
**RESPONSE TO THE PERSONAL DATA PROTECTION COMMISSION'S
CONSULTATION PAPER ON PROPOSED ADVISORY GUIDELINES ON THE
APPLICATION OF THE PERSONAL DATA PROTECTION ACT TO SCENARIOS
FACED IN THE REAL ESTATE AGENCY SECTOR**



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1. SUMMARY OF MAJOR POINTS

1.1. Thank you for the opportunity to comment on the Consultation Paper on the Proposed Advisory Guidelines on the Application of the Personal Data Protection Act to Scenarios Faced in the Real Estate Agency and Telecommunication Sectors.

1.2. Our comments on the Proposed Advisory Guidelines on the Application of the Personal Data Protection Act to Scenarios Faced in the Real Estate Agency Sector ("**Proposed Real Estate Advisory Guidelines**") are summarised as follows:

- (a) We suggest that salespersons of estate agents should not be regarded as data intermediaries. Their roles and functions as independent contractors would run counter to their obligations as data intermediaries, and estate agents would be unduly exposed to liability in this regard.
- (b) We suggest that the guidelines may need to be clarified as to the extent of due diligence expected of organisations in respect of "publicly available information" in order to comply with the Personal Data Protection Act ("**PDPA**").
- (c) With regards to the examples provided of websites of estate agents referring to salespersons, it is suggested that in these circumstances what is personal data and what is business contact information overlaps so closely that it is not possible to draw a distinction.
- (d) Insofar as a salesperson is an employee of an estate agent, we would also ask that the examples clarify the position of the Personal Data Protection Commission ("**PDPC**") in relation to reliance on the section 20(4) exception, i.e., employee consent not being needed to "manage or terminate" an employment relationship.
- (e) It is a common business practice for salespersons in the real estate sector, and independent brokers in other industry sectors, to discuss and provide alternatives and options to their clients. On the ground, the relationship between salespersons and their customers is often fluid and the examples of "specified messages" that breach the Do-Not-Call ("**DNC**") provisions are unduly restrictive and would hamper the carrying on of business.
- (f) The PDPC appears to have taken a strict view of obtaining clear and unambiguous consent from individuals at property launches. The PDPC should reconsider this position. It is suggested that other methods of obtaining clear and unambiguous consent from individuals may also be suitable.

2. POSSIBLE CHARACTERISATION OF SALESPERSONS AS DATA INTERMEDIARIES

2.1. Paragraphs 4.4 and 4.5 of the Proposed Real Estate Advisory Guidelines discuss the role played by salespersons of estate agents. Paragraph 4.4 notes that salespersons may be considered separate organisations from estate agents. Paragraph 4.5 then discusses the obligations of data intermediaries under the PDPA. This suggests that the PDPC may, depending on the factual circumstances, regard salespersons of estate agents as data intermediaries.

2.2. We note that section 4(3) of the PDPA states:

"An organisation shall have the same obligation under this Act in respect of personal data processed on its behalf and for its purposes by a data intermediary as if the personal data were processed by the organisation itself."

Accordingly, should salespersons be regarded as data intermediaries, any failure to discharge their PDPA obligations set out in sections 24 (Protection of personal data) and 25 (Retention of personal data) will also render the principal organisation represented by these salespersons liable for non-compliance.

2.3. It is suggested, however, that salespersons are not, in the carrying on of their business as property agents, dealing with data in the same way as a data intermediary to whom an organisation has outsourced its data processing functions. It is not clear to what extent a salesperson can be expected to be responsible for "making reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks" on the estate agent's behalf given that they are also carrying on a business as independent contractors using the same data in their own right. In addition, to what extent does the salesperson remain responsible for ensuring proper protection and retention of an estate agent's customer data when he moves to another estate agent in respect of customer data that is both his own property and that of the first estate agent?

2.4. We would therefore urge caution in arriving at any such conclusion as there are many other sectors that rely on independent brokers. The brokers in such sectors would, in principle, then be regarded as data intermediaries as well. We would also request clarification from the PDPC on the circumstances which may render salespersons data intermediaries given the issues of liability that are attendant on this issue.

3. **INTERACTION BETWEEN PERSONAL DATA AND PUBLICLY AVAILABLE DATA**

3.1. The PDPC emphasises that generic information that does not relate to a particular individual may also form part of his personal data when combined with other personal data or publicly available data to enable that individual to be identified. The second example in section 3 (Personal data) of the Proposed Real Estate Advisory Guidelines notes the challenges posed when anonymised data may be combined with information in the public domain to identify individuals.

3.2. In the context of the real estate industry, the status of salespersons as independent contractors and not employees may pose difficulties for estate agents when providing salespersons with apparently anonymised information on recent transactions as they may be in possession of information that, when combined with the anonymised information, allow them to ascertain the identity of the individuals involved. Moreover, it would be very difficult to ascertain in advance of that disclosure what information each salesperson may be privy to in order to suitably eliminate the risk of inadvertent identification and breach.

3.3. We therefore suggest that the guidelines may need to be clarified as to the extent of due diligence expected of organisations in respect of "publicly available information" in order to comply with the PDPA, and in particular, the particular types of publicly available data they should pay more attention to.

4. **PUBLISHING PERSONAL DATA OF SALESPERSONS**

4.1. Section 4 of the Proposed Real Estate Advisory Guidelines provides two examples of the personal data of real estate salespersons:

4.2. The first example states:

"Estate agent ABC would like to publish the names and photographs of its 'Top 100 salespersons' on its website. The names and photographs of these individuals will be personal data of the individuals concerned. ABC should obtain the consent of these individuals to disclose their personal data for the purpose of publicising their achievements."

4.3. The second example states:

"A prospective buyer enquires about a property listed on ABC's website. ABC provides the buyer with the contact details of its salesperson, Jack, for the buyer to enquire about the listing. Since the contact information of Jack is considered business contact information, ABC does not require Jack's consent to disclose his business contact information to the prospective buyer."

4.4. It is very often the case, however, that websites do not provide discrete pages of information unlinked from each other. The website of ABC setting out the contact details of its salesperson Jack, will often also state that Jack is a Top 100 salesperson (and include his name and/or photograph, with a link to his contact particulars). In view of the manner in which websites tend to be laid out, it may be difficult and impractical for estate agents to distinguish between information that is business contact information and information that is personal data in those circumstances.

4.5. Insofar as a salesperson is an employee of an estate agent, we would also ask that the PDPC clarify its position in relation to reliance on the section 20(4) exception, i.e., employee consent not being needed to "manage or terminate" an employment relationship, and the scope and extent of the section 20(4) exception.

5. **DNC PROVISIONS – MEANING OF "SPECIFIED MESSAGES"**

5.1. In relation to the DNC provisions, the Proposed Real Estate Advisory Guidelines appear to have taken a very strict view of introducing other related offerings in the course of a call or other phone contact, and we would suggest that there would be practical difficulties in enforcing this position.

5.2. For example, the Proposed Real Estate Advisory Guidelines provide at example 5.3(d) that where "Jack, a salesperson, recalls his old contact list and calls Tom, who enquired about another property that Jack was marketing previously, to ask if he would be interested to buy the property. Here, Jack is sending a specified message to Tom and the DNC provisions apply."

5.3. In another example, 5.9(a), "Sarah sends a message to enquire about a property marketed by a salesperson, Jack. Jack responds to the enquiry with more details about the property. In

this case, while Jack can respond to Sarah’s query, he cannot rely on the Exemption Order to send specified messages to Sarah’s telephone number as her enquiry is a one-off interaction.”

- 5.4. These examples do not seem to take into account the role of the salesperson in recommending alternatives, even in response to a query. There could be implications in other industries such as financial advisors or stock brokers discussing options and recommendations. It might be difficult to respond to a client’s queries without inevitably making statements that may be characterised as an offer for goods and services. This is especially so if the client’s queries are directed at property types and prices, or if in the course of their reply, salespersons are expected to introduce properties, which are available on the market.
- 5.5. As such, further examples may be needed to clarify the issue and to recognise the business reality that customers may seek alternatives and salespersons would be expected to respond to these customer requests. In this regard, bearing in mind that the interactions between a customer and an agent proactively seeking to provide a high level of customer service are inevitably going to be somewhat fluid, we would urge the PDPC to allow for greater flexibility, especially at this early stage of implementation, as a strict approach may cast a chill on businesses seeking to avoid inadvertently breaching the PDPA.

6. **DNC PROVISIONS – OBTAINING THE CLEAR AND UNAMBIGUOUS CONSENT OF INDIVIDUALS AT PROPERTY LAUNCHES**

- 6.1. The PDPC has provided a number of examples in the Proposed Real Estate Advisory Guidelines to illustrate what would constitute the obtaining of clear and unambiguous consent from individuals in the context of property launches. These examples suggest that the PDPC is taking a very strict view on the manner in which the clear and unambiguous consent is to be obtained from the individuals.
- 6.2. Paragraph 5.5 provides that where the guestbook at the showroom clearly indicates for **every individual** to “tick here if [they] wish to be contacted by phone or SMS for this development and other new launches by ABC Development Pte Ltd”, clear and unambiguous consent would have been obtained from those individuals if they then tick the checkbox.
- 6.3. It should not be necessary to do so as the individual, in voluntarily providing his contact details via the guestbook, has taken a positive step which should satisfy the requirements for clear and unambiguous consent. The PDPC should consider if there is a strict necessity for every individual to check a box indicating their consent, or if alternative methods of obtaining clear and unambiguous consent would also be acceptable, and to provide further examples of the same.

7. **CONCLUSION**

The implementation of the PDPA is still in its nascent stage. It will take businesses some time to adjust and adapt their practices. In addition, it is also necessary to ensure that in doing so, they are not unduly hampered or restricted in carrying on what would be regarded by both customers and industry participants as normal and beneficial to both sides. It is suggested that at this stage, a more flexible and open approach be taken in order to see where the issues and limits lie. In this regard, it is suggested that the better approach is for the PDPC to

be slow to restrict practices if there are currently no clear and compelling complaints with regards to them.

WongPartnership LLP
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