



PRIVACY LAW WATCH



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Data Privacy

China lacks a national data privacy law, but in recent months legislative interest in the topic has surfaced at the national and local levels, along with litigation suggesting a willingness to protect private information. The authors note that an amendment to the national Criminal Law criminalizes the sale or other unlawful disclosure of personal data by government officials and employees in key industries. They say that companies operating in China in the financial, telecommunications, transportation, education or medical sectors would be well advised to review their internal systems for preventing unauthorized disclosure of customer data, and that all companies looking to acquire customer databases in China should take care to conduct thorough due diligence about the sources of such information.

Recent Data Privacy Developments in China

BY GORDON MILNER, PAUL MCKENZIE, FANG JINGXIAO AND DYLAN BUDD

The People's Republic of China ("PRC") still lacks a comprehensive legal framework to regulate the use and disclosure of personal data. While the introduction of a national, generally applicable data privacy

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law remains elusive, recent months have seen a resurgent, if piecemeal, legislative interest in the topic at both the national and local levels.

Notable recent developments include:

- The promulgation of an amendment to the national Criminal Law in February 2009 to criminalize the sale or other unlawful disclosure of personal data by government officials and employees in key industries;
- The introduction by several provinces and cities across of China during 2008 and 2009 of independent local legislative measures to address Internet privacy concerns;
- Further legislative progress of the draft Torts Liability Law, a long-debated measure with potentially important privacy implications; and
- Recent decisions of the PRC courts helping to clarify the circumstances in which civil liability

may arise under existing defamation rules when personal data is disclosed without authorization.

In this update we outline the substance and current status of each of these developments and consider their potential implications for businesses operating in China.

A. Legislative Activity at the National Level

Seventh Amendment to the Criminal Law

On Feb. 28, the Standing Committee of the National People's Congress ("NPC") promulgated the Seventh Amendment to the Criminal Law of the PRC. The Amendment, which also updates the Criminal Law in a variety of areas such as tax evasion and insider trading, makes it a criminal offense:

- (i) for employees of government institutions or private organizations in the financial, telecommunication, transportation, education or medical sectors to sell or otherwise unlawfully provide to third parties the personal data of any citizen which has been obtained in the course of performing duties or services by their employers; or
- (ii) for any person to obtain such information by means of theft or other unlawful means.

If the violation is "severe," individuals found guilty of either offence will be subject to imprisonment of up to three years and/or a monetary fine. The Amendment also specifically provides that organizations (such as corporate entities) that commit either offence shall be liable to a monetary fine and the responsible officers may be personally liable to criminal charges.

The Amendment is vaguely drafted. It does not define personal data, leaves unclear what types of disclosure will constitute "unlawful provision," whether and to what extent any authorization by the employer and/or consent by the data subject are relevant and what factors will be relevant in determining whether a violation is "severe." Major national level PRC laws are often broadly drafted and subsequent implementing regulations or interpretations of the Supreme People's Court may provide guidance on these questions in due course.

In the meantime, companies operating in the PRC in the financial, telecommunications, transportation, education or medical sectors would be well advised to review their internal systems for preventing unauthorized disclosure of customer data and all companies looking to acquire customer databases in China should take care to conduct thorough due diligence about the sources of such information.

Draft Tort Liability Law

A draft Tort Liability Law has been in the legislative process for some time. Sensitivities surrounding the law have delayed its progress since the first draft was initially submitted for review by the Standing Committee of the NPC in 2002. However, the process appears to have picked up momentum and the draft law was submitted for a second round of review and comments at the end of 2008. It is possible that the Tort Liability Law may be promulgated in the coming year, though no timetable has currently been set, and given the slow legislative progress to date, further delays should not be ruled out.

The draft Tort Liability Law contemplates a wide ranging reform and modernization of PRC tort law. In addition to extensive provisions governing areas such as product liability and environmental pollution that are

unrelated to data privacy, the draft law contains several novel provisions with potentially far-reaching data privacy implications.

There is no generalized right to prevent disclosure of personal data under existing PRC tort. Any such right arises only within the context of a defamation action—specifically a claim of infringement of an individual's "reputational right" under the 1986 General Principles of the Civil Law of the PRC ("General Principles") (as further clarified in a 1993 interpretation by the Supreme People's Court). Whilst recent decisions suggest an increasing willingness on the part of the PRC courts to give prominence to the protection of privacy (see section C below), such protection remains essentially limited by the need to establish reputational infringement.

In contrast, the draft Tort Liability Law appears to recognize an independent right of privacy. Unfortunately little further detail is provided in the draft law, and, if the law is passed in the present form, it will be necessary to wait for the Supreme People's Court to add flesh to these bare bones.

In addition to this potential elevation of the right of privacy, the draft Tort Liability Law provides that:

- a party whose right to privacy is infringed is entitled to claim from the tortfeasor the profits arising from the breach. In addition to the right to claim damages for "emotional harm" and actual loss which arises under the existing General Principles;
- a website operator who either acknowledges that a party's privacy or other rights are being infringed through content posted on its website or who is warned of such infringement by an affected party and fails to remove the content or adopt other corrective measures, is jointly and severally liable with the party having posted the content; and
- if an affected party requests registered information about the party having posted infringing content and the website operator refuses to divulge such information, the website operator itself becomes liable for the infringement.

Draft Personal Information Protection Measures

Following an initial study carried out in 2003, the PRC State Council commissioned a group of PRC legal scholars to prepare a draft national law which would focus exclusively upon the regulation of data privacy. The draft Personal Information Protection Measures ("Protection Measures") were published in 2005 and provided as follows:

- entities undertaking the commercial processing of personal data would require a permit from a new "personal data administrative authority" prior to collection of personal data;
- collection of personal data by non-government entities would generally require prior consent from the data subject; and
- the administrative authority would have the power to restrict the cross-border transmission of personal data to any jurisdiction which did not provide sufficient protection to such data.

The draft Protection Measures were merely a consultative document and have not been formally adopted by any part of the PRC government. Indeed, since the publication of the draft measures, attempts to introduce a national privacy law appear to have remained in limbo. Proposals for such a law have been submitted to the

NPC several times since 2005. However, none of these proposals have yet come to fruition and it seems likely that the introduction of any such national privacy law remains some way off.

B. Legislative Activity at the Local Level

Recent months have also seen moves to legislate on matters of personal privacy at a local level. Several provinces and cities (including Guangdong Province, Shanxi Province and Xuzhou city) have introduced laws to regulate the online disclosure of personal information.

By definition, local legislation is limited in territorial scope and it is therefore difficult to see how it might be sensibly applied to the Internet. Moreover, there is a risk that overeager local legislative activity may result in an inconsistent patchwork of laws across the country—though such a possibility might spur the central government to accelerate progress towards the adoption of a unified national law.

The legislation passed by the city of Xuzhou in Jiangsu province on Dec. 12, 2008 is fairly typical of local Internet privacy statutes. The *Municipal Provisions for Protection of Computer Information System Security* (the “Xuzhou Provisions”) are expected to come into force on June 1, 2009 and expressly prohibit any person from using any computer information system to:

- provide or publicize another person’s private information without consent;
- steal account numbers, codes or other information;
- intercept, alter or delete others’ e-mail or other data; or
- publicize or send information by false impersonation.

As with the national laws previously discussed, the Xuzhou Provisions are drafted at a very high level and no guidance is given as to the meaning of key concepts such as “private information.” The Xuzhou Provisions also:

- place several obligations upon website operators including to designate personnel to be responsible for verifying and reviewing information posted online; to restrict the dissemination of group messages and anonymous information; to delete links to unlawful information; and to maintain records for the purpose of collecting evidence; and
- provide for administrative sanctions against employees in certain government departments who release private information, materials or data relating to computer system operators or users.

In addition to issuing warnings and imposing monetary fines, in severe cases the local Public Security Bureau is also given the power to shut down a breaching party’s Internet connection for six months and to recommend that the relevant government authority revoke any relevant operating license held by that party in connection with its Internet business.

C. Recent Litigation

The PRC courts have recently demonstrated an increasing willingness to protect private information by broadly interpreting existing PRC law.

The leading case involved an action brought by a Chinese citizen against one individual and two local website operating companies under the General Principles

of the Civil Law. The wife of the claimant had committed suicide after discovering that the claimant was involved in an extramarital affair. The individual defendant established a website on which he described the extramarital affair and its effect on the deceased. The website’s contents included the name, address and employer of the claimant, personal pictures and other private information related to the claimant and his family. Visitors to the website copied the material to other websites, including those hosted by the two defendant companies. As a result of the publicity, the claimant and his family suffered harassment and his employment was terminated. The claimant claimed both an infringement of reputation due to inaccurate statements contained in the posted material and an infringement of the right to privacy as a result of the publication of private information.

The Beijing Chaoyang district court rendered judgment in favor of the claimant on Dec. 18, 2008. The judgment is notable for its detailed analysis and exposition of a “right to privacy” which appears to somewhat stretch the concepts contained in the General Principles of the Civil Law. The court took the view that a person’s “right to privacy” could be infringed by disclosure or publication of private information that the person does not want to disclose to others, concerning aspects of his private life, private areas or domestic tranquility and connected with his interests or his body.

The court identified five specific factors which it considered important in the determination of whether an infringement of the right to privacy has occurred: (i) the manner by which the private information is acquired, (ii) the manner by which the private information is disclosed, (iii) the scope of disclosure of the private information, (iv) the purpose of disclosure, and (v) the consequences of disclosure.

In addition to the exposition of the “right to privacy,” the court also held that the website operating companies:

- were required to demonstrate best efforts in the prevention of the disclosure of personal information over the Internet, such as implementing privacy policies and website policies to regulate the activities of users, and implementing a monitoring system; and
- assumed tortious liability for information posted and circulated on their websites where the information was not timely removed once it became known or acknowledged to be illegal or to infringe individuals’ legal rights.

Notwithstanding the focus of the judgment on the right to privacy, it may be somewhat premature to assume (as some observers have suggested) that the right to privacy now exists independent of the right to reputation under the General Principles. It is important to recognize that the infringement of the right to privacy claim was brought in conjunction with a successful infringement of reputation claim and that ultimately the reputational rights sections in the General Principles were still cited in the judgment as the statutory basis for the decision. Moreover, in any event, it is important to note that under the PRC’s civil law system, the judgment does not have any formal binding precedential effect.