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\* Associated Firm

Monday, April 1, 2013

Personal Data Protection Commission

**By email**

pdpc\_consultation@pdpc.gov.sg

Dear Sirs

**Public Consultation on Proposed Advisory Guidelines on Key Concepts and Selected Topics in the Personal Data Protection Act**

We refer to the public consultation paper on the proposed Advisory Guidelines on Key Concepts ("**Key Concepts Guidelines**") and proposed Advisory Guidelines on Selected Topics ("**Selected Topics Guidelines**") in the *Personal Data Protection Act* ("**PDPA**"), issued by the Personal Data Protection Commission ("**PDPC**") on 5 February 2013.

We have been keenly following the development of the PDPA and we are pleased to set out under cover of this letter our comments on the Proposed Regulations.

We thank you for giving us the opportunity to provide feedback on the Proposed Regulations and we hope that our input would prove useful.

This submission is made on behalf of Baker & McKenzie.Wong & Leow. If you require any clarification, please do not hesitate to contact the undersigned.

Yours faithfully

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## 1. SUMMARY OF MAJOR POINTS

### 1.1 In the next section, we have set out our comments on the following areas of the Key Concepts Guidelines and the Selected Topics Guidelines:

#### Key Concepts Guidelines

- (a) We wonder if the application of the exclusion for "business contact information" should be based on the circumstances under which the business contact information was provided by the individual.
- (b) We are of the view that the PDPC's default position that a failure to opt-out will only constitute valid consent in limited circumstances may lead to practical difficulties when organisations seek to enforce their website terms of use or privacy policy against users.
- (c) We would recommend that the PDPC considers whether conflicts between the PDPA and data protection legislation in other countries should be specifically addressed, since the PDPA potentially has extra-territorial application.
- (d) It is not clear why the reference to the word "use" in section 19 of the PDPA should in this context exclude collection and disclosure. Further, we propose that it should be mandatory for organisations to set out in a written form the "reasonable existing uses" for personal data collected before the appointed day.
- (e) While we are supportive of the exclusion of calls from recruiters and headhunters from the scope of "specified messages", we suggest that the PDPC may wish to consider setting this out explicitly in the Key Concepts Guidelines.
- (f) We note that there is some uncertainty as to whether consent obtained before the prescribed date needs to be "clear and unambiguous", and would urge the PDPC to make this clear.

#### Selected Topics Guidelines

- (g) The Selected Topics Guidelines confirm that prospective employers may obtain references from the candidate's former employers or managers without the need for consent. However, we note that it is unclear if the former employers or employers need specific consent before they are allowed to disclose the candidate's personal data pursuant to such a request, and we would suggest that this should be clarified.
- (h) Paragraph 5.22 of the Selected Topics Guidelines deals with a situation where the collection of employee personal data by an employer is necessary for an evaluative purpose, but is also reasonable for the purpose of managing or terminating the employment relationship. We are of the view that in such situations of overlap, there should be no strict necessity on the part of the employer to notify the employee where the employer is able to rely on the evaluative purpose exemption.

## 2. COMMENTS

### Exclusion of business contact information

- 2.1 We note that the Key Concepts Guidelines clarify that the applicability of the exclusion for business contact information in section 4(5) of the PDPA depends on the purpose for which such business contact information was provided by the individual. While we appreciate that there is some attractiveness in such an approach, we are concerned that this may render the exclusion difficult to administer in practice. Taking the illustration found at paragraph 5.20 of the Key Concepts Guidelines as an example, what would the position be if the seminar that Sharon is attending is not strictly "corporate" in nature, but pertains to professional as well as personal development (e.g. coaching on presentation skills)? Would the seminar organiser need to keep track of the job scope of attendees in order to determine whether the exclusion applies, since the topic of the seminar may be business-related for some but not others (e.g. for seminars on photography, would the exclusion apply to professional photographers only, or should it also extend to freelance, part-time photographers)? Further, how should an organisation treat the business contact information of an individual that it obtained from two different sources, who collected the business contact information under different circumstances?
- 2.2 We submit that it may be neater for the business contact information exclusion to apply regardless of the context under which it was provided by the individual. Individuals should be circumspect in respect of the provision of their business contact information, whether such information is provided for a business or personal purpose. However, even if the exclusion applies in respect of business contact information that the individual provided in a personal context, the impact should not too onerous on the individual concerned. The caveat found in the definition of "business contact information" in the PDPA would be more pertinent in the context of a piece of information that an individual uses both for business as well as personal purposes. Thus, for example, if an individual provides a client of his/her company with his/her personal email address or mobile telephone number, the business contact information exclusion should apply, but if the individual provides the same information solely for a personal purpose, then the exclusion should not be applicable.

### Failure to opt-out generally not valid consent

- 2.3 According to paragraph 11.7 of the Key Concepts Guidelines, the PDPC's default position is that an individual's failure to opt-out would not constitute valid consent. It would therefore appear that individuals must generally take an affirmative action in order for consent to the collection, use and disclosure of their personal data to be imputed, consistent with the concept of "deemed consent" under section 15 of the PDPA. However, as we mentioned in our earlier response to the public consultation on the draft bill issued by the then-Ministry of Information, Communications and the Arts on 19 March 2012, deemed consent under the PDPA is merely one form of implied consent. We believe that it is not the PDPC's intention to disallow the use of implied consent, particularly consent implied through the conduct of the individual concerned (which may be an action or inaction on the part of the individual), and would suggest that this should be clarified in the Key Concepts Guidelines.
- 2.4 Such clarification would be particularly important for operators of websites that collect personal data from users passively (e.g. through the use of cookies or web beacons). The collection, use and disclosure of such personal data is typically regulated through the privacy policy of the relevant website, which would generally describe the information-gathering practices of the

website and the purposes for which such information may be processed. In most cases, the user's acceptance of such privacy policy is implied by the mere fact that the user continues to visit or use the website after being notified of the privacy policy. We assume, based on the clarification set out in paragraph 11.20 of the Key Concepts Guidelines, that in such a scenario the user would still be deemed to have consented to the collection, use and disclosure of his/her personal data, by virtue of having taken some action (i.e. visiting or using the website) allowing the data to be collected.

- 2.5 If the operator of the website subsequently wishes to change the terms of the privacy policy (e.g. to provide for a new form of processing not envisaged under the original privacy policy), and the operator notifies users that they should stop visiting or using the website from the date that the revised privacy policy takes effect if they disagree with the terms of the revised privacy policy, would users be similarly deemed to have consented to the revised privacy policy if they visit or use the website after the appointed date, or would there be no valid consent to the revised privacy policy since the users have merely failed to opt out? We are of the view that it is important that the above issues are specifically addressed in the Key Concepts Guidelines.
- 2.6 We note that footnote 6 of the Key Concepts Guidelines alludes to some of these issues, but does not provide substantive guidance to organisations relying on online privacy policies. Paragraphs 13.16 to 13.18 of the Key Concepts Guidelines are also relevant, but do not specifically address whether the use of an online privacy policy would be sufficient for the purposes of obtaining valid consent. Further, would an organisation be taken to have provided the individual with a reasonable opportunity to view its privacy policy before collection of personal data if the privacy policy has been posted on its website?

#### Compliance with "other written laws"

- 2.7 Section 4(6)(b) of the PDPA provides that the provisions of any "other written law" shall prevail over the provisions in the PDPA in the event of inconsistency. As pointed out in paragraph 22.1 of the Key Concepts Guidelines, the definition of "other written law" in the *Interpretation Act* limits the term to local legislation, subsidiary legislation, regulations etc. We are of the view that it would be useful if the PDPC provided guidance regarding conflicts between the PDPA and data protection legislation in other countries, particularly since the PDPA may potentially have extra-territorial application.
- 2.8 We note that the requirement for a "Singapore link" has been deleted in the final form of the PDPA, and there is strictly speaking no express requirement for a nexus to Singapore before the PDPA applies based on the current drafting of the Act. The PDPC has stated that the PDPA will apply to foreign organisations who collect, use or disclose personal data in Singapore<sup>1</sup>. While we agree with the policy position taken by the PDPC (with the qualifier that more guidance should be provided on what constitutes collection, use or disclosure within Singapore), we suggest that the PDPC should specifically address situations of conflict between the PDPA and data protection legislation in other countries (e.g. the home country of a foreign organisation subject to the PDPA). We note that a number of data protection legislation in other countries (e.g. Australia and New Zealand) contain provisions addressing such conflicts. Typically, this would take the form of a provision providing that the requirements of a foreign law would not limit the application of the relevant data protection legislation, but any action that an organisation is required to take pursuant to such foreign law would not cause the organisation to be in breach of its obligation under the relevant data protection legislation. For example, would an overseas organisation be in breach of section 21(3) of the PDPA if it revealed the identity of an individual who has provided personal data about another individual because it was required to

<sup>1</sup> See for example paragraph 6.3 of the Key Concepts Guidelines and the FAQs on the PDPC's website.

do so pursuant to such foreign law, and the individual providing the personal data does not consent to the disclosure of his identity?

Use of personal data collected before the appointed date

- 2.9 Paragraph 23 of the Key Concepts Guidelines clarifies that section 19 of the PDPA only applies to use of personal data collected before the appointed day, and that "use" in this context excludes "collection" and "disclosure". As mentioned in our earlier submission in response to the public consultation of the draft bill, it is important for these terms to be clearly defined in the PDPA to avoid unnecessary uncertainty. The PDPC has tried to provide a bit more colour to these terms in paragraph 7 of the Key Concepts Guidelines. In this regard, paragraph 7.2(b) of the Key Concepts Guidelines provides that use of personal data '*may occasionally involve collection or disclosure that is necessarily part of the use.*' We are of the view that this is the correct position based on the common usage of the word. In view of the foregoing, we are slightly perplexed as to why the meaning of "use" in the context of section 19 of the PDPA should be restricted as proposed by the PDPC. While we agree that further collection of personal data after the appointed date should be covered by fresh consent from the individual concerned, we feel that any disclosure of personal data that is intrinsic in the existing use of personal data should be permitted without the need for such fresh consent.
- 2.10 The Key Concepts Guidelines further clarify that section 19 of the PDPA only applies to "reasonable existing uses" of personal data collected before the appointed day. While we understand that conceptually this may strike the right balance in reducing the compliance cost imposed on organisations and fulfilling the consumer protection objectives of the PDPA, it is unclear exactly how the "reasonableness" of an existing use should be determined, particularly since the requirement is not specifically reflected in the drafting of section 19.
- 2.11 We would propose that organisation should be obliged to set out such "reasonable existing uses" in a document and to make such document publicly available, so that they may be held accountable by the data subjects. Paragraph 23.4 of the Key Concepts Guidelines recommends this but does not make it compulsory. We would submit respectfully that this represents a missed opportunity in preventing organisations from stockpiling personal data before the appointed date, or from extending the use of pre-existing personal data under the guise that it is an "existing use".

Meaning of specified message

- 2.12 We note that paragraph 26.3 of the Key Concepts Guidelines clarifies that a message sent solely to promote an employment opportunity would not be regarded as a "specified message" for the purposes of the DNC registry to be established under the PDPA. While we agree with this position as a matter of policy, we would suggest that it should be explicitly stated in the Key Concepts Guidelines that this exclusion covers messages from recruiters or headhunters, since such messages could also be construed as an offer on the part of the relevant recruiter or headhunter to supply services, or an advertisement or promotion of the relevant recruiter's or headhunter's services.

Operation of DNC registry

- 2.13 Paragraph 33.1 of the Key Concepts Guidelines clarifies that organisations are not required to check the DNC registry before sending a specified message to a Singapore number if it has obtained the clear and unambiguous consent from the user or subscriber of the number. Such clarification is welcomed given the ambiguity in the drafting of section 43 of the PDPA, as alluded to in our earlier submission in response to the public consultation on the draft bill.

- 2.14 However, we are of the view that one point of ambiguity remains, which is whether organisations relying on consent given before the prescribed date (i.e. pursuant to section 47(4) of the PDPA) need to ensure that such consent satisfies the same requirements as consent obtained after the prescribed day. In other words, does consent obtained before the prescribed date need to be clear and unambiguous and evidenced in written or other form so as to be accessible for subsequent reference? Would an organisation who imposed such consent as a condition for the provision of its goods and services to the individual before the prescribed date have to obtain fresh consent?

Provision of references for ex-employees

- 2.15 Paragraph 5.4 of the Selected Topics Guidelines provides that an organisation may obtain references on a prospective candidate for employment from his/her ex-employers without the consent of the candidate, if collection of such personal data is necessary for the organisation to evaluate the candidate. This is not controversial, since it is a straight-forward application of the evaluative purpose exemption.
- 2.16 We would urge the PDPC to provide more guidance on whether the ex-employer in such a scenario is allowed to disclose the information to the organisation that is the prospective employer pursuant to its request. For example, in most cases the referee(s) would be appointed by the candidate in his/her application for the new position. It would therefore be possible to argue that the candidate should be deemed to have consented to the ex-employer providing the relevant references to the prospective employer, even if this is not covered by an existing consent arising out of the employment relationship between the candidate and the ex-employer. On the other hand, if the candidate did not specify that the prospective employer may contact the ex-employer, should the ex-employer withhold the relevant information unless separate consent is obtained from the candidate (assuming again that this is not covered by an existing consent from the candidate)?

Exclusion for managing or terminating an employment relationship

- 2.17 Paragraph 5.22 of the Selected Topics Guidelines acknowledges that there may be overlaps when collection of personal data is necessary for an evaluative purpose and for the purpose of managing or terminating a relationship. The potential for an overlap is very real, especially since purposes associated with "managing" an employment relationship can be read very broadly, and would likely include evaluations for promotion or termination. In this regard, paragraph 5.22 states that where such overlaps occur, the organisation would not need to obtain consent from the employee, but would be required to notify the employee regarding the collection of personal data pursuant to section 20(4) of the PDPA.
- 2.18 We would humbly suggest that the position taken by the PDPC in this regard is conceptually odd, since the wider exemption should apply (in which case there should be no requirement for notification). The notification that is required under section 20(4) of the PDPA is likely to be in place in any event, if the employer wishes to rely on the exemption for managing or terminating an employment relationship. However, such notification is not likely to exhaustively set out all possible forms of personal data that the employer would collect for such purposes. If the employer is evaluating an employee for promotion and wishes to collect personal data that is not specifically covered in the notice that has been provided to its employees, does paragraph 5.22 of the Selected Topics Guidelines imply that the employer has to amend the notice before proceeding with such collection, notwithstanding that such collection would also be covered under the evaluative purpose exemption?

**3. CONCLUSION**

- 3.1 We hope that the above comments would prove useful to the PDPC in undertaking further review of the Proposed Regulations.
- 3.2 Please note that while the above comments are submitted by the author on behalf of the firm, they do not reflect the position adopted by any of the firm's clients. Responsibility for any error in this submission remains with the author.