私密空间、私密活动和私密信息等”，第813条规定个人信息是能够识别特定自然人的各种信息。

#### 个人信息的范围

《民法总则》中并未对个人信息的范围予以明确，个人信息的定义散落在《电信和互联网用户个人信息保护规定》、《侵害消费者权益行为处罚办法》、《中华人民共和国网络安全法》（以下简称“**《网络安全法》**”）等法律法规之中。

草案三审稿第813条沿袭了《网络安全法》之

中对个人信息的定义，规定“个人信息是以电子或者其他方式记录的能够单独或者与其他信息结合识别特定自然人的各种信息，包括自然人的姓名、出生日期、身份证件号码、生物识别信息、住址、电话号码、电子邮箱地址、行踪信息等”。相较于2019年4月26日公布的《民法典人格权编（草案）》二次审议稿，草案三审稿扩大了个人信息的范围，增加了“电子邮箱地址、行踪信息”。在草案三审稿的审议过程中，委员们建议根据实践情况，继续扩大个人信息的保护范围，对可能影响人身财产安全的个人隐私敏感信息的内涵和范围适度扩大<sup>2</sup>。

#### 个人信息保护要求

《民法总则》第111条仅概要性地要求“任何组织和个人需要获取他人个人信息的，应当依法取得并确保信息安全，不得非法收集、使用、加工、传输他人个人信息，不得非法买卖、提供或者公开他人个人信息”。个人信息保护的具体要求及个人信息主体的权利是通过《全国人民代表大会常务委员会关于加强网络信息保护的決定》、《电信和互联网用户个人信息保护规定》、《网络安全法》等法律法规进行规定。

而草案三审稿通过第814条至815条从收集使用个人信息的条件、自然人享有的权利进行了详细规范。

草案三审稿第814条规定了收集、处理个人信息的四个条件，即征得自然人或监护人同意，公开

<sup>1</sup><http://nx.people.com.cn/GB/n2/2019/0827/c192490-33292117.html>

<sup>2</sup><http://www.npc.gov.cn/npc/c30834/201908/05268bfc1b634ef6bcd2d0d6d9>

收集处理信息的规则，明示收集处理目的、方式和范围，符合法律法规规定和双方约定。

草案三审稿第815条明确，自然人有权查阅、抄录、复制其个人信息；信息有误的，可以进行更正；信息控制者违反法律法规规定或双方约定收集、处理个人信息的，自然人有权要求信息控制者及时删除其个人信息。

### 个人信息保护的责任与义务

草案三审稿第816条首次明确规定了行为人收集、处理自然人个人信息不承担民事责任的三种情形：

- (1) 在自然人或者其监护人同意范围内；
- (2) 信息已自行公开或者已合法公开，但是该自然人明确拒绝或者处理该信息侵害其重大利益的除外；
- (3) 为了维护公共利益或者该自然人合法权益，合理实施的其他行为。

对于第一种情形，在审议过程中，部分委员指出，目前很多App收集的个人信息范围过大且无必要，虽经过该自然人或监护人“一揽子”同意，但实际上严重违背了其意愿，不利于对其个人信息的全面保护。因此，建议修改为“在该自然人或者其监护人同意的范围内实施的行为，并且符合收集、处理个人信息的软件或载体的功能，以实现服务目的为限”<sup>3</sup>。

草案三审稿第817条明确了信息收集者、控制

者不得泄露、篡改个人信息，未经被收集者同意，不得向他人非法提供个人信息。国家机关及其工作人员不得泄露或者向他人非法提供自然人隐私和个人信息。在审议过程中，部分委员指出，草案三审稿仅规定了信息收集者、控制者和国家机关及其工作人员负有的义务，但是未明确规定相关法律责任。因此，建议增加关于信息收集者、控制者泄露、篡改、非法提供个人信息以及国家机关及其工作人员泄露或者向他人非法提供自然人隐私和个人信息的责任条款，以加强个人信息保护的力度<sup>4</sup>。

### 展望

在《民法典人格权编（草案）》之前，民法体系下，对于个人信息主要通过《民法总则》第111条、结合《中华人民共和国侵权责任法》中的相关条文进行保护，但司法实践中因举证困难等因素，民事诉讼对于个人信息保护的程序较为有限。《民法典人格权编（草案）》在民法体系下定义了个人信息的范围，明确了个人信息保护的要求，规定了个人信息保护的责任与义务，但其未来是否能够成为保护个人信息的有效手段、赋予权利人个人信息保护更多的救济可能，将是我们持续关注的问题。

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<sup>3</sup><http://www.npc.gov.cn/npc/c30834/201908/4d538aecd038454282efcd77ec362e03.shtml>

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