

COVID-19: Evaluation of Coronavirus Outbreak within the scope of Personal Data Protection Law

Introduction

The Covid-19 Coronavirus (**Covid-19**) outbreak, that started in Wuhan, China and spread to the world in a short time and declared as “pandemic” by the World Health Organization on 11 March 2020, has also affected our country and various precautions have been taken in several areas to tackle the outbreak.

In conjunction with the precautions taken during the Covid-19 outbreak, there are also practices that need to be reviewed within the scope of personal data protection law. Furthest discussed practices are; in order to detect Covid-19-like symptoms at workplaces, requesting information on the travels of employees, employees’ relatives and/or visitors and filling out questionnaires, verifying the health such as performing temperature checks on employees/visitors at the entrance to the buildings and notifying the infected person to relevant public institution and organization.

Processing of health data within the scope of Turkish Personal Data Protection Law

Pursuant to Turkish Personal Data Protection Law No. 6698 (PDPL); health status, body temperature, symptoms relating to health are considered within special categories of personal data. The processing conditions for health data are set out in the separate provisions of PDPL.

In accordance with the Article 6.2 of PDPL, principally, it is forbidden to process personal data without the explicit consent of the data subject. In terms of health data, the exception to this prohibition is regulated in the third sub clause of the same article. Pursuant thereto, health data may only be processed without obtaining the explicit consent of the data subject for purposes of protection of public health, operation of preventive medicine, medical diagnosis, treatment, and care services, planning and management of health services and financing, **by persons under the obligation of secrecy or by authorized public institutions.**

Protective precautions related to the Covid-19 outbreak, which also has an intensive effect in our country, are within the scope of the purpose of protecting public health and when health data are processed for this purpose, the exception given above will be applied. On the other hand, it is substantial to identify the individuals who are under obligation to keep secrets and the authorized public institutions. Nevertheless, there is no direct definition of “persons under obligation to keep secrets” in the PDPL or Regulation on Personal Health Data (**Regulation**). It is stated within the doctrine that they are professionals who are under the obligation to keep secrets by their profession such as doctors and lawyers. In this context, healthcare professionals, with a more specific example, workplace doctors and nurses are under obligation to keep secrets within the workplace.

Processing of health data by employers

With these explanations, an employer must ensure at least one of the two conditions listed below, to process the health data of its employees:

- i. **obtaining explicit consent from the employee** for this processing activity, as well as fulfilling the obligation to inform which continues in accordance with PDPL in matters of, purpose of processing (such as protection of public health, taking health and safety precautions in the workplace), to whom and for what purposes

this data may be transferred (such as the request of Ministry of Health), the method and legal reason for collecting this data (such as in a physical environment in writing and based on explicit consent), the duration of storage (such as with the decrease of the spread of the outbreak and in all circumstances for a maximum of 3 months), or

- ii. processing health data **through workplace doctor** who is under the obligation to keep secrets (and at the same fulfilling the obligation to inform).

In both cases, processing of health data must comply with general principles set out in PDPL and the measures within relevant regulations. Accordingly, the processing of health data shall be relevant, limited and proportionate to the purposes for which data are processed, the data security shall be ensured, the obligation to inform shall be fulfilled, necessary measures shall be taken especially pursuant to Decision No. 2018/10 of the Turkish Personal Data Protection Authority “Adequate Measures to be taken by Data Controllers in Processing of Personal Data”, dated 31/01/2018, data minimization and deletion, destruction, and anonymization of personal data when the purpose of processing terminated, shall be ensured.

Within this scope, for instance, in case employees are asked about their travels due to Covid-19 outbreak, the first option should be not to request information regarding health data and private life and should be not to ask about travel-specific questions. If a question is asked directly to the employees about their symptoms, this communication can be possible through workplace doctor, by prior fulfillment of obligation to inform. Likewise, there are conditions to be followed if the employer wants to conduct temperature check of the employees due to its duty of ensuring the health and safety of the workplace according to Occupational Health and Safety Law. In this context, either (i) employees should be asked for their explicit consent with freewill and this data should be used by the employer in a limited and proportioned manner, and this method should not be applied to employees who do not give explicit consent; or (ii) if the explicit consent method will not be used, it should only be conducted by the workplace doctor, with fulfillment of obligation to inform.

Processing of health data by public institutions and organizations

During the Covid-19 outbreak, the processing of health data occurs not only within private law subjects in the employer-employee relationship but also within public institutions and organizations.

For instance; people who have recently traveled in countries with travel hazards can be called by the Ministry of Health and be asked questions on their health status. Even though this situation can be evaluated within the scope of the exceptions of explicit consent of data subject described above, it is actually one of the exceptions of application of PDPL pursuant to Article 28. In accordance with the related article; in case processing of personal data within the scope of preventive, protective and intelligence-related activities **by public institutions and organizations who are assigned and authorized by law** for providing national defense, national security, public safety, public order or economic safety, PDPL would not be applicable. Considering the purpose of this provision which covers only the relevant activities of public institutions and organizations and the current situation, the precautions taken for the Covid-19 outbreak have made exceptions to public institutions in their responsibilities on processing of personal data as a public safety measure. Undoubtedly, this circumstance should not be interpreted as the rights of confidentiality of private life and personal data protection may be damaged, which has its foundation in Turkish Constitution.

Regulations on infectious diseases

In addition to PDPL, the regulations on tackling with infectious diseases may counted as; General Sanitary Law dated 1930 (**Law**), Regulation of Surveillance and Control of Infectious Diseases (**Regulation of Control**), Communiqué on Notification and Notification System of the Infectious Diseases (**Communiqué**) and Circular on Notification and Notification System of Infectious Diseases published by the Ministry of Health (**Circular**).

Law states that some authorized public institutions and authorizations and private law subjects are under the obligation to inform any incidence that they have learned during their duty and these subjects are chief physicians of hospitals, the owners or directors of school, charity offices, trading house and store, hotel, motel, mansion, Turkish bath, prison, doormen, village elderly councils, pharmacists, dentists, midwives, nurses, coffin makers. Although Covid-19 is not included in the Law within the incidents and epidemics, “MERS (Coronavirus)” has been listed as one of the diseases subject to notification obligation under Annex-1 of Regulation of Control. It is known that, MERS is a member of Coronavirus family like Covid-19. In this context, it could be interpreted that Covid-19 is one of the diseases subject to notification obligation. We would like to remind that there is no direct provision or regulation in this regard yet.

Pursuant to Regulation of Control, there is an additional notification obligation for all public health institutions and all real and legal persons. Considering the above mentioned provisions, it has been discussed in the doctrine that Regulation of Control imposes a notification obligation to a different group than Law. In accordance with rules of conflict of laws, Regulation of Control shall not have a regulation that is not complied with Law, but the principles of PDPL on processing of health data through authorized person should be taken into consideration. Considering that PDPL has stricter regulations on health data and it is the posterior law, a purposive interpretation shall be made and we are of the opinion that also the group under the Law, shall notify only through the health authorities. In other words, doormen or hotel managers need to notify through a primary care physician or workplace doctor, not directly by themselves.

Approach of the Authority

Turkish Personal Data Protection Authority (**Authority**) made two announcements as, Public Announcement on Covid-19 on 23 March 2020¹ and Public Announcement on Issues Needs to be known during the Tackling with Covid-19 on 27 March 2020².

Announcement dated 23 March 2020. Within this announcement it is stated that, data controllers must follow the time periods on regulations regarding complaints and notifications to Authority, but regarding the assessment of time periods the extraordinary circumstances within the precautions of data controllers (such as remote working, alternate working) would be taken into consideration. In this regard, when applying precautions it should not be forgotten that data controllers are subject to data protection regulations and their obligations continue. With this, we are on the opinion of that Authority will make its assessments by taking into consideration of the extraordinary conditions.

Announcement dated 27 March 2020. Within this announcement it is stated that, it is inevitable of processing the personal data while tackling with Covid-19, including the special

¹ Can be reached via: <https://kvkk.gov.tr/icerik/6706/KAMUOYU-DUYURUSU-COVID-19->

² Can be reached via: <https://www.kvkk.gov.tr/icerik/6721/KAMUOYU-DUYURUSU-Covid-19-ile-Mucadele-Surecinde-Kisisel-Verilerin-Korunmasi-Kanunu-Kapsaminda-Bilinmesi-Gerekenler->

categories of personal data (health data, race, ethnicity, political opinion, philosophical opinion, clothing, membership information of associations, foundations and unions, health, sexual life, criminal records) and several other personal data (such as identity number, name, address, workplace and travel information). With respect to our above mentioned explanations, it is stated that obligations of data controllers still continue, the processing activities shall comply with fundamental principles and legal reasons, all necessary administrative and technical measures must be taken on data security, data minimization is important and the obligation to notify must be fulfilled by data controllers. As stated above, it is emphasized that especially on processing of health data, the method of taking the explicit consent of employee may be preferred, considering the spreading speed of outbreak, employee himself/herself may notify his/her diseases, but on the conditions other than explicit consent, health data should be processed through workplace doctor.

Authority emphasized the obligations on processing health data by public institutions and authorities and employees on same direction of above and constituted a frequently asked questions part:

- **The communication of health institutions without prior consent of data subjects.** It is stated that, authorities could perform additional data processing activities with the purposes of protection of public health and security and this activities are not against the PDPL and relevant regulations.
- **Data security within remote working practice.** It is stated that personal data protection regulations do not prevent remote working but even in this process, the obligations regarding data security continue. In the name of reducing the risks on data security, all necessary measures should be taken primarily as, the data traffic between systems should be carried out by secure communication protocols and it should be ensured that there is no security gap and anti-virus systems/firewalls shall be kept up-to-date.
- **The announcement of infected employee.** It is stated that employee should inform its employees regarding the incidents due to its obligation to ensure the safety of employees and duty of care, but during the announcement the minimum amount of personal data must be shared according to preventive measures.
- **Request of information from employees and visitors.** It is stated that, the employer has valid grounds on requesting information on travel history and symptoms from employees and visitors, considering its obligations of protecting the health of employee and providing a safe workplace. It is emphasized that during this process, the activities should be complied with proportionality and necessity principles. It is also stated that providing advisory to data subjects in case of there being people in risk group, is not against PDPL and relevant regulations.
- **Transferring employees' health data to authorities.** It is stated that, the personal data of infected people should be transferred to authorized public institutes by the employer pursuant to Article 8 of PDPL and regulations on infectious diseases.
- **Time periods on PDPL and relevant regulations.** The statement on the Announcement dated 23 March regarding the compliance of data controllers about time periods on PDPL and relevant legislations shall be repeated hereby.

Conclusion

Many organizations need to process personal data within the scope of tackling the Covid-19 outbreak, for different reasons, such as the obligation of employers to ensure occupational health and safety, the government's duty to protect public health, and citizens' duty to comply with obligations. The outbreak situation does not eliminate the implementation of PDPL and relevant regulations, as well as the obligations of data controllers in this context. During the Covid-19 outbreak, data processing activities should be conducted in accordance with PDPL and relevant regulations, together with the regulations on infectious diseases. We are of opinion that all related subjects should approach to data protection law more carefully than ever before.

COVID-19: Reflection of the Outbreak to Internet and Technology World

Due to the Coronavirus Covid-19 (**Covid-19**) outbreak, countries and international institutions continue to take measures successively and to implement such measures at a high level as a result of the recent developments. In this scope, we would like to compile the main measures which are particularly reflected in the internet and technology world.

i. Establishment of the Coronavirus Scientific Committee

Within the scope of the tackling against Covid-19 in our country, firstly, the Coronavirus Scientific Committee (**Committee**) was formed under the Ministry of Health. Covid-19 cases and trends around the world and in our country are monitored instantly by the Committee, in particular through the internet, and reported to citizens.

ii. Remote Education Decision

The Ministry of National Education firstly decided, in line with the joint work conducted with other ministries and Committee recommendations, for the elementary and secondary schools to go on an earlier mid-term break between 16 March – 20 March 2020, which was planned to be held between 6 April and 10 April 2020. Afterwards, the Minister of National Education announced that the remote education system will be commenced as of 23 March 2020 to prevent the interruption of the education system. On 25 March, with the suggestion of the Committee, considering the course of the outbreak it was reported that remote education will continue until 30 April within the scope of Covid-19 measures. In his statement, Minister Selçuk stated that due to the possible problems that may occur related to internet access and for the purpose of ensuring one hundred percent access, the remote education will be conducted mainly over television, and the internet will also be used in addition to television. Due to the fact that the fastest means of access is television and the internet infrastructure problems may be encountered, the remote education can be reached through 3 different channels: TRT EBA TV primary school, TRT EBA TV secondary school and TRT EBA TV high school, as well as through the Internet via the Education Information Network (EBA) (<http://www.eba.gov.tr/>).

iii. Sharing the phone subscriber and location information in disasters and emergency situation by ICTA

The Law Amending the Certain Law (**Omnibus Bill**) published on the repeating Official Gazette dated 26 March 2020 did not come into force specifically for the Covid-19 outbreak however, there are certain regulations enabling to implement measures that may be beneficial also for this outbreak. Under the iii. and iv. paragraphs of this information note, the regulations set forth under the Omnibus Bill are included.

The Information and Communication Technologies Authority (ICTA) is authorized with sharing immediately the phone subscriber and location information required by 112 emergency call center or related governorship, in order to reach the callers within the scope of calls to 112 emergency call centers provided that the sharing is limited with the call time. Within the scope of sharing such information, the access system may be established in the frame of the principles and procedures determined by ICTA and relevant ministry and therefore the developments in the coming days should be monitored.³

iv. Transactions that can be carried out electronically with the effect of Covid-19

Within the scope of the Covid-19 outbreak, where the social distance rule is at the forefront, public institutions and organizations made announcements for certain transactions to be carried out electronically. The Revenue Administration published its related announcement under the name of "Announcement on Certain Measures Taken within the Scope of Effectively Combating New Corona Virus Disease" and it has been stated that tax transactions should be carried out through the Interactive Tax Office or through contracted banks until 10 April 2020, as long as the technical facilities allow such transactions.⁴

In addition, the Ministry of Commerce suggested that persons wishing to apply to the Consumer Arbitration Committee should complete their applications electronically. Moreover, as an important development; it is recommended that the complaints, application and data violation notifications to be made to the Personal Data Protection Authority should be made through electronic platforms. Thus, it can be referred that the alternative ways of the transactions that should be carried out in daily life has found its place in technology.

v. Quick support model from the Ministry of Industry and Technology

Within the scope of the tackle against Covid-19, it has been announced by the Ministry of Industry and Technology that the products to be used in the diagnosis and treatment of Covid-19, the equipment for the improvement of environmental conditions, R&D projects that develop effective protective products for the prevention of disease, and information applications that can affect the direct or indirect consequences of the outbreak will be supported with a special and fast program.⁵

In addition, other measures taken by the Ministry of Industry and Technology for the outbreak include; supporting SMEs by shifting their payment terms, providing flexibility in credit supports of companies benefiting from investment incentives, commissioning the TÜBİTAK Covid-19 portal where information, experience and data are shared, determining the basic rules to be followed in the factories for industrialists, conducting studies on production of local breathing apparatus studies.

vi. Decision relating to TeknoPark companies and R&D and design centers

Companies operating in technology development zones and enterprises with R&D and design centers are required to perform R&D and design activities within these fields of activity in order to benefit from exemptions and incentives. However, in the press statement made by the Ministry of Industry and Technology on 15 March 2020, it was announced that employees working in these areas could work remotely due to the Covid-19 outbreak risk. In order to work from home, it was shared with the public that TeknoPark companies and R&D

³ <https://www.resmigazete.gov.tr/eskiler/2020/03/20200326M1-1.htm>

⁴ <https://www.gib.gov.tr/yeni-korona-virus-hastaligi-kovid-19-ile-etkin-mucadele-kapsaminda-alinan-bazi-tedbirler-hakkinda>

⁵ <https://www.sanayi.gov.tr/medya/haber-detayi/gLAYI4bl8x49>

design centers should report the number of employees they deem appropriate to work from home to the Ministry of Industry and Technology on a monthly basis and within this, they can continue to benefit from exemptions and incentives until the end of April.

vii. Remote working

There are several precautions taken by employers in the private sector during Covid-19 outbreak, as predicted by government policies against the Covid-19 outbreak and, in particular, on Economic Stability Shield. Recently, the most common precaution in private sector is the decision of employers with respect to remote working. Committee has consistently stressed that minimum interaction is the most crucial precaution for Covid-19 outbreak and private sector is beginning to take into consideration these warnings. Many employers have begun the first trials of remote working and the amount of companies that are transferring into remote working practice is increasing day by day. Companies started to use video conferencing along with remote working practice. Giant technology companies such as Apple, Amazon, Microsoft and Google continue to advice their offices around the world to adapt working from home.

Even if remote working activities are compulsory today, there are practices of remote working along with the above mentioned technology giants and as these companies continue to be spoken by their successful works, we predict that remote working would become a phenomenon in the near future.

viii. "Online Coronavirus Control System" was established by the Ministry of Health

As a recent development in the internet and technology world, the "Online Coronavirus Control System" was established by the Ministry of Health on the website <https://koronaonlem.saglik.gov.tr/>. According to this system, after the information to be entered in 4 steps (such as various personal information, whether user has any diseases that are placed in the system, where user has symptoms and the locations that user has been in the last 14 days), only a preliminary result that does not contain a final result/certainty is provided to the user. Such online systems and them being provided by public institutions and organizations, prove that everyone benefits from technology.