

Government of India
Ministry of Electronics and IT

New Delhi, 26th May, 2021

Press Release

The Government Respects the Right of Privacy and Has No Intention to Violate it When WhatsApp is Required to Disclose the Origin of a Particular Message.

Such Requirements are only in case when the message is required for Prevention, Investigation or Punishment of Very Serious Offences related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material.

Right to Privacy is a Fundamental Right

- The Government of India recognises that ‘Right to Privacy’ is a Fundamental right and is committed to ensure the same to its citizens.
- On this issue, Union Minister Shri Ravi Shankar Prasad has stated that “the Government of India is committed to ensure the Right of Privacy to all its citizens but at the same time it is also the

responsibility of the government to maintain law and order and ensure national security.”

- Minister Shri Ravi Shankar Prasad also stated that “none of the measures proposed by India will impact the normal functioning of WhatsApp in any manner whatsoever and for the common users, there will be no impact”
- As per all established judicial dictum, no Fundamental Right, including the Right to Privacy, is absolute and it is subject to reasonable restrictions. The requirements in the Intermediary Guidelines pertaining to the first originator of information are an example of such a reasonable restriction.
- When Rule 4(2) of the Intermediary Guidelines is examined through the test of proportionality then that test is also met. The cornerstone of this test is whether a lesser effective alternative remedy exists. As per the Intermediary Guidelines, the originator of information can only be traced in a scenario where other remedies have proven to be ineffective, making the same a last resort measure. Moreover, such information can only be sought as per a process sanctioned by the law thereby incorporating sufficient legal safeguards.

Rule is in Abiding Public Interest

- It is very important to note that such an order, to trace first originator, under Rule 4(2) of the said guidelines shall be passed only for the purposes of prevention, investigation, punishment etc. of inter alia an offence relating to sovereignty, integrity and security of India, public order incitement to an offence relating to rape,

sexually explicit material or child sexual abuse material punishable with imprisonment for not less than five years.

- It is in public interest that who started the mischief leading to such crime must be detected and punished. We cannot deny as to how in cases of mob lynching and riots etc. repeated WhatsApp messages are circulated and recirculated whose content are already in public domain. Hence the role of who originated is very important.

Rules as Per Law of Land

- Rule 4(2) of the Intermediary Guidelines is not a measure in isolation. The rules have been framed after consultation with various stakeholders and social media intermediaries, including but not limited to WhatsApp.
- After October 2018, no specific objection has been made by WhatsApp to Government of India in writing relating to the requirement to trace the first originator in relation to serious offences. They have generally sought time to extend the time for enforcement of guidelines but did not make any formal reference that traceability is not possible.
- WhatsApp's challenge, at the very last moment, and despite having sufficient time and opportunity available during consultation process and after the rules were enacted, to the Intermediary Guidelines is an unfortunate attempt to prevent the same from coming into effect.
- Any operations being run in India are subject to the law of the land. WhatsApp's refusal to comply with the guidelines is a clear act of defiance of a measure whose intent can certainly not be doubted.

- At one end, WhatsApp seeks to mandate a privacy policy wherein it will share the data of all its user with its parent company, Facebook, for marketing and advertising purposes.
- On the other hand, WhatsApp makes every effort to refuse the enactment of the Intermediary Guidelines which are necessary to uphold law and order and curb the menace of fake news.
- WhatsApp defends its refusal to enact the Intermediary Guidelines by carving out an exception that messages on the platform are end to end encrypted.
- It is pertinent to note that the rule to trace the first originator of information is mandatory for each and every significant social media intermediary, irrespective of their method of operation.
- Minister Shri Ravi Shankar Prasad said that “the entire debate on whether encryption would be maintained or not is misplaced. Whether Right to Privacy is ensured through using encryption technology or some other technology is entirely the purview of the social media intermediary. The Government of India is committed to ensuring Right of Privacy to all its citizens as well as have the means and the information necessary to ensure public order and maintain national security. It is WhatsApp’s responsibility to find a technical solution, whether through encryption or otherwise, that both happen.”
- As a significant social media intermediary, WhatsApp seeks a safe harbour protection as per the provisions of the Information Technology Act. However, in a befuddling act, they seek to avoid responsibility and refuse to enact the very steps which permit them a safe harbour provision.

International Precedence

- The rules enacted by Government of India in public interest are not rules enacted in isolation but have global precedence.
- In July 2019ⁱ, the governments of the United Kingdom, United States, Australia, New Zealand and Canada issued a communique, concluding that: “tech companies should include mechanisms in the design of their encrypted products and services whereby governments, acting with appropriate legal authority, can gain access to data in a readable and usable format.”
- Brazilian law enforcementⁱⁱ is looking for WhatsApp to provide suspects' IP addresses, customer information, geo-location data and physical messages.’
- What India is asking for is significantly much less than what some of the other countries have demanded.
- Therefore, WhatsApp’s attempt to portray the Intermediary Guidelines of India as contrary to the right to privacy is misguided.
- On the contrary in India, privacy is a fundamental right subject to reasonable restrictions. Rule 4(2) of the Guidelines is an example of such a reasonable restriction.
- It would be foolhardy to doubt the objective behind Rule 4(2) of the Intermediary Guidelines, which aims to protect law and order.
- All sufficient safeguards have also been considered as it is clearly stated that it is not any individual who can trace the first originator of information. However, the same can only be done by a process sanctioned by the law. Additionally, this has also been developed as

a last resort measure, only in scenarios where other remedies have proven to be ineffective.

References:

-
- i 1. The United States Department of Justice:
<https://www.justice.gov/opa/pr/international-statement-end-end-encryption-and-public-safety>
 - ii 2. Brazil Government Law Enforcement:
<https://money.cnn.com/2016/03/10/technology/whatsapp-brazil/>