

**Response to the Personal Data Protection Commission’s public consultation paper on
“Approaches to Managing Personal Data in the Digital Economy”**

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CONTENTS

I. Comments	2
A. Preface.....	2
B. Proposal 1: “Notification of purpose” approach	2
1. The proposal stated.....	2
2. Comment: Individuals should be provided with a reasonable opportunity to opt out..	3
3. Suggestion for implementation.....	3
C. Proposal 2: “Legal or business purpose” approach.....	4
1. The proposal stated.....	4
2. Comment: Organisations should be accountable for their collection, use and disclosure of personal data.....	5
3. Suggestion for implementation.....	5
II. Conclusion	6

I. COMMENTS

A. Preface

The author would like to thank the Personal Data Protection Commission (“**PDPC**”) for this opportunity to comment on the public consultation paper on “Approaches to Managing Personal Data in the Digital Economy”.

In general, the author would like to express his support for the changes proposed in Part II and Part III of the public consultation paper. They are timely adaptations to the growth of the digital economy, which creates both opportunities and challenges pertaining to personal data.

This Response will focus on the proposed changes to the consent requirement in the Personal Data Protection Act 2012 (“**PDPA**”), as discussed in Part II of the public consultation paper. This Response will offer comments on each proposal, as well as suggestions on how each proposal may be implemented within the PDPA’s statutory framework.

B. Proposal 1: “Notification of purpose” approach

1. The proposal stated

The public consultation paper proposes to add an additional basis for the collection, use and disclosure of personal data, viz. “notification of purpose”.

Specifically, the public consultation paper proposes that organisations may collect, use or disclose the personal data of individuals upon:

- (i) the provision of appropriate notification to the individual; and
- (ii) the conduct of a risk and impact assessment,

subject to the conditions that

- (i) it is impractical for the organisation to obtain consent; and
- (ii) the collection, use or disclosure of personal data is not expected to have any adverse impact on the individuals.

2. *Comment: Individuals should be provided with a reasonable opportunity to opt out*

The author submits that organisations seeking to rely on “notification of purpose” should provide individuals with a reasonable opportunity to opt out.

As stated in paragraph 3.9 of the public consultation paper, notification is “a way of ensuring that individuals retain some measure of control over their personal data”. This control may be more illusory than real if notification is not coupled with the opportunity to opt out.

Individuals may have serious personal reasons for needing to opt out of the collection, use and disclosure of their personal data; the lack of that option could result in harm to those individuals. From a systemic perspective, if organisations are perceived as having the freedom to disregard the needs or preferences of individuals as to their personal data, then trust and confidence in organisations and the data protection regime may be eroded.

Minimal (if any) burden would be imposed by a requirement to provide a reasonable opportunity to opt out. Organisations relying on “notification of purpose” to collect, use or disclose personal data are, in any case, obliged to notify the individuals concerned about the purpose of the collection, use or disclosure. Little additional expenditure is incurred in also providing information about how the individuals may opt out of the collection, use or disclosure. It is then up to the individual to opt out accordingly, should they choose to do so.

Therefore, it is the view of the author that the proposed “notification of purpose” approach should be subject to the condition that the individuals concerned be given a reasonable opportunity to opt out.¹

3. *Suggestion for implementation*

It is suggested that the “notification of purpose” approach may be implemented through a revision of PDPC’s advisory guidelines.

¹ See s 8(3)(a), (b) and (c) of the Personal Information Protection Act of British Columbia, for what a providing a reasonable opportunity to opt out may entail.

In particular, paragraphs 12.10 to 12.12² of the Advisory Guidelines on Key Concepts in the PDPA (“**Key Concepts Guidelines**”) may be revised to incorporate the “notification of purpose” approach, by defining a set of conditions under which PDPC will consider ‘opt out consent’ to be valid consent. These conditions could include those suggested in the public consultation paper (e.g. the collection, use or disclosure of personal data is not expected to have any adverse impact on the individuals).

Several advantages may be suggested in favour of this mode of implementation. It:

- (i) fits neatly into the existing statutory framework, thus minimising disruption to the data protection regime;
- (ii) does not require legislative amendment, thus minimising the administrative burden of reform; and
- (iii) maximises flexibility for future adjustment of the “notification of purpose” approach, should the need to do so arise.

This would make the “notification of purpose” approach less of a *deviation* from the consent requirement than an *adaptation* of the consent requirement for the digital economy.

C. Proposal 2: “Legal or business purpose” approach

1. The proposal stated

The public consultation paper proposes to add another additional basis for the collection, use and disclosure of personal data, viz. “legal or business purpose”.

Specifically, the public consultation paper proposes that organisations may collect, use or disclose personal data where it is necessary for a legal or business purpose, subject to the conditions that:

- (i) it is not desirable or appropriate to obtain consent from the individuals for the purpose; and
- (ii) the benefits to the public (or a section thereof) clearly outweigh any adverse impact or risks to the individual.

² Paragraphs 12.10 to 12.12 of the Key Concepts Guidelines sets out the PDPC’s approach to obtaining consent by the “opt out avenue”.

Organisations relying on the “legal or business purpose” approach must undertake measures to minimise the risks to individuals arising from the collection, use or disclosure, and must conduct a risk and impact assessment.

2. *Comment: Organisations should be accountable for their collection, use and disclosure of personal data*

It is recognised that there may be certain circumstances where organisations need to collect, use or disclose personal data without consent or notification. The “legal or business purpose” approach addresses these special circumstances by relieving organisations of the requirement to obtain consent or provide notification.

One possible concern that might arise, as an unintended consequence, is that of a potential accountability gap. This accountability gap arises when organisations need not account to any other person for their collection, use and disclosure of personal data pursuant to the “legal or business purpose” approach. Such an accountability gap would detract from our pivoting from compliance to accountability.

Without an element of accountability in the “legal or business purpose” approach, the “legal or business purpose” approach may be exposed to misuse. For example, an organisation may rely on the “legal or business purpose” approach without having conducted an adequate risk and impact assessment, or may rely on the “legal or business purpose” approach even in circumstances where obtaining consent is perfectly appropriate; these misuses cannot be policed unless organisations are accountable about the way in which they apply the “legal or business purpose” approach. This potential for misuse may damage trust in organisations and the data protection regime.

The author is of the view that accountability may be built into the “legal or business purpose” approach by its mode of implementation, as suggested below.

3. *Suggestion for implementation*

It is noted that in paragraphs 3.13 to 3.20 of its Guide to Data Sharing, PDPC has set out a framework for obtaining exemptions (pursuant to s 62 of the PDPA) for data sharing arrangements.

The author is of the view that the “legal or business purpose” approach may be implemented through an extension of this framework to encompass the collection, use or

disclosure of personal data for other legal or business purposes; this may perhaps be done through the issuance of advisory guidelines on applications for exemptions.

This bridges the abovementioned accountability gap. Organisations relying on the “legal or business purpose” approach may not be able to account to individuals for the collection, use or disclosure of their personal data, but they may account to PDPC in applying for an exemption, which serves as a check against potential misuse of the “legal or business purpose” approach.

The advantages accruing to the suggested mode of implementation of the “notification of purpose” approach may, *mutatis mutandis*, be said to apply to this suggested mode of implementation of the “legal or business purpose” approach.³

II. CONCLUSION

PDPC has taken a progressive approach towards the management of personal data in the digital economy; such an approach is commendable and, indeed, necessary in light of developments in technology and the economy. It is hoped that the comments and suggestions in this Response will be of some assistance to PDPC in its efforts.

The author is grateful for the opportunity to participate in this public consultation.

³ See Part I.B.3., above.