

Realistic Dilemma and Improvement of Sensitive Personal Information Processing Rules

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Abstract. The Personal Information Protection Law has a special chapter to stipulate the special pro-cessing rules of sensitive personal information, which reflects the value orientation of strengthening the protection of sensitive personal information. However, due to the mode of permitting the processing of sensitive personal information in principle and restricting pro-cessing with exceptions, the protection of sensitive personal information is greatly weakened in fact. Through the comprehensive analysis of our country's specific specifications of pro-cessing mode of principled prohibition and exception prohibition and combined with compara-tive law experience, the processing of sensitive personal information should adopt the legis-lative mode of principled prohibition and exception permission, and further limit the processing of exceptional allowed circumstances.

Keywords: Sensitive Personal Information; Personal Information Protection Law; Legislative Mode.

1. The Presentation of Problems

The 30th session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China passed The Personal Information Protection Law of the People's Republic of China on August 20, 2021. The law adopts the concept of "sensitive personal information" for the first time, and classifies personal information into general personal information and sensitive personal information according to the difference in sensitivity. "Personal Information Protection Law" not only makes a clear definition of "sensitive personal information", but also establishes the mode of sensitive personal information processing license in principle and the special rules for processing sensitive personal information in our country. The problem caused by this is that it is urgent to think about whether the connotation and extension of sensitive personal information defined in the Personal Protection Law are exact and comprehensive. Are the types of sensitive personal information listed comprehensive? Does the "ambiguity" of personally sensitive information lead to limitations in its processing rules? And how to improve its special processing rules effectively?

The author believes that the definition and judgment scale of sensitive personal information is still not completely clear, there are still loopholes and disputes in the special processing rules, and the processing mode of the principle is not appropriate, which actually weakens the special protection of sensitive personal information. This paper starts with a concrete analysis of the realistic dilemma of the definition of sensitive personal information and special processing rule, combining the experience of comparative law to preliminarily discuss the improvement of the mode of principled prohibition and exception permission and special processing rules.

2. The Realistic Dilemma of Sensitive Personal Information Processing Rules

2.1 The Definition of Sensitive Personal Information Is Broad

The definition of sensitive personal information in Article 28 of the Personal Information Protection Law[1] adopts the form of conceptual summary and enumeration-supplement, which contains double standards that are easy to cause an infringement on the personal dignity of natural persons and harm to personal and property safety. Since the scope of personal information conforming to the two standards is broad, not only involving the scope of private information but also general personal information may meet the standards under certain circumstances, the legislation adopts the

enumeration method to supplement and limit the category of sensitive personal information. Although the legislation defines the connotation of sensitive personal information, its extension is uncertain. For example, specific identities and trajectories need to be combined with specific scenarios to determine whether they constitute sensitive personal information, rather than being generalized [2]. Although the Personal Information Protection Law defines the concept of sensitive personal information, the judgment standard of sensitive personal information only adopts legal standards (namely personal dignity, personal property safety and the protection of minors) and the "purpose consideration model"[3] is insufficient because information sensitivity is not natural. Any information can be sensitive in a specific context [4]. Especially in practice, the protection of sensitive personal information will be greatly adversely affected only by the statutory judgment standard of sensitive personal information. Therefore, we should not only evaluate the sensitive information by applying the legal standard but also adopt the "scenario theory" to evaluate whether it is sensitive information according to the specific processing situation [5].

A clear definition of sensitive personal information is a prerequisite for special protection. Although Article 28 of the Personal Information Protection Law defines sensitive personal information, its extension is uncertain. Therefore, some sensitive personal information is difficult to be summarized under the legal definition due to its own particularity, and therefore cannot be protected as it should be. Especially under the mode of permitting the processing of sensitive personal information in principle, the difficulty of distinguishing sensitive personal information in practical judgment will make it hard to protect sensitive personal information.

2.2 The Legislation Mode of Sensitive Personal Information Is Insufficient

2.2.1 The Deficiency of The Processing Mode of Permitting in Principle and Forbidding Exceptionally

Article 28 (2) of the Personal Information Protection Law[6] stipulates three conditions under which sensitive personal information can be processed: a specific purpose, sufficient necessity, and applying strict protection measures. According to the 28th to the 32nd article, the standard logic of the protection of sensitive personal information and general personal information has no substantial difference [7], which embodies that we have adopted a legislative model that permits by principle and prohibits by exception both for general personal information and sensitive personal information. Compared with general personal information processing rules, the legislation stipulates special processing rules for sensitive personal information, which are limited from the aspects of "specific purpose rule", "individual consent rule" and special requirements for processing information of minors, reflecting special protection for sensitive personal information. However, in general, there are many problems in this legislative mode. The processing mode of permitting in principle and forbidding exceptionally still follows the existing framework of "informed consent". Moreover, due to the unclear concept and large scale for interpretation of the rules of "specific purpose" and "individual consent", these formal provisions cannot truly realize the requirements of protecting the personal dignity and personal property safety of natural persons.

2.2.2 The Deficiency of Special Protection Rules

What constitutes a "specific purpose" is unclear

The Personal Information Protection Law stipulates that sensitive personal information should be processed following a specific purpose, but it does not explain the concept of "specific purpose". As an uncertain concept, it has a large space for semantic interpretation in the actual processing of sensitive personal information. Although Article 6 of the Personal Information Protection Law stipulates that personal information should be processed for a clear and reasonable purpose, it is clear that this limitation applies to general personal information as well as sensitive personal information processing. However, the "specific purpose" required for processing sensitive personal information is much higher than this standard, so the clear and reasonable "specific purpose" is still a general term, and the criteria for meeting the specific purpose for processing sensitive personal information is still

not clear. Moreover, sensitive personal information can be processed without a specific purpose, and it is necessary to consider whether the legal interest guaranteed by the purpose is higher than the legal interest of the natural person on the sensitive personal information [8]. The sufficient necessity of sensitive personal information processing is closely related to the specific purpose. The sufficient necessity is the necessity of realizing the specific purpose. The legislation stipulates that the processing of sensitive personal information requires sufficient necessity, which is the embodiment of strengthening the protection of sensitive personal information. However, in the case of "meeting the specific purpose" without a specific definition and typological analysis, the judgment of sufficient necessity is more difficult for both the natural person and the relevant personal information processing organization.

According to Article 28 Clause 2 of the Personal Information Protection Law, the government does not completely prohibit the processing of sensitive personal information, but restricts the processing of personal information through specific purposes and sufficient necessity, which is not only vulnerable to arbitrary interpretations of specific purposes and sufficient necessity, but may also lead to the gradual erosion of legal restrictions on the processing of sensitive personal information.

The Separate consent rule is difficult to achieve a particular purpose of protection

Article 29 of the Personal Information Protection Law[9] provides the rule of "sole consent" for the processing of sensitive personal information and the rule of "written consent" in statutory cases. "Sole consent" means that when dealing with sensitive personal information, the authorization mode of general consent or constructive consent is prohibited by law, while "written consent" is the specific form of consent required by laws and administrative regulations under specific circumstances. All these indicate the strict restrictions on the processing of sensitive personal information. Although individual consent, as one of the special protection rules of sensitive personal information, improves the requirements of the informed consent principle in the protection of personal information, this regulation only denies the package authorization of sensitive personal information and emphasizes the explicit notification obligation of the information processor, which is no essential difference from the "personal consent" required for the processing of general personal information. Because the consent of the information subject is only a formality in most cases, it is difficult for individuals to truly understand the risks of processing sensitive personal information and make judgments accordingly [10]. Moreover, individual consent is only for the processing of personal information that requires permission, so there is no difference between the processing of sensitive personal information and general personal information in the case that the notification consent is not applicable [11].

According to the current Personal Information Protection Law, the term "specific purpose" for processing sensitive personal information is too abstract and general. At the same time, sensitive personal information cannot be processed with a specific purpose because the legal interest level should be considered. However, in legislation, it is more difficult to determine the legal reasons for the specific purpose of processing sensitive personal information. On the one hand, if a specific purpose is defined by a general method, it requires coordination between all parties in terms of both the basic provisions and the defining standards, and this provision is more likely to lead to new problems. On the other hand, defining specific purposes by enumeration is prone to omissions. The specific purpose of the way of summary and enumeration put forward higher requirements for legislation, and the legal interests involved in the order of issues are more complex. However, the individual consent rule cannot play its function as the core system of sensitive personal information protection because it has not broken through the traditional informed consent mode and the information subject has insufficient cognition of the risk of sensitive personal information. Although some scholars have proposed to construct a scenario-based "informed consent principle", it not only needs to break through the traditional static mode of "informed consent", but also needs to establish a continuous information disclosure mechanism, which adds a lot of burdens to information processors. It can be seen that the current processing mode of sensitive personal information is faced with many problems, and the improvement of the existing mode is not enough to really solve the pain

points of sensitive personal information processing. Therefore, the author believes that we should break the shackles of the current processing mode of sensitive personal information, re-examine the choice of sensitive personal information processing mode and explore new processing patterns by comparative reference.

3. The path to improving rules for handling sensitive personal information

3.1 Adopt the legislative model of prohibiting by principle and permitting by exception

Different from the processing mode of sensitive personal information permitted by principle in China, some countries or regions adopt the processing mode prohibited by principle and permitted by exception for sensitive personal information. For example, article 8 of the Eu Data Protection Directive prohibits member states from handling sensitive personal information. Article 9 of the General Data Protection Regulation of the European Union (GDPR)[12] also states that the processing of special personal information shall be prohibited except in exceptional circumstances, such as in order to protect the vital interests of the data subject or to safeguard the vital public interest. Article 6 of Taiwan's Personal Data Protection Law stipulates that personal data relating to medical history, medical treatment, genes, sex life, health examination, and criminal record shall not be collected, processed, or used. Special cases that can be dealt with are also specified.[13] It can be seen that the EU and Taiwan adopt a comprehensive prohibition on the processing of sensitive personal information. The "processing" in the EU law and the "collection, processing, and utilization" in the Taiwan law both cover the whole process of sensitive personal information processing. Both also provide exceptions for handling sensitive personal information.

Australia's Privacy Protection Act states that, in principle, sensitive personal information cannot be collected unless it is authorized by law or a court, reasonably collected by law enforcement agencies for the purpose of carrying out a mission, or collected by a non-profit organization relating to its work. If biometric information is disclosed, it can only be disclosed for the specific purpose of collection and cannot be used or disclosed for direct marketing purposes. This mode of legislation does not completely prohibit all kinds of operations on sensitive personal information but selectively prohibits some behaviors that are more likely to infringe on the rights and interests of the parties concerned.

From the above extraterritorial legislation, it can be seen that sensitive personal information is prohibited in principle and allowed by exception in various countries, but the scope of the prohibition and legal effect are different [14]. The principle prohibition here includes both total prohibition and partial prohibition; Exceptions are mainly divided into two types: one is the party's permission, that is, the party's permission to process sensitive personal information; the other is the case that can be handled according to the law, such as "significant public interest"[15]. The legislation technology that "sensitive personal information is prohibited in principle" gives the sensitive information of natural persons double protection. On the one hand, if a type of information falls within the category of sensitive personal information listed in the legislation, no one can, in principle, process it. On the other hand, even if such information falls within the category of sensitive personal information that can be processed under exceptional circumstances, the subject of information processing is still required to strictly comply with the general provisions of personal information processing. This model focuses on strengthening the special protection of sensitive personal information, while selectively allowing the processing of sensitive personal information through exceptions, which can flexibly adapt to the needs of the practice. In contrast, the processing mode allowed by our principles is not only inferior to the "prohibited processing" mode in terms of protection intensity but also under the framework of "specific purpose" + "individual consent", the unclear legal norms have brought great inconvenience and contradictions to the practical application, which is obviously not in line with the original intention of strengthening the protection of sensitive personal information.

Strong protection measures of "prohibition in principle" on processing sensitive personal information in foreign legislation have reference significance for our country's legislation. First of all,

due to the particularity of sensitive personal information, the need for its protection is obviously higher than that of general personal information, because compared with general personal information, improper handling of sensitive personal information may bring huge and irreparable harm to personal rights and property rights of individuals. In addition, under the background of the era when personal information is widely used in various fields, the call for high-intensity protection of sensitive personal information is increasingly rising in reality, and the adoption of "principled prohibition" is a response to the strong protection of sensitive personal information. At the same time, it can be seen from the extra-territorial legislative practice that the mode of "prohibition by principle and permit by exception" in handling sensitive personal information will not become an institutional barrier to the use of sensitive personal information under special circumstances. On the contrary, the legal reasons for handling sensitive personal information can be further specified by utilizing an exceptional permit. It avoids ambiguity in the existing treatment mode of allowing the principle and prohibiting the exception, which is conducive to strengthening the protection of sensitive personal information.

3.2 Improvement of special protection rules

As can be seen from the value orientation of "enhancing the protection" of sensitive personal information in the Personal Information Protection Law which establishes a special chapter to stipulate the processing rules of sensitive personal information, the current legislation adopts a processing mode and a simple system design, however, which are not enough to achieve the legislative purpose of giving special protection to sensitive personal information. In the information society where the risk of personal information infringement is becoming more and more prominent, to truly realize the differential protection of sensitive personal information, it is necessary to break through the general framework of the personal information processing system, rather than make small changes under the existing framework.

By comprehensive analysis of the specific norms of sensitive personal information processing and combined with the experience of comparative law, the author believes that the processing mode of sensitive personal information needs to be improved in the current Protection Law of Personal Information, and the processing mode of sensitive personal information should be prohibited in principle unless the legislation mode is following the exception of the law. At the same time, on this basis, the form of summary + enumeration is adopted to stipulate the legal reasons for the exception of sensitive personal information. It should be noted that the generalization at this time should not be defined merely as conforming to a specific purpose or such generalized interpretation, but should embody specific criteria. At the same time, when enumerating the legal causes for handling sensitive personal information, we should base it on the realistic environment and cultural traditions. We must reflect the clear identification standards of legal causes, and be conducive to the determination of legal causes under the concrete processing scenes. If using "major public interest" as the basis for the causes, we need to apply the arbitrary interpretation of "public interest" by specific field restrictions. For special cases in which sensitive personal information can be processed, the individual consent rule can be adopted, but the existing individual consent rule should be improved. For example, the detailed notification obligation should be added under the framework of the individual consent rule in the Personal Information Protection Law, and dynamic informed consent should be constructed in combination with specific processing scenarios, that is, consent should be layered and phased according to changes in processing scenarios [7]. Only in this way can we effectively protect the rights and interests of personal information more fully.

4. Conclusion

Although the Personal Information Protection Law defines sensitive personal information, the definition of sensitive personal information adopts the standards of personal dignity, personal property safety, and protection of minors, which is more likely to cause controversy in reality. Moreover, because the definition of sensitive personal information is directly related to follow-up

processing, the ambiguity of the concept leads to the limitation of special processing rules for sensitive personal information to some extent. At the same time, the processing standard of sensitive personal information also has certain realistic difficulties. Under the processing mode of allowing the principle and prohibiting the exception, the drawbacks of the processing rules are further highlighted. Given this, it is necessary to change the mode of processing sensitive personal information, adopt the mode of prohibiting by principle and allowing by exception in combination with the experience of comparative law, and determine the legal reasons for processing sensitive personal information by enumeration under this legislative mode, and construct dynamic "informed consent" by introducing scene theory.

References

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appropriate safety maintenance measures before or after; (3) Personal data disclosed by the parties themselves or otherwise legally disclosed; (4) Public organs or academic research institutions are necessary for statistical or academic research for the purpose of medical treatment, hygiene or crime prevention, and the data cannot be processed by the provider or by the collector according to the disclosure method. (5) In order to assist public organs to perform statutory duties or non-public organs to perform statutory obligations within the necessary scope, and before or after the appropriate safety maintenance measures. (6) With the written consent of the parties. Except where such collection, processing or exploitation is beyond the limits necessary for a particular purpose or otherwise limited by law, and is not permitted by written consent of the party, or by consent contrary to its will."

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