



PERSONAL DATA
PROTECTION COMMISSION
S I N G A P O R E

**CLOSING NOTE FOR PUBLIC CONSULTATION ON PROPOSED ADVISORY
GUIDELINES ON THE PERSONAL DATA PROTECTION ACT FOR SELECTED
TOPICS – PHOTOGRAPHY**

11 SEP 2014

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PART I: INTRODUCTION AND OVERVIEW

1 Background and Introduction

- 1.1 The Personal Data Protection Commission (the “**Commission**”) launched a public consultation on 16 May 2014 on the proposed Advisory Guidelines on photography (“**photography guidelines**”).
- 1.2 The photography guidelines aim to complement the more general guidelines issued by the Commission by addressing the application of the Personal Data Protection Act 2012 (“**PDPA**”) to photography-related issues and scenarios.
- 1.3 The consultation closed on 6 June 2014 with four responses from consumers and organisations. Please refer to the Commission’s website for the full list of respondents and their submissions¹. The Commission thanks all respondents for their comments and participation.
- 1.4 Most of the responses received sought clarity from the Commission on the existing examples in the photography guidelines, or proposed new scenarios for the Commission to illustrate the applicability of the PDPA.
- 1.5 The Commission has carefully considered all the comments and has endeavoured to address them as fully as possible in the finalised guidelines. Organisations will notice revised examples and further elaboration on areas where respondents have made comments.
- 1.6 This closing note for the photography guidelines (“**closing note**”) seeks to:
 - a) summarise the key issues in this consultation, and
 - b) address common issues or queries which were raised by several respondents.
- 1.7 This closing note should be read in conjunction with the finalised photography guidelines, which forms part of the Advisory Guidelines on the Personal Data Protection Act for Selected Topics.

¹ <http://www.pdpc.gov.sg/legislation-and-guidelines/public-consultations>

PART II: OVERVIEW OF ISSUES – PHOTOGRAPHY GUIDELINES

2 Individual acting in a personal or domestic capacity

2.1 Paragraph 2.4 of the draft photography guidelines had provided an example where an individual (Diana) attends her employer's corporate social responsibility event, and takes a photograph of her and her friend (Dawn).

Feedback received

2.2 A respondent opined that, in relation to this example, if Diana wanted to post the photograph she took with Dawn in a corporate website or display it in a corporate board, Diana should first obtain consent from Dawn.

Use of photograph may be subject to Data Protection Provisions even if collection was not

2.3 The Commission notes that an organisation that uses a photograph containing personal data of an individual may be subject to the Data Protection Provisions even if the original photo-taking was not (e.g. if the photographer was acting in a personal or domestic capacity). In the scenario given by the respondent, where the personal data was subsequently used for business or commercial purposes, the organisation concerned would need to ensure its compliance with the Data Protection Provisions (e.g. by ensuring that consent was obtained from the individual whose image is captured in the photograph, unless any exceptions apply). The example in paragraph 9.4 of the finalised photography guidelines has been amended to reflect this.

3 Deemed consent for photo-taking at a private space/event

3.1 Paragraph 2.10 of the draft photography guidelines had provided an example which noted that where an organisation holding a private function intends to rely on deemed consent to take photographs of attendees, measures the organisation may take to better ensure that the attendees are aware of (and accordingly, more likely to be deemed to have consented to) the purpose for which their photographs are collected, used and disclosed, could include:

- a) Clearly stating in its invitation to clients that photographs of attendees will be taken at the function for publication in its internal newsletter; or
- b) Putting up an obvious notice at the reception or entrance of the function venue to inform attendees that photographs will be taken at the event for publication in its internal newsletter.

3.2 Paragraph 2.11 of the draft photography guidelines had provided an example in which an individual was informed by a photographer of the purpose of photo-taking and voluntarily posed for his photograph to be taken. It was noted that by voluntarily posing for his photograph to be taken, the individual would be deemed to have given consent for the photograph to be collected, used or disclosed for the stated purpose.

Feedback received

3.3 In relation to paragraph 2.10, one respondent suggested that where an individual entered an area voluntarily and could see there were photographers present, and chose to remain, that should constitute the individual voluntarily permitting photo-taking, even in the absence of the abovementioned measures or the individual voluntarily posing for a photograph.

3.4 In relation to paragraph 2.11, a respondent asked if an individual would still be deemed to have given consent if a photographer chose not to inform him of the intended purpose of photo-taking and simply took his photograph; and whether the treatment would change depending on whether the individual posed for the photo-taking. The respondent also noted that it would be helpful for the Commission to provide some advice on how the individual could “opt out” of having his photographs taken.

3.5 Both these respondents also sought clarity on whether a photographer would still be required to obtain consent for each photograph, if consent could already be deemed through adopting the measures stated in paragraph 2.10 of the draft guidelines.

Consent unlikely to be deemed solely by individual's continued presence

- 3.6 In the Commission's view, it is unlikely that an organisation can rely on deemed consent solely by virtue of the individual remaining in an area where photographers can be seen to be present. One key reason is that in many circumstances, it would be difficult, if not impossible, to accurately determine an individual's awareness of the existence of photo-taking activities or photographers within his surroundings. It would be even more difficult to assess whether he voluntarily allowed his photograph to be taken for the intended purposes. As such, the Commission would not recommend that organisations consider consent to be deemed in such circumstances.

Applicability of deemed consent uncertain if conditions vary

- 3.7 While the photography guidelines set out examples of situations in which consent may be deemed to have been given for photo-taking, consent may not necessarily be deemed to have been given if there are additional or different material facts in the particular case. The Commission will consider the facts of the case to determine if consent may be deemed to have been given in a particular situation. In situations where it is not clear whether the deemed consent provision applies, obtaining consent from the individual would avoid disputes where an individual claims that he did not voluntarily provide personal data for the purpose. The Commission has further clarified this in the photography guidelines.

Various means to "opt out"

- 3.8 The PDPA does not prescribe how individuals may indicate their consent or lack thereof. Generally, individuals may wish to indicate that they do not consent to photo-taking in the same ways that they would usually be expected to indicate consent (e.g. verbally or in writing). For avoidance of doubt, under the PDPA, it is the organisation's obligation to obtain consent (unless any exception applies) and no obligation is imposed on the individual to indicate that he does not consent.

Photographer need not obtain separate consent if consent is already deemed

- 3.9 Where consent may already be deemed to have been given by an individual to an organisation for photo-taking for a particular purpose, the PDPA does not require that consent also be separately obtained by the organisation's photographer for such photo-taking for the same purpose. The Commission has clarified this in the photography guidelines.

4 Withdrawal of consent

- 4.1 The proposed guidelines addressed the situation when individuals withdraw consent in relation to published photographs. In particular, paragraph 2.23 of the proposed guidelines provided an example where an organisation publishes a photograph of an individual client in its annual report distributed to shareholders and clients, and the client subsequently withdraws his consent to the publication of the photograph.

Feedback received

- 4.2 Respondents queried the effect of withdrawal of consent by an individual when the image of the individual was displayed on a billboard, or uploaded onto a webpage or social media page.
- 4.3 Respondents also had divergent views on whether the organisation in paragraph 2.23 should be required to recall copies of a published annual report if an individual withdraws consent to the publication of his photograph in the annual report. While one respondent opined that such withdrawal of consent would be unreasonable given the cost to the organisation, another commented that the organisation should revise the annual report pursuant to the withdrawal of consent. The latter also proposed that if the published annual report is available on a third party website, the organisation should inform the third party website to update the annual report with an updated version where the individual's photograph is removed.
- 4.4 One respondent also queried if an individual's withdrawal of consent would mean that the organisation would not be able to use an image (in a photograph or video) that includes him and other individuals, even if the other individuals did not withdraw consent.

Withdrawal of consent has no effect on publicly available personal data

- 4.5 The Commission has clarified in the finalised guidelines that the withdrawal of consent by an individual has no effect on personal data that is already publicly available. That is, in such cases, organisations may wish to cease further use or disclosure as a good practice.

Current approach strikes a reasonable balance

- 4.6 The Commission also notes the divergence in views on the extent to which organisations should comply with a withdrawal of consent, and is of the view that the current provisions relating to an individual's withdrawal of consent (e.g. organisations should cease future collection, use or disclosure of personal data if consent is withdrawn, unless exceptions apply; individuals

should give reasonable notice to the organisation²; etc) strikes a reasonable balance between the two viewpoints.

Organisations may continue using image of a group if withdrawal of consent is addressed

- 4.7 In the case of a photograph or video that includes multiple individuals, the Commission is of the view that an organisation may still use or disclose the photograph or video in future even if one individual in the group withdraws consent, provided that the organisation effects the withdrawal of consent (e.g. by masking the image of the individual), or the organisation is authorised or required under the PDPA or other written law to use or disclose the individual's personal data without consent. In addition, the Data Protection Provisions (including the obligation to comply with a withdrawal of consent) would not apply to an image that does not identify an individual. The Commission has included a new example in the finalised guidelines to address this.

² In this regard, the Commission has previously set out the view that considerations for whether reasonable notice has been given would include the amount of time needed to give effect to the withdrawal of consent and the manner in which notice was given.

5 Other issues

Consent for photo-taking by employee

- 5.1 Paragraph 2.5 of the proposed guidelines set out an example where an employee in an organisation is tasked by its management to take photographs at the organisation's event and publish them on its webpage. In relation to this example, a respondent sought clarity on the type of consent an employee should obtain where he has been assigned to ensure his employer's compliance with certain obligations (such as obtaining consent) for photo-taking.
- 5.2 The Commission clarifies that the Data Protection Provisions do not prescribe the form and manner in which an organisation should obtain consent. For example, as indicated in the photography guidelines, consent may be deemed to have been given rather than explicitly obtained depending on the circumstances. The guidelines also provide examples of obtaining consent for different circumstances.

Whether certain exceptions under the PDPA would apply to volunteer photographers

- 5.3 One respondent proposed that photographers who volunteer to take photographs for voluntary welfare organisations' ("VWOs") private activities and events, and subsequently use or disclose the photographs for their own portfolio or publicity purposes should be able to rely on the exceptions for collection without consent solely for artistic or literary purposes, and use or disclosure for purposes consistent with the purpose of collection.
- 5.4 The Commission is of the view that this set of exceptions is unlikely to apply in such circumstances as it requires that the collection be solely for artistic and literary purposes. The Commission suggests that VWOs consider establishing arrangements with photographers to obtain consent for the latter's use and disclosure for their own portfolio or publicity purposes, if VWOs so prefer.

Application of exceptions to photography competitions

- 5.5 A respondent sought clarification on whether someone who took a photograph in a personal capacity and submitted it as an entry to a competition would still be considered to be acting in a personal capacity.
- 5.6 The same respondent also noted that a contest organiser would typically rely on a warranty by the contest participant (i.e. the photographer) that he has obtained the necessary consents for the contest organiser's use of the photo for the specified purposes. The respondent asked if the Commission would

regard the contest organiser as having exercised appropriate due diligence in the sense of paragraph 12.34 of the Advisory Guidelines on Key Concepts in the PDPA³ (“**Key Concepts Guidelines**”), if it accepted such warranty provided by the contest participant in accordance with the contest’s terms and conditions.

5.7 The Commission clarifies that the fact that the participant is submitting a photograph for a photography contest is, on its own, insufficient to determine whether the participant is acting in a personal capacity. For completeness, the Commission notes that exceptions in the Second, Third and Fourth Schedules to the PDPA may potentially apply to a photography contest, such as those relating to artistic purposes⁴. However, what would constitute “artistic” purposes may be strongly subjective. The Commission would have to take into account the full facts of the case in order to determine if such exceptions apply. The Commission has provided some clarity on this issue in the photography guidelines.

5.8 As regards due diligence, the Commission has set out in paragraph 12.35 of the Key Concepts Guidelines⁵ some measures by which organisations may exercise appropriate due diligence when obtaining personal data from third party sources, and would suggest organisations consider adopting these measures.

Applicability to charity events

5.9 A respondent sought clarification on the applicability of the PDPA to charity events held by an organisation. The respondent argued that charity events should not fall within the definition of a specified message as an offer to

³ Among other things, paragraph 12.34 sets out that organisations obtaining personal data from third party sources should exercise the appropriate due diligence to check and ensure that the third party source can validly give consent for the collection, use and disclosure of personal data on behalf of the individual (under section 14(4)) or that the source had obtained consent for disclosure of the personal data (under section 15(2)).

⁴ For example, paragraph 1(g) of the Second Schedule provides for collection of personal data without consent if collection is solely for artistic or literary purposes. There are also exceptions for collection, use and disclosure without consent necessary for evaluative purposes, which include determining the suitability, eligibility or qualifications of the individual to whom the data relates for selection for an athletic or artistic purpose.

⁵ Paragraph 12.35 sets out that in exercising appropriate due diligence to verify that a third party source (“B”) can validly give consent or has obtained consent from the individual concerned, organisations (“A”) may adopt one or more of the following measures appropriate to the circumstances at hand:

- a) Seek an undertaking from B through a term of contract between A and B that the disclosure to A for A’s purposes is within the scope of the consent given by the individual to B;
- b) Obtain confirmation in writing from B;
- c) Obtain, and document in an appropriate form, verbal confirmation from B; or
- d) Obtain a copy of the document(s) containing or evidencing the consent given by the individuals’ concerned to B to disclose the personal data.

supply good or services, and hence organisations would not need to obtain consent to send such messages.

- 5.10 The Commission would like to clarify that there does not currently exist a general exception for charities or charitable events under the Data Protection Provisions or the Do Not Call Provisions. While there may be certain exceptions which could potentially apply to events (such as if the personal data is publicly available or if the messages do not contain any telemarketing elements), the Commission would advise organisations to carefully review their circumstances in order to ascertain their obligations under the PDPA. Organisations may also wish to refer to the Advisory Guidelines on the Do Not Call Provisions for examples of when messages would fall within the scope of the Do Not Call Provisions.

Masking of images

- 5.11 The Commission has separately received queries regarding the masking of images of individuals collected by closed-circuit television cameras (“**CCTVs**”). The Commission has thus updated the chapter in the Advisory Guidelines on the Personal Data Protection Act for Selected Topics on CCTVs to provide some guidance on the issues raised. Organisations are advised to refer to that guidance if they have similar queries regarding the masking of photographs.

Part III: CONCLUSION

6 Conclusion

- 6.1 The Commission will continually assess the need to issue guidelines in future on other topics to facilitate understanding and compliance of the PDPA obligations.
- 6.2 There are other resources available to organisations apart from guidelines issued by the Commission. Organisations should visit www.pdpc.gov.sg for more information on the following:
- How to contact the Commission for general queries
 - Answers to Frequently Asked Questions
 - Training, workshops and learning facilities to help organisations gain further insights into the requirements of the PDPA
 - The Commission's informal guidance process
- 6.3 This closing note should be read in conjunction with the finalised guidelines. Once again, the Commission thanks all respondents for their comments and participation in this public consultation.