

**RESPONSE TO THE PUBLIC CONSULTATION ON  
THE PROPOSED ADVISORY GUIDELINES ON  
KEY CONCEPTS IN THE  
PERSONAL DATA PROTECTION ACT**



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## SUMMARY

1. We suggest that a broader range of acceptable practices be given to provide greater clarity to organisations. [Paragraphs 1.1 to 1.3]
2. For the obtaining of consent for the collection, use, or disclosure of personal data about an individual, it is suggested that a wider range of examples of when opt-outs might be regarded as deemed consent be provided. [Paragraphs 2.1 to 2.3]
3. The examples of when a space (online or physical) is to be regarded as open to the public should be amended. [Paragraphs 2.4 to 2.6]
4. Further guidance on the application of the exceptions to access and correction is needed to assist organisations determine if they fall within their ambit. [Paragraphs 3.1 to 3.5]
5. The examples of sending a greeting card and sending a newsletter for the requirement of determining whether use of personal data is for a similar purpose appear to be at odds with each other, and we suggest amending them. [Paragraphs 4.1 to 4.3]
6. We request additional examples to deal with the application of the exceptions in the Second, Third, and Fourth Schedules. [Paragraphs 4.4 and 4.5]
7. We request further guidance on the obligations of the data protection officer. [Paragraph 5]

## COMMENTS

### 1. GENERAL

- 1.1. As a general comment, we would suggest that the Advisory Guidelines on Key Concepts ("**Advisory Guidelines**") in the Personal Data Protection Act ("**PDPA**") provide a wider range of examples of practices that the Personal Data Protection Commission ("**PDPC**") would consider as complying with the requirements of the PDPA. Many of the best practices and examples currently provided set a standard that represents an ideal that may not be practicable in all circumstances, or for all organisations.
- 1.2. The tests set out in the PDPA are necessarily not bright-line tests that may easily be applied in all situations. However, for organisations seeking to ensure compliance with their obligations under the PDPA, this translates into a lack of clarity as to what practices are acceptable. In addition, a failure to comply with certain requirements of the PDPA would amount to a criminal offence. This further raises compliance concerns for organisations as they do not wish to inadvertently flout the law, but remain unsure as to what the standards of acceptable practice are.
- 1.3. As organisations are new to the requirements of the PDPA, a sense of acceptable business practices for compliance has yet to develop. The best practices and examples provided in the Advisory Guidelines set a very high bar and refer to specific situations. We would request that the PDPC perhaps clarify that the best practices and examples set out in the Advisory Guidelines do not preclude the use or acceptability of other commercial and marketing practices adopted by businesses. A broader range of examples in the Advisory Guidelines would also assist organisations to develop a better sense of the range of practices available to them, and would better help to assuage business concerns.

### 2. OBTAINING CONSENT

#### Opting-In / Opting-Out

- 2.1. The PDPA requires the provision of consent for the collection, use, or disclosure of personal data about an individual. Paragraph 11.5 of the Draft Advisory Guidelines provides the following best practice for obtaining consent: "an organisation should obtain consent that is in writing or recorded in a manner that is accessible for future reference, for example, if the organisation is required to prove that it had obtained consent."
- 2.2. Paragraph 11.7 further provides that an individual's failure to opt-out would not constitute consent. This wording suggests a hard and fast rule. However, whether consent has been given is a question of fact to be determined taking into account all the facts and a failure to opt-out other than in the example described in paragraph 11.7 may not be determinative of a lack of consent. For example, where customers are provided with and are aware of easily available and clear processes for opting-out and yet do not choose to exercise these processes, we suggest that consent may reasonably be inferred in these circumstances. We suggest that the best practice specified limits organisations to a very narrow set of options for obtaining consent. Instead, we would ask that a wider range of marketing methods and techniques be included.

- 2.3. We note that other jurisdictions, such as Ireland, permit soft opt-ins in certain specified circumstances. This approach is neither exceptional nor unusual as it is the basis for the Do Not Call regime, as well as the Spam Control Act. It is suggested that the PDPC consider setting out a wider range of examples and guidelines of situations where opt-outs may be regarded as acceptable.

### **Publicly Available Data**

- 2.4. Paragraphs 11.44 to 11.51 discuss what constitutes publicly available data, and in particular, when something is "open to the public". It is suggested that the examples given of what situations are likely to be considered to be "open to the public" may appear unduly restrictive, and the circumstances described might reasonably be regarded by many businesses and individuals as in fact being "open to the public". By suggesting otherwise, the examples appear to set standards of practice that will be difficult for organisations to adopt.
- 2.5. The example of the online group at paragraph 11.46 could be widened to take into account the fact that online groups and fora and participation in the same are in a constant state of change. A person joining as a member of an online group may from year to year or even day to day adopt different privacy settings. Data that was set as public in one year may be changed to private the next with no notification to anyone. It would not be possible for an organisation that had obtained data in one year to ensure that the settings had not changed, or to prove after the fact that it had obtained the data in that earlier period unless it was the actual entity managing the platform. A wider range of examples would help to make this clear.
- 2.6. The example, at paragraph 11.51, of a person in a room with clear glass windows through which he can see that he can be observed by other persons outside the room is similarly restrictive. It is suggested that such a person might reasonably infer that he was not in a private setting. It is further suggested that a reasonable person that wanted to ensure privacy would take additional steps to ensure this, for example, by using curtains. It is suggested that the example be amended accordingly.

### **3. THE ACCESS / CORRECTION OBLIGATION**

- 3.1. Paragraph 14 deals with the rights of individuals to request for access and for correction of their personal data. It is suggested that the current examples provided be expanded to include a wider range of examples of what requests would likely to be considered by the PDPC as acceptable and what requests would not be so considered.
- 3.2. We would also suggest that the Advisory Guidelines deal with how the exceptions in the Fifth and the Sixth Schedule will be applied. For example, it is suggested that the Advisory Guidelines clarify whether a request is trivial or vexatious is to be determined based on the needs of the organisation or the requestor. A requestor who several years previously bought a particular item from an online vendor might, for personal reasons, wish to track down information about that purchase but to extract information about that transaction will require the organisation to search through and index several hundred thousand storage discs to locate the data requested.
- 3.3. Another example might be that of access to past emails and other electronic records by employees. It is common for employees to also use their employers' email and computer system for personal purposes. Most organisations automatically archive emails and other

electronic records (for example, surfing activity) without filtering out data that might be purely personal in nature. As such data would contain personal information about the employee, it would prima facie amount to personal data and hence be subject to the obligations imposed under the PDPA. If an employee or former employee were to request for access to such information, the organisation might need to dedicate considerable time and effort to extract the information requested, and at the same time also ensure that it does not inadvertently release information belonging to other individuals to the requestor.

- 3.4. In these examples, the organisation might reasonably regard the request as being unreasonably burdensome, trivial, or vexatious, but the individual requestor might feel that his needs should take precedence. It would be useful to set out the factors that should go into determining whether the unreasonably burdensome, trivial, or vexatious exception has been met.
- 3.5. Such clarifications and further examples would ease the burden on organisations facing a request for access or correction as any refusal would entail the organisation taking a risk that it might inadvertently be in breach of its obligations under the PDPA even if it had, in assessing its duty, taken a decision in good faith that the request fell under one of the exceptions set out in the Fifth Schedule or the Sixth Schedule.

#### **4. THE USE OBLIGATION**

##### **The Similar Purpose Requirement**

- 4.1. Paragraph 13.23 of the Draft Advisory Guidelines discusses when personal data can be used or disclosed for a particular purpose without obtaining fresh consent. Among other things, it states that an organisation should determine whether the purpose is within the scope of the purposes for which the individual concerned had originally been informed, for example, if it would fall within the organisation's servicing of the existing business relationship with the individual.
- 4.2. The example provided for this paragraph seems to suggest a very narrow construction. This is because while the first example of sending greeting cards would be treated as falling within this exception, the sending of newsletters would not be. However, as examples of similar purpose, it is difficult to see how the sending of newsletters is materially different from the sending of greeting cards as both are intended to service the business relationship with the individual.
- 4.3. We would request that other examples be provided to better illustrate how the test of similar purpose will be applied.

##### **The Exception for Use that Is Necessary**

- 4.4. The Second, Third, and Fourth Schedules of the PDPA set out various exceptions as to when an organisation may use personal data without obtaining the individual's consent. Among others, the exceptions include the following:
  - (a) the use is necessary in the national interest;
  - (b) the use is necessary for any investigation or proceedings;

- (c) the use is necessary for evaluative purposes; and
- (d) the use is necessary for the provision of legal services by the organisation to another person or for the organisation to obtain legal services.

4.5. The requirement of necessity in these exceptions introduces a degree of subjectivity and uncertainty that will make it difficult to determine if the exception may be relied upon. We would request greater guidance and clarification be provided as to how this exception will be applied and construed.

## **5. MISCELLANEOUS**

5.1. We would request that the PDPC provide greater clarity in the Advisory Guidelines as to the obligations of a data protection officer vis-à-vis the organisation as a whole. In particular, we would request that the guidance include best practice as to what must be done by a data protection officer in the development and enforcement of data protection policies in order for his obligations under the PDPA to be met.