

The Digital Personal Data Protection Act 2023

A Crucial aspect in the Digital Era



A. INTRODUCTION: In today's digital era, information is going online at a faster pace and the incidents of such information being misused are also increasing at the same pace, making the processing of the data an important concern. In order to provide a manner as to how the data should be processed, *The Digital Personal Data Protection Bill, 2023* was introduced in the Parliament, which was passed by both houses of Parliament and received the assent of the President on 11th August 2023, and became *The Digital Personal Data Protection Act, 2023 ('the Act')*. ***The Act shall be effective from 11th August 2023***

B. PURPOSE OF THE ACT: To provide for the "Processing" of "Digital Personal Data" in a manner that recognizes two crucial aspects, Firstly the right of individuals to protect their "Personal Data" and secondly, the need to process it for the "Lawful Purposes."

C. STRUCTURE OF THE ACT: The Act is divided into IX chapters and 44 sections. A Schedule is also part of the Act which provides for the monetary penalty in case of breach of the provisions of the Act or Rules made thereunder. However, the Rule is yet to be notified.

D. KEY TERMINOLOGIES UNDER THE ACT:

"Data" means a representation of information, facts, concepts, opinions, or instructions in a manner suitable for communication, interpretation or processing by human beings or automated means.

"Data Fiduciary" means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.

"Data Principal" means the individual to whom such personal data relates and where such individual is

(i) a child, include the parents or lawful guardian of such child.

(ii) a person with a disability includes her lawful guardian, acting on her behalf

"Data Processor" means any person who processes personal data on behalf of a Data Fiduciary.

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“Digital Personal Data” means personal data in digital form.

“Person” includes

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not;
- (vi) the State; and
- (vii) every artificial juristic person, not falling within any of the preceding sub-clauses

“Personal Data” means any data about an Individual who is identifiable by or in relation to such data.

“Personal Data Breach” means any unauthorized processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction, or loss of access to personal data, that compromises the confidentiality, integrity, or availability of personal data.

“Significant Data Fiduciary” means any Data Fiduciary or class of Data Fiduciaries as Significant Data Fiduciary as may be notified by the Central Government under Section 10 of the Act

E. APPLICABILITY OF THE ACT: *The Act shall apply to the processing of digital personal data:*

- a. Within the territory of India: where data is **collected either in digital form** or in non-digital form and it is **digitized subsequently***
- b. Outside the territory of India: if such processing is in connection with *any activity* related to the offering of goods or services to Data Principals **within the territory of India.***

F. NON- APPLICABILITY OF THE ACT: The Act shall not be applicable to:

- a. Personal data processed by an individual for any **personal or domestic purpose**; and
- b. Personal data that is made or caused to be made **publicly available** by—
 - (i) the Data Principal to whom such personal data relates; or
 - (ii) any other person who is under an obligation under any law for the time being in force in India to make such personal data publicly available.

G. OBLIGATIONS OF DATA FIDUCIARY

1. Data Fiduciary may process the personal data of the Data Principal **for lawful purposes**, after getting her **consent** or for certain **legitimate uses**. *The Onus is on Data Fiduciary to prove that the Notice was given to the Data Principal.*

The Act provides a list of Certain legitimate uses, as given below.

- a. for the specific purpose;
 - b. by the State for providing any subsidy or benefit from the State;
 - c. by the State for performing any function under the law or in the interest of sovereignty and integrity of India or security of the State;
 - d. for fulfilling any obligation under any law on any person to disclose to the State;
 - e. for compliance with any judgment or decree or order issued under any law;
 - f. for responding to a medical emergency involving a threat to the life or immediate threat to the health of the Data Principal or any other individual;
 - g. for taking measures to provide medical treatment or health services to any individual during an epidemic, outbreak of disease, or any other threat to public health;
 - h. for taking measures to ensure the safety of, or provide assistance or services to, any individual during any disaster, or any breakdown of public order.
 - i. for the purposes of employment or those related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property etc.
2. Data Fiduciary **to make a request** to the Data Principal for her consent for processing her Data and such consent to be accompanied or preceded by a Notice informing her about her Personal Data and the purpose for which the same is proposed to be processed, the manner in which she can exercise her rights & the manner in which she can make a complaint to the “Data Protection Board.”
3. Data Fiduciary **to give Notice** to the Data Principal for the use of Personal Data **before the date of commencement of this Act**. Such Notice is to be given as soon as it is reasonably practicable informing her of the personal data and the purpose for which the same has been processed, the manner in which she may exercise her rights & the manner in which she can make a complaint to the “Data Protection Board.”

H. GENERAL OBLIGATIONS OF DATA FIDUCIARY

1. A Data Fiduciary shall be responsible for complying with the provisions of this Act and the Rules made thereunder, **with respect to the processing of data** by it or by the Data Processor, *irrespective of any agreement to the contrary or failure of a Data Principal to carry out the duties provided under this Act.*
2. A Data Fiduciary may engage, appoint, use, or otherwise involve **a Data Processor** to process personal data on its behalf for any activity related to offering of goods or services to Data Principals only under a **valid contract**.

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3. Where personal data processed by a Data Fiduciary is likely to be— (a) used to make a decision that affects the Data Principal; or (b) disclosed to another Data Fiduciary, the Data Fiduciary processing such personal data shall ensure its **completeness, accuracy, and consistency**.
4. A Data Fiduciary shall implement appropriate technical and organizational measures to ensure **effective observance of the provisions** of this Act and the Rules made thereunder.
5. A Data Fiduciary shall protect personal data in its possession or under its control, including in respect of any processing undertaken by it or on its behalf by a Data Processor, by taking **reasonable security safeguards** to prevent personal data breach.
6. In the event of a personal data breach, the Data Fiduciary shall give the Board and each affected Data Principal, **intimation of such breach** in such form and manner as may be prescribed.
7. A Data Fiduciary shall, unless retention is necessary for compliance with any law for the time being in force, — (a) **erase personal data**, upon the Data Principal withdrawing her consent or as soon as it is reasonable to assume that the specified purpose is no longer being served, whichever is earlier; and (b) **cause its Data Processor to erase any personal** data that was made available by the Data Fiduciary for processing to such Data Processor
8. A Data Fiduciary shall **publish the business contact information of the Data Protection Officer** or a person who is able to answer on his behalf the question raised by the Data Principal about the processing of her personal data.
9. A Data Fiduciary shall establish an effective mechanism to **redress the grievances** of Data Principals.

I. PROCESSING OF PERSONAL DATA OF CHILDREN OR PERSONS WITH DISABILITY.

1. The Data Fiduciary shall, before processing any personal data of a child or a person with a disability who has a lawful guardian **obtain verifiable consent** of the **parent** of such child or the **lawful guardian**.
2. A Data Fiduciary shall **not undertake such processing** of personal data that is likely to cause **any detrimental effect on the well-being of a child**.
3. A Data Fiduciary shall **not undertake tracking or behavioral monitoring of children or targeted advertising** directed at children.
4. The Central Government may notify under the Rule certain non-applicability and exemption of obligations of Data Fiduciary for the processing of Data of a Child or a person with a disability.

J. RIGHTS AND DUTIES OF DATA PRINCIPAL.

Rights of Data Principal

1. Right to access information about personal data for which consent has been given by her, such as a summary of personal data that is being processed, the processing activities undertaken, identities of all other Data Fiduciaries and Data Processors with whom the personal data has been shared, with a description of data so shared.
2. Right to correction, completion, updating, and erasure of personal data.
3. Right of grievance redressal provided by a Data Fiduciary or Consent Manager in respect of any act or omission of such Data Fiduciary or Consent Manager regarding the performance of its obligations.
4. Right to nominate any other individual to exercise the rights as Data Principal in case of death or incapacity of the Data Principal.

Duties of Data Principal.

1. To Comply with the provisions of all applicable laws while exercising rights under the provisions of this Act;
2. To ensure not to impersonate another person while providing personal data for a specified purpose;
3. To ensure not to suppress any material information while providing personal data for any document, unique identifier, proof of identity or proof of address issued by the State or any of its instrumentalities;
4. To ensure not to register a false or frivolous grievance or complaint with a Data Fiduciary or the Board; and
5. To furnish only such information that is verifiably authentic, while exercising the right to correction or erasure of data.

K. EXEMPTIONS FROM THE ACT- Data Fiduciary and Data Principal are exempted from this Act in the following instances:

1. The processing of personal data is necessary for enforcing any legal right or claim;
2. The processing of personal data by any Court or Tribunal or any other body in India for the performance of any judicial or quasi-judicial function.
3. Personal Data is processed in the interest of prevention, detection, investigation or prosecution of any offense or contravention of any law.
4. Personal Data of Data Principals not within the territory of India is processed pursuant to any contract entered with any person outside the territory of India by any person based in India;
5. The processing is necessary for a Scheme of Compromise or Arrangement or Merger or Amalgamation of two or more companies or Reconstruction by way or Demerger or otherwise of the company or Transfer of Undertaking of one or more companies to another company or involving the Division of one or more companies approved by the

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Court or Tribunal or other competent authority.

6. The processing is for the purpose of ascertaining the financial information and assets and liabilities of any person who has defaulted in payment due on account of a loan or advance taken from a financial institution.

The provisions of this Act shall not apply in respect of the processing of Personal Data-

1. by the State as the Central Government may notify, in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence.
2. necessary for research, archiving or statistical purposes.
3. The Central Government may, having regard to the volume and nature of personal data processed, notify certain Data Fiduciaries or classes of Data Fiduciaries, including Startups, as Data Fiduciaries to whom the provisions shall not apply.
4. The Central Government may, before the expiry of five years from the date of commencement of this Act, declare that any provision of this Act shall not apply to such Data Fiduciary or classes of Data Fiduciaries for such period.

L. ENFORCEMENT OF THE ACT: The Central Government may by notification establish a Board, which will be called as "Data Protection Board." The Board shall inquire about personal data breaches, conduct inquiries, and impose penalties. It shall also have the power to issue, modify, or cancel any directions. It shall function as a digital office and adopt techno-legal measures to resolve the complaints received for data breaches. It shall have powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of certain matters.

There will be an "Appellate Tribunal" where any person aggrieved by the order or direction made by the Data Protection Board may prefer an appeal. Such Appellate Tribunal is named as Telecom Disputes Settlement and Appellate Tribunal, established under section 14 of the Telecom Regulatory Authority of India Act, 1997. Any Order passed by such Appellate Tribunal shall be executable as a decree of civil court and the Appellate Tribunal shall have all powers of a civil court.

M. APPEAL PROVISIONS UNDER THE ACT: Any person aggrieved by an order or direction made by the Data Protection Board may prefer an Appeal before the Appellate Tribunal within 60 days from the date of receipt of the order or direction. The Appellate Tribunal may, for sufficient cause, entertain an appeal after the expiry of the said period. The appeal shall be finally disposed of by the appellate tribunal within 6 months from the date when it was presented.

N. ALTERNATE DISPUTE RESOLUTION: If the Data Protection Board is of the opinion that any complaint may be resolved by Mediation, it may direct the parties concerned to attempt resolution of the dispute through such Mediation by such Mediator as the parties may mutually agree upon, or as provided for under any law for the time being in force in India.

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O. PENALTIES AND ADJUDICATION The Data Protection Board is empowered to impose a monetary penalty on the conclusion of inquiry if it determines that there was a breach of the provisions of this Act and such breach was significant. While determining the amount of monetary penalty, the Board shall have regard to the following matters:

1. The *nature, gravity, and duration* of the breach;
2. The *type and nature of the personal data* affected by the breach;
3. *Repetitive nature* of the breach;
4. Whether the person, as a result of the breach, has realized *a gain or avoided any loss*;
5. Whether the person took *any action to mitigate the effects and consequences* of the breach, and the *timeliness and effectiveness* of such action;
6. Whether the *monetary penalty to be imposed is proportionate and effective*, having regard to the need to secure observance of and deter breach of the provisions of this Act; and
7. The *likely impact of the imposition* of the monetary penalty on the person.

(Note: The amount of maximum monetary penalties is provided in the schedule, as given in Annexure I)

The amounts realized by way of penalties are credited to Consolidated Fund of India.

Annexure I THE SCHEDULE

<u>Sr. No</u>	<u>Breach of the provisions of the act or rules</u>	<u>Penalty</u>
1	Breach in observing the obligation of data fiduciary to take reasonable security safeguards to prevent personal data breach	May extend to two hundred and fifty crore rupees.
2	Breach in observing the obligation to give the board or affected data principal notice of a personal data breach	May extend to two hundred crore rupees
3	Breach in observance of additional obligations in relation to children under section 9	May extend to two hundred crore rupees.
4	Breach in observance of additional obligations of significant data fiduciary under section 10	May extend to one hundred and fifty crore rupees.
5	Breach in observance of the duties under section 15	May extend to ten thousand rupees.
6	Breach of any term of voluntary undertaking accepted by the board under section 32	Up to the extent applicable for the breach in respect of which the proceedings under section 28 were instituted
7	Breach of any other provision of this act or the rules made thereunder.	May extend to fifty crore rupees

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