



# Jackson, Etti & Edu

Data Protection Newsletter

A close-up, blue-tinted photograph of a metal padlock resting on a printed circuit board (PCB). The padlock is on the left, and the intricate traces of the circuit board are visible throughout the background.

## **LAGOS STATE INTRODUCES DATA PROTECTION BILL - SHOULD BUSINESSES WORRY?**

**Jackson, Etti & Edu | March 2022**

## INTRODUCTION

On the 25th of October 2021, the Lagos state Data Protection Bill (“LDPB” “Bill”) passed the second reading at the Lagos State House of Assembly. The long title of the Act, provides that the Bill is for a Law “to promote the protection of personal information processed by public and private bodies, establish minimum requirements for the processing and protection of personal information, establish the data protection commission and for connected purposes.” The aim of the Bill is to set out standards, rules, and salient overarching principles for the processing of personal data within the state. It is also expected that the Bill will attract additional revenue into Lagos state as it proposes a registration fee for data controllers and data processors that process data within the state.

The LDPB is inspired by the Nigeria Data Protection Regulation (NDPR) 2019, the country's main data protection instrument, which regulates all organisations handling personal data of Nigerians and persons residing in Nigeria. Additionally, the LDPB is the first Bill of its kind at the state level in Nigeria. It has the potential to alter how data is collected, stored, and managed by businesses in the country. This article will highlight several significant provisions of the Bill. We will discuss the Bill's relationship to the NDPR, as well as potential implementation challenges that may arise if the Bill is enacted in its current form.

### Notable Provisions of The Bill.

- 1. Scope of Application:** Section 2 of the LDPB provides that the Bill would apply to the processing of personal data by automated or non-automated means recorded by or on behalf of a data controller domiciled in Lagos. In addition to being physically domiciled in Lagos, a data controller is deemed to be domiciled in Lagos State where the controller ‘carries out’ data processing activities in Lagos state through its branch or office within the state. We note that the Bill contains no definition for the term 'carries out.' In light of previous court decisions interpreting the term "carries out," it is our submission that the data processing activity must be continuous within the State and not a one-time event.

Additionally, where the data controller is not domiciled in Lagos, the Bill provides that a data processing activity would still be caught within its scope of application if the data is collected via automated or non-automated means in Lagos state, unless those means are only used to forward personal data through the State. The relevant data controller is mandated to appoint a representative within the state. Whilst non-automated is not defined in the Bill, it is very likely that this refers to manually collected data. In which case, they come within the scope of the Bill where they form or intend to form part of a filing system.

**Implication:** One profound implication of this section is that Data Controllers domiciled in Lagos are accountable for data processing activities carried out both inside and outside Lagos State. They would therefore be bound by the provisions of the proposed law with respect to data collected and/or processed by them.

Further, Data Controllers not domiciled in Lagos, who continuously process data within Lagos through a branch, office or agency would be deemed domiciled in Lagos and as such, their data processing activities would also be caught within the scope of the proposed law.

The provision seems to neglect or play a blind eye to the principles of 'Data Localisation'. This is so because the arguments for data localisation insist that data about a nation's or state's citizen or resident should remain with that nation or state. Thus if a European or Anambrian data is automatically collected in Lagos, the argument would insist that only the country in EU or the State in Anambra, should have control over the rules and regulation of such data, and not Lagos.

- 2. The Commission:** The Bill provides for the establishment of the Lagos State Data Protection Commission which will be responsible for ensuring that personal data is collected, held, or processed in a manner that does not infringe on the privacy of a data subject. The Commission will maintain a register of all data controllers and data processors and ensure compliance with the provisions of the Bill.

The Commission would also have powers to investigate perceived infractions and towards this end, request the assistance of other enforcement agencies, or altogether delegate these powers to the enforcement agencies. Where upon an investigation, the Commission believes that an entity has breached the provisions of the Bill, the Commission will refer to the Police for prosecution.

**Implication:** The proposed Commission would be conferred with extensive powers to obtain any type of information from Data Controllers and Processors. Additionally, the Commission would have powers to receive complaints and carry out necessary investigations with respect to such complaints. The Commission would also exercise wide discretion to issue enforcement notices where it is of the view that a Data Controller or Data Processor has or is about to contravene the law. Whilst this may be useful in increasing compliance, if unchecked, it may become a source of arbitrary administrative actions which could negatively affect stakeholders. These discretionary powers are not currently exercised by NITDA in enforcing the NDPR. Legislators also need to consider possible clash of power between the commission and the National Information Technology Agency.

3. **Data Collection:** Like the NDPR, the proposed law mandates the Data Controller to only collect data which is necessary towards a lawful purpose which relates to a function or activity of the data controller. Where data is collected personally from the data subject, the Data Controller is obligated to, among other things, inform the Data Subject that the data is being collected, the purpose for which it is collected, the recipient of the data as well as the name and address of the data controller.

Interestingly, unlike the NDPR, the Bill introduces novel exceptions to the above obligations. The Data controller is not required to comply with the above obligations where the data collection is a second collection occurring within 12 months of the first collection and which purpose is not materially different from that of the first collection. Also, where the data will be used in a form which the data subject is not reasonably expected to be able to identify; as well as where compliance is not practicable at the point of collection (in which case the data controller will make the required information available to the data subject as soon as practicable).

**Implication:** By extending the validity of consent to collect data to 12 months, the proposed law seeks to create a proper balance between the Data subject's need to know and consent to the collection of his data on the one hand, and the Data Controller or Processor's need to collect necessary data seamlessly without the need to incur any additional cost on receiving multiple consents from the same subject over a short period of time. This eases the regulatory burden on the Data Processor or Controller whilst insulating the data subject from constant badgering for consent.

4. **Data Transfer:** Data Controllers cannot transfer data outside of Lagos without the express written authorisation of the Commission unless such transfer is done with the consent of the data subject, or the data transfer is necessary in line with the relevant provisions of the proposed law.

**Implications:** Entities with branch offices outside of Lagos State would be unable to freely transfer personal data to said branches without the consent of the data subject or the authorisation of the Commission where consent is not obtained from the data subject, or the data transfer is not deemed “necessary”.

Whilst the above may bring about an added layer of protection of data subjects’ personal data, the attempt to localise data within Lagos state may negatively impact entities with branches outside of Lagos State, as it may disrupt the free flow of crucial business information within organisations. Beyond this, it is left to be seen whether the Commission would be able to put an adequate mechanism in place to monitor such data transfer and enforce compliance.

The difficulty of enforcing this provision is further exacerbated by the remote working system employed by most companies in the aftermath of the Covid-19 outbreak. This provision can make it cumbersome for companies domiciled in Lagos with staff working remotely in other states to effortlessly transfer personal data needed for the operation of the company.

5. **Register of Data Processors and Data Controllers:** The Bill provides that all Data Controllers and Processors in the state must be registered with the Commission. Data controllers or processors shall apply in the prescribed form and pay the requisite application fee to be registered. Entities that keep or process personal or sensitive data without registering shall be liable on conviction to a fine of N2,000,000 (Two Million Naira) or a term of two (2) years or both.

Registration is to be valid for one year after the date of registration; after which registrants are required to renew their registration annually by making an application at the expiration of the registration. Any data processor or controller that continues to keep and process data without lawful authorisation after the expiration of the registration period, commits an offence and is liable to a fine of N1,000,000 (One Million Naira) or a fine of one (1) year or both.

**Implications:** Notwithstanding the provisions of the Bill on domicile, Data controllers and processors in Lagos State must be registered with the Commission in order to be able to lawfully collect and process data in Lagos State. Naturally, data controllers and processors that are domiciled in Lagos would be within scope since they operate in Lagos. However, it is unclear whether Data controllers deemed to be domiciled in Lagos by the proposed law would have to register since they are not exactly 'in' Lagos State. How can the commission determine if a Data controller is in Lagos? Is it on the basis of domicile as defined by the proposed Law or actual operation within Lagos? The draftsmen need to clarify this point by making necessary amendments in order to forestall any future controversy.

Although the requirement for data controllers and processors to register and renew annually in Lagos stems from the regulator's desire to effectively monitor data controllers' and processors' compliance with the law, the provisions could however significantly increase the cost of establishing and operating businesses within the state and if replicated across other states, could also negatively impact the ease of doing business in Nigeria. Also, since there is no data processing threshold to determine who is to be registered, this requirement basically means that all entities carrying on business in Lagos would be required to register.

6. **Principles:** The Bill also provides principles that guide the activities of data controllers and processors regarding the personal data of data subjects. Similar to the principles contained in the NDPR, these principles are a broad statement of rights that must be considered by data processors and controllers in ensuring the lawful processing of data. They are:

- Lawfulness and fairness
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Due regard to the rights of the data subject.
- Integrity and confidentiality
- Data localisation

**Implications:** This provision is largely similar to the NDPR principles. In this wise, there is no radical difference in the principles which Data Controllers and Processors are required to abide by.

7. **Audit:** The Bill provides that the Commission will carry out a periodic audit of the systems of data controllers and processors to ensure compliance with the data protection principles stated above.

**Implication:** The Bill makes no provision for a specific period of data auditing. Likewise, the Bill does not include provisions for the registration and licensing of Data Protection Compliance Officers (DPCOs), who are typically responsible for conducting these audits on behalf of regulators. As a result, it appears as though the Commission would perform this audit function on its own.

This provision may lead to double compliance standards, stress, and expense of money for data controllers who also fall within the radar of the NDPR's Audit. There may be a lot of confusion as to which regulatory body's audit to comply with – Federal or State?

8. **Exemptions:** The Bill provides for circumstances in which data processing activities, data controllers, or data processors would be exempted from the application of the proposed law. Depending on the circumstance, the entire provision of the proposed law could be exempted, or data processing could be carried out without the need to regard or consider specific principles in the proposed law. For instance, personal data is exempt from the provision of the law where the purpose is for the safeguarding of State or National interest. Also, where data is processed for the purpose of apprehending or prosecuting criminals, preventing, or detecting the commission of a crime, or the assessment or collection of tax or any other duty, specified provision of the proposed law would not apply to the extent that they are prejudicial to the purpose for collecting or processing such personal data.

**Implications:** By establishing broad exemptions, the proposed law sheds clarity on the set of facts that would constitute an exemption from the law; and to what extent a data controller, data processor, or data processing activity would be exempted from the proposed law.

## **CHALLENGES THAT MAY ARISE FROM THE BILL – SHOULD BUSINESSES BE WORRIED?**

Firstly, if the Bill is passed into law, there are fears that there would be a multiplicity of regulations and regulatory agencies. Since the NDPR and the ongoing NDPR Bill is enforced by NITDA - a commission formed by an Act of the National Assembly for the Federation, there are concerns as to which regulatory agency would filing be made to. The constitution, itself appears unclear as to whether the Federal or State Assembly would have the power to regulate data, since data per se, is not in the exclusive list. The repercussion therefore is that both the Federal and the State House of Assembly can legislate on the matter. Given the position, it is a matter of corporate governance or good governance that there should be some synchronisation between the Federal and State Government so as not to frustrate entities which carry on business in Lagos, with multiple regulations, extra costs, and bottlenecks.

There is a global debate about localisation of data for each country. Some have argued that such a localisation regulation would kill globalisation, businesses, technology, and its benefits in an era of the internet of things. Subsequently, development will be threatened. Here, should the Lagos State Assembly proceed to pass this Bill into law, any transfer of data beyond Lagos without written authorisation, would be considered a breach; thus, introducing intra-division of data-usage amongst an already complex global system of localisation.

Furthermore, unlike the NDPR which focuses on non-compliance before sanction, the Lagos Bill introduces an immediate sanction upon failure to register with the Commission within the stipulated time.

The omission of DPCOs in the Bill leaves all the process and policing to Lagos State Government. It is not certain if the state government is able to attend to the host of businesses operating in the state.

The Bill is not yet in its perfect state as it were. It is submitted that some of the obligations on data controllers and processors provided for in the proposed law are tenuous and can affect the business operations of companies. There is also the need to ensure that the Bill is made whilst taking into consideration the national law and extant regulator to avoid a clash of powers, conflicting provisions of law or multiplicity of compliance requirements for stakeholders.



## RECOMMENDATIONS

We recommend that the provision on registration of Data controllers or processors and payment of application fee should be removed from the Bill, if the Bill must come to law.

Lagos State could collaborate with NITDA to avoid overreaching consequences to Data Controllers who may be caught between compliance with the NDPR and the Lagos State Bill.

Additionally, we urge that the Bill be amended to include a specified audit period and to recognize the role of NITDA-Licensed DPCOs in conducting these audits on the Commission's behalf. Perhaps, the Bill could give special consideration to Data Controllers and Processors that have carried out data audits in compliance with the NDPR. They could submit the same audit reports to the Commission to prevent duplication of efforts.

## CONCLUSION

The importance of this Bill is underscored by the fact that Lagos state represents Nigeria's major technology hub and boasts of teeming youth and adult population that adopts technology gadgets in their day to day lives. The issue of data protection must therefore be highly prioritised. By establishing broad mechanisms to ensure compliance, it is expected that the proposed law would foster ethical and lawful data collection and processing activities with more regard for the privacy rights of data subjects. Our hope is that when the Bill progresses through the committee stage, it will be subjected to a more thorough, industry-focused examination to strike the optimal balance between all stakeholders covered by the proposed law and create a collaborative sync with the existing NDPR and the NITDA.

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