



1 April 2013

BY EMAIL ONLY

THE PERSONAL DATA PROTECTION COMMISSION
Email:pdpc_consultation@pdpc.com.sg

Dear Sirs

PUBLIC CONSULTATION ON PROPOSED REGULATIONS AND ADVISORY GUIDELINES ON KEY CONCEPTS AND SELECTED TOPICS IN THE PDPA

Please find enclosed a submission from BSA | The Software Alliance (“BSA”)¹ in relation to Singapore’s proposed advisory regulations and advisory guidelines in the Personal Data Protection Act 2012 (“PDPA”).

BSA supports the establishment of the of the Personal Data Protection Commission and its efforts to engage stakeholders to obtain feedback on the proposed guidelines and advisory regulations in Singapore. The BSA believes that the protection of privacy is essential to fostering trust and confidence between consumers and businesses.

BSA appreciates the opportunity to be heard as part of this public consultation. In this submission, we provide our specific observations and suggestions on the proposed regulations and advisory guidelines in order to address a number of the questions regarding the parameters of the newly enacted PDPA.

Yours sincerely,



Roger Somerville

Senior Director, Government Relations and Policy, APAC
BSA | The Software Alliance



¹ The Business Software Alliance (www.bsa.org) is the world’s foremost advocate for the software industry, working in 80 countries to expand software markets and create conditions for innovation and growth. Governments and industry partners look to BSA for thoughtful approaches to key policy and legal issues, recognizing that software plays a critical role in driving economic and social progress in all nations. BSA’s member companies invest billions of dollars a year in local economies, good jobs, and next-generation solutions that will help people around the world be more productive, connected, and secure. BSA members include Adobe, Altium, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, Cisco, CNC/Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, Intel, Intuit, Kaspersky Lab, McAfee, Microsoft, Minitab, PTC, Progress Software, Quark, Quest Software, Rosetta Stone, Siemens, Sybase, Symantec, and The MathWorks.

**BSA SUBMISSION TO PERSONAL DATA PROTECTION COMMISSION
1 APRIL 2013**

**PUBLIC CONSULTATION OF THE PROPOSED REGULATIONS AND ADVISORY GUIDELINES IN
THE PDPA**

A. SUMMARY OF MAJOR POINTS

1. Data transfers out of Singapore: Organisations should be left to determine the scope and language of the binding legal instrument used to effect transfers of personal data out of Singapore. The framework proposed in the draft Regulations is too restrictive and does not give organisations sufficient leeway to structure commercial documents to achieve compliance with the PDPA.
2. Transfers out of Singapore should exclude transfers that are unintentional or merely in transit out of Singapore. Due to dispersed network of servers and nodes of modern computer systems, data being sent from one party to another in Singapore may sometimes be routed temporarily out of Singapore. This should not constitute a “transfer” of data under the PDPA.
3. More clarity is needed on the requirements of the Data Protection officer. The Guidelines should clarify whether this individual must be employed by the organisation or alternatively, whether this person can be a non-employee of the organisation, such as an officer in a related entity. In addition, it should be recognized that such an individual need not be resident in Singapore.
4. There is insufficient clarity on the position of IP addresses under the PDPA. The use of IP addresses is critical to e-commerce, mobile computing and cloud services. It is important for the PDPC to provide clearer examples of the situations in which IP addresses would constitute personal data.
5. Where organisations monitor their employees’ use of company equipment or network, the PDPA requires organisations to expressly inform their employees of this. However, to require an organisation to expressly inform the employee in this situation would be unnecessary.

B. COMMENTS

Data Transfers Outside Singapore

6. BSA supports the need to allow organisations flexibility to determine the means to provide comparable standards of protection under the PDPA when personal data is transferred out of Singapore. We agree that the use of a “legally binding instrument that contains the appropriate safeguards in the form of contractual clauses or binding corporate rules” is appropriate (Paragraph 7.5 of the Proposed Regulations on Personal Data Protection in Singapore or “**the Proposed Regulations**”).
7. However, the Proposed Regulations also state that such a legally binding instrument “shall contain provisions that implement” obligations relating to purpose, use and disclosure, accuracy, protection, retention and policies. The content of these obligations is set out in very specific terms (see Paragraph 7.5(a)-(f) of the Proposed Regulations and in Paragraph 7.12 for Binding Corporate Rules (BCRs)).

8. BSA is of the view that the PDPC's intention to give flexibility to organisations is not well served by prescribing the content of the legally binding instrument. Organisations are already required to transfer personal data out of Singapore "in a manner consistent with their obligations under the other provisions of the PDPA (i.e. other than Section 26)." (see Paragraph 7.5 of the Proposed Regulations).
9. This obligation requires transferring organisations to ensure receiving organisations cannot treat personal data in a way that runs contrary to the PDPA.
10. Furthermore, multinational companies may find that these specific contractual requirements difficult to incorporate as they already have existing adequate contracts that deal with external data transfers.
11. Organisations will have to re-examine the language of existing and prospective contracts to ensure that they are consistent with the suggested content. This is both laborious and unnecessary. So long as transferring organisations comply with the restrictions on transfers in substance through language that best suits their commercial needs, this should be sufficient to discharge their obligations under the PDPA.
12. In the case of BCRs, organisations may already have in place BCRs that are sanctioned by EU data protection authorities. If BCRs have to be modified to accommodate the suggested content in the Proposed Regulations, organisations face increased compliance costs in obtaining approval from data authorities in certain jurisdictions that require approval, such as the E.U.
13. Specific to BCRs, the requirement in Paragraph 7.12(b) of the Proposed Regulations that BCRs have to "at least specify" the "data transfers or set of transfers...the type of individuals affected and identification of each country or territory in question" is not feasible for all organisations. In organisations performing *ad hoc* transfers or for which the need for these transfers have not yet arisen, it is unrealistic to expect them to commit such a high-degree of specificity of information.
14. The BSA also suggests that the PDPC should consider specifying that EU approved BCRs would comply with the PDPA.

Data Transfers to Exclude Personal Data in Transit

15. The BSA also seeks clarity on whether personal data *in transit* outside of Singapore, when there is no intention to *transfer* this information outside Singapore, would be considered a transfer under the PDPA.
16. For instance, if an organisation in Singapore emails another organisation in Singapore, and if the email is routed through a server in Malaysia, it would appear on first blush that if the email contains personal data, it would amount to a transfer outside Singapore under the PDPA.
17. However, BSA's preferred position is that where personal data merely passes outside Singapore in transit, then the restrictions on data transfer should not apply. This appears to be the position endorsed by the data protection authority in the UK².

²The Eighth Data Protection Principle and international data transfers, UK Information Commissioner (2006) <http://www.ico.org.uk/upload/documents/library/data_protection/detailed_specialist_guides/international_transfers_legal_guidance_100706.pdf> at 1.3

18. We would appreciate clarity from the PDPC as to whether this is also the intended position under the PDPA and what the scope of such a “transit exclusion” is. For instance, would the a so-called “transit exclusion” extend to cover a situation where - as in the above example of an email sent from Singapore to an addressee in Singapore through a Malaysian server - a copy of the email containing personal data is also stored and processed at the external server site in Malaysia.

Data Protection Officer

19. Paragraphs 19.4 and 19.5 of the Proposed Advisory Guidelines on Key Concepts in the Personal Data Protection Act (“**the Guidelines**”) discuss Section 11 of the PDPA, which requires organisations to designate “one or more individuals to be responsible for ensuring that the organisation complies with the Act.” (Section 11(3) of the PDPA). This individual can delegate to another individual the responsibility conferred by that designation (Section 11(4)).
20. The Guidelines should recognize that organisations may wish to choose to designate or delegate an individual based outside Singapore to deal with privacy complaints.
21. Ideally, there should be enough flexibility to allow both the designated and delegated individual to be from the organisation’s parent companies or regional headquarters, such as a group compliance officer or an Asia-wide privacy manager. This ensures companies will not have to provide resources to designate or delegate an individual in Singapore to discharge its obligations under the Act and allows them to save on compliance costs, if they already have an existing data protection officer for group or related entities.
22. Even though this individual may be overseas, safeguards can be put in place to ensure the individual is readily contactable by individuals in Singapore. This would deal with the concerns of Section 19.7 of the Guidelines, which recommends as a best practice that “business contact information of the relevant person should be readily accessible from Singapore, operational during Singapore business hours and in the case of telephone numbers, be Singapore telephone numbers”.
23. The Guidelines should clarify whether designated individuals, as opposed to delegated individuals, must be employees of the organisation to whom the PDPA applies. At the very least, the Guidelines should confirm that delegation to non-employees be allowed, so that compliance with the PDPA may be outsourced to a regional officer.

IP Addresses

24. The BSA welcomes clear guidelines on when IP addresses become personal information, in addition to what is provided in the draft Guidelines at Paragraph 7.1-7.4. We would appreciate clear examples of situations that would or would not cause an IP address to be considered personal data. The example of a computer used by several individuals (Paragraph 7.2 of the proposed Guidelines) is a useful starting point, but more examples relevant to e-commerce, mobile data and cloud computing would be useful for the industry.
25. From a policy perspective, providing guidance to the effect that an IP address is a relatively uncontroversial piece of information would greatly reduce the compliance burden of online data analytics businesses, e-commerce businesses, software companies, many of whom provide services which involve the collection of IP addresses. If the PDPC signals that an IP address is a relatively benign piece of information except when it is in the hands of specific organisations such as ISPs, it

would save other organisations from having to deal with IP addresses in their organisation as a potential concern under the PDPA and ultimately reduce costs in complying with the PDPA.

Monitoring of Employees

26. Paragraph 5.19 of the Guidelines provides that, where organisations monitor their employees' use of company equipment or network, the PDPA requires organisations to inform their employees of the purposes of such collection, use and disclosure, even though their consent is not required.
27. BSA believes that it may be impractical to require an organisation to expressly inform the employee and suggests that there would be no need to inform the employee if the purpose is fairly obvious.

C. CONCLUSION

28. While the proposed Guidelines and Regulations provide some clarity on the operation of specific provisions of the recently enacted PDPA, they do not address some questions which would enable companies to implement the law effectively. The PDPA's great potential in advancing Singapore's economic interests should be balanced against the compliance costs for businesses and the need for certainty and clarity in the obligations.
29. BSA would again like to thank the PDPC for the opportunity to be heard on these very important issues surrounding the proposed framework. BSA and its members look forward to working closely with the PDPC on opportunities to further exchange their views expressed in this submission.