



LEGAL SERVICE
GENERAL ADMINISTRATION AND SUPPORT
SERVICES GROUP
 DSWD-GF-004 | REV 03 | 22 SEP 2023

DRN: LS-L-LO-24-10-92435-C

MEMORANDUM

FOR : **JIMMY FRANCIS T. SCHUCK II, CESE**
 Director IV, National Household Targeting Office (NHTO)

FROM : **THE ASSISTANT SECRETARY FOR GENERAL**
ADMINISTRATION AND SUPPORT SERVICES GROUP
(GASSG) AND CONCURRENT OFFICER-IN-CHARGE,
LEGAL SERVICE

SUBJECT : **LEGAL OPINION ON THE LISTAHANAN DATA SHARING**
AGREEMENT (DSA)

DATE : **02 DECEMBER 2024**

This is in reference to your Memorandum¹ requesting for legal opinion of the Legal Service (LS), with an attached memorandum from the Field Office (FO) III, endorsing the comment of Atty. Martin T. Menez from the City of San Jose Del Monte, Office of the City Legal Service (CSJDM-OCLS) expressing their reservation to paragraph 13 of the *Obligations of the Second Party* of the Listahanan Data Sharing Agreement (DSA):

xxx 13. indemnify the First Party against all costs, claims, damages, or expenses incurred by the First Party or for which the First Party may become liable due to any failure by the Second Party or its employees, subcontractors or agents, and any other party receiving the personal data from the Second Party, to comply with the obligations under this Agreement.

In the attached legal opinion from CSJDM-OCLS, Atty. Menez claimed that the City of San Jose is not bound by, and should not be accountable for the acts or omissions of its employees, agents, or subcontractors, and recommended that the aforementioned paragraph be revised. To highlight, the CSJDM-OCLS's opinion are as follows:

The OCLS concurs with the DSWD Field Office III in upholding the accountability of all the concerned parties in data processing covered by DSA as provided under Section 21 of the Data Privacy Act, to wit:

SEC. 21. Principle of Accountability. - Each personal information controller is responsible for personal information under its control or custody, including information that have been transferred to a third party for processing, whether domestically or internationally, subject to cross-border arrangement and cooperation.

- 1. The personal information controller is accountable for complying with the requirements of this Act and shall use contractual or other reasonable means to provide a comparable level of protection while the information are being processed by a third party.*

¹ Attached as Annex "A"



2. *The personal information controller shall designate an individual or individuals who are accountable for the organization's compliance with this Act. The identity of the individuals) so designated shall be made known to any data subject upon request.*

Furthermore, it is worthy to note that the Data Privacy Act provides the extent of liability of the offender, to wit:

SEC. 34. Extent of Liability. - If the offender is a corporation, partnership or any juridical person, the penalty shall be imposed upon the responsible officers, as the case may be, who participated in, or by their gross negligence, allowed the commission of the crime. If the offender is a juridical person, the court may suspend or revoke any of its rights under this Act. If the offender is an alien, he or she shall, in addition to the penalties herein prescribed, be deported without further proceedings after serving the penalties prescribed. If the offender is a public official or employee and he or she is found guilty of acts penalized under Sections 27 and 28 of this Act, he or she shall, in addition to the penalties prescribed herein, suffer perpetual or temporary absolute disqualification from office, as the case may be.

It is our understanding that the aforementioned provisions deal with the accountability and liability of the personal information controller with regard to the data subject. In addition, the inclusion of an indemnification clause on the proposed DSA is purely contractual in nature. In this regard and in line with the principle of party autonomy provided under Article 1306 of the New Civil Code, we recommend the revision of paragraph 13 if the proposed DSA, as follows:

Obligations of the Second Party

The Second Party shall:

xxx

13. Indemnity the First Party against all costs, claims, damages, or expenses incurred by the First Party or for which the First Party may become liable due to the Second Party's negligence in the supervision of its employees, subcontractors or agents, and any other party receiving the personal data from the Second Party, to comply with the obligations under this Agreement.

The original draft provides:

The Second Party shall:

xxx

*13. Indemnity the First Party against all costs, claims, damages, or expenses incurred by the First Party or for which the First Party may become liable due to **any failure by the Second Party or its employees, subcontractors or agents, and any other party receiving the personal data from the Second Party, to comply with the obligations under this Agreement.***

Our opinion:

We respectfully disagree with the opinion of the City Legal Officer of San Jose Del Monte, Bulacan in so far as the City's claim that it is not bound by, and should not be accountable

for the acts or omissions of its employee, agents, or subcontractors is concerned. In accordance with Sec. 21 of the Data Privacy Act, all parties to a data sharing agreement must ensure compliance with the Act, and that data sharing shall only be allowed where there are adequate safeguards for data privacy and security as emphasized in Sections 9 and 12 of the National Privacy Commission (NPC) Circular 02 series of 2016², thus:

SECTION 9. Responsibility of the Parties. *All parties to a data sharing agreement shall comply with the Act, its IRR, and all applicable issuances of the Commission, including putting in place adequate safeguards for data privacy and security. The designated data protection officer shall be accountable for ensuring such compliance.*

In the case of a government agency, the head of agency shall be responsible for complying with the security requirements provided in the Act, its IRR and all applicable issuances of the Commission

SECTION 12. Security of Personal Data. *Data sharing shall only be allowed where there are adequate safeguards for data privacy and security. The parties to a data sharing agreement shall use contractual or other reasonable means to ensure that personal data is covered by a consistent level of protection when it is shared or transferred.*

In addition to the aforementioned provisions and pursuant to the Section 8 of NPC Circular 03 s. 2020³, the key considerations in data sharing also include the parties' obligations to protect personal data shared, the responsibilities of the parties, and mechanisms through which data subjects may exercise their rights, to wit.

SECTION 8. Data sharing agreement; key considerations. — *Data sharing may be covered by a data sharing agreement (DSA) or a similar document containing the terms and conditions of the sharing arrangement, including obligations to protect the personal data shared, the responsibilities of the parties, mechanisms through which data subjects may exercise their rights, among others.*

The execution of a DSA is a sound recourse and demonstrates accountable personal data processing, as well as good faith in complying with the requirements of the DPA, its IRR, and issuances of the NPC.

Although the Act provides for the extent of liability, it also provides for the principle of accountability and responsibility of the head of each government agency or instrumentality to ensure compliance with the security requirements, as follows:

CHAPTER VI

Accountability for Transfer of Personal Information

SECTION 21. Principle of Accountability. — *Each personal information controller is responsible for personal information under its control or custody, including information that have been transferred to a third party for processing, whether domestically or internationally, subject to cross-border arrangement and cooperation.*

(a) The personal information controller is accountable for complying with the requirements of this Act and shall use contractual or other reasonable means to

² National Privacy Commission Circular 02 s. 2016 or the Data Sharing Agreement Involving Government Agencies

³ NPC Circular 3 s. 2020 or the Data Sharing Agreements

provide a comparable level of protection while the information are being processed by a third party.

Chapter VII

SECURITY OF SENSITIVE PERSONAL INFORMATION IN GOVERNMENT

Section 22. Responsibility of Heads of Agencies. All sensitive personal information maintained by the government, its agencies, and instrumentalities shall be secured, as far as practicable, with the use of the most appropriate standard recognized by the information and communications technology industry, subject to these Rules and other issuances of the Commission. The head of each government agency or instrumentality shall be responsible for complying with the security requirements mentioned herein. The Commission shall monitor government agency compliance and may recommend the necessary action in order to satisfy the minimum standards.

Moreover, the First Party has no control or supervision over the Second Party's employees, subcontractors, and agents, nor does the First Party have control on how the Second Party will ensure that the data being shared will be secured other than the provisions under this DSA. The Second Party shall have the freedom to choose the employees, subcontractors, and agents who can have access to the list. In this regard, the people who were authorized to access the list shall be legally answerable to the LGU, and the LGU in turn, could pursue action against their employees, subcontractors, and agents. Hence, to ensure the Second Party's faithful compliance thereto, the indemnification clause is reasonable as it is conditioned upon the Second Party's failure to comply with its obligations under the DSA. To highlight, the obligations of the Second Party state that the Second Party shall:

1. Act as and have the duties and accountabilities of a personal information controller for all personal data received from the First Party and covered under this Agreement;

xxx

6. Have in place the required procedures or protocols so that any person or party acting under the authority of the Second Party to have access to the personal data will be legally answerable to the Second Party to respect and maintain the confidentiality and security of the personal data, and shall be obligated to process the personal data only on instructions from the Second Party.

xxx

In addition, Chapter IV – Rights of a Data Subject of the Data Privacy Act, states that the data subject is entitled to *be indemnified for any damages sustained due to such inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorized use of personal information.* In line with the faithful compliance of both parties and in upholding the rights of the data subject pursuant to the Data Privacy Act, its IRR and other relevant issuances of the NPC, the inclusion of the indemnification clause on the proposed Listahanan DSA is necessary.

Upon coordinating with the proponent office via email, they confirmed that the DSA template used was the Listahanan DSA template of the Memorandum Circular (M.C.) No. 15 series of 2021. The proponent office further added that upon the approval of the

Enhanced Data Privacy Manual of the DSWD, the National Household Targeting Office (NHTO) will also re-align its DSA based on it. On the same email, the proponent office attached the proposed/simplified DSA template indicated in the DSWD Enhanced Data Privacy Manual (version 2.1 draft) cascaded by the Office of the DPO in July 2024. In this regard, we observed that paragraph 13 is no longer under the obligation of the Second Party in the DSA Template of the M.C No. 11 s. 2023 or the Data Privacy Manual. Alternatively, it is added under Liabilities provision which provides for the liability of each party wherein the First Party may also be held liable. Hence, to be compliant and consistent with our internal guidelines, we highly recommend using the DSA Template under the Data Privacy Manual.

In view of the foregoing, we respectfully submit for the retention of the original provision on the proposed Listahanan DSA pursuant to the Memorandum Circular (M.C.) No. 11 s. 2023⁴, to ensure compliance of the DSWD to the pertinent provisions of Republic Act (R.A.) No. 10173, its Implementing Rules and Regulations (IRR), and other issuances of the National Privacy Commission (NPC).

Please be advised that the above legal opinion is based solely on the information provided by your office, and may vary based on the additional information or document/s or when the facts are changed or elaborated.

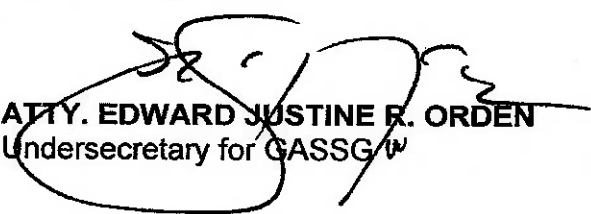
Kindly fill out the attached Customer Feedback Form and return the same to the Legal Service.

For your consideration. Thank you.


ATTY. GINA V. WENCESLAO

MCMUG/MGFN/10065

Approved by:


ATTY. EDWARD JUSTINE R. ORDEN
Undersecretary for GASSG

⁴ Data Sharing Agreement Memorandum Circular No. 11 or the DSWD Data Privacy Manual