

PUBLIC CONSULTATION
by
Personal Data Protection Commission

**Managing Unsolicited Commercial Messages
and the Provision of Guidance to Support
Innovation in the Digital Economy**

Comments

Gn Chiang Soon

PDataCare Consultancy Pte Ltd

PDataCraft Consultancy LLP

CS GN Law Chambers

email: chiangsoon@pdatacare.com

tel: 96168660

6 June 2018

FEEDBACK ON EXCEPTIONS TO CONSENT

The focus of this feedback is on how, in the opinion of the writer, some of the existing exceptions to the obligation of obtaining consent for the collection, use and disclosure of personal data as provided in the Second, Third and Fourth Schedules of the Personal Data Protection Act ('Act') can be adjusted, amended or clarified to serve their purposes better.

(A) To seek adjustment and clarification on the scope of the following group of exceptions:-

1. Section 17(1) & Second Schedule – Collection of personal data without consent

“ An organisation may **collect** personal data about an individual without the consent of the individual in any of the following circumstances:

(c) the personal data is **publicly available;** ”

2. Section 17(2) & Third Schedule – Use of personal data without consent

“ An organisation may **use** personal data about an individual without the consent of the individual in any of the following circumstances:

(c) the personal data is **publicly available;** ”

3. Section 17(3) & Fourth Schedule – Disclosure of personal data without consent

“ An organisation may **disclose** personal data about an individual without the consent of the individual in any of the following circumstances:

(d) the personal data is **publicly available;** ”

(emphasis added)

The clarification sought for this group of exceptions is best explained and illustrated by the scenario in Picture A below where a private event was held in an unenclosed part of a restaurant that was open to the public.


Picture A

Publicly Available Personal Data

Section 2 :- Not so straight forward example

Steve Job attended a staff's birthday party at the Orange Restaurant.

Can the owner of the restaurant receive, download and circulate this photo on its website without his consent?



The question raised in Picture A is whether the image of Steve Job can be considered to be publicly available under the Act so that the owner of the restaurant can collect, use and disclose it without seeking his consent.

Section 2 of the Act has defined the term as:-

“publicly available”, in relation to personal data about an individual, means personal data that is generally available to the public, and includes personal data which can be observed by reasonably expected means at a **location or an event** —

- (a) at which the individual appears; and
- (b) that is **open** to the **public**.

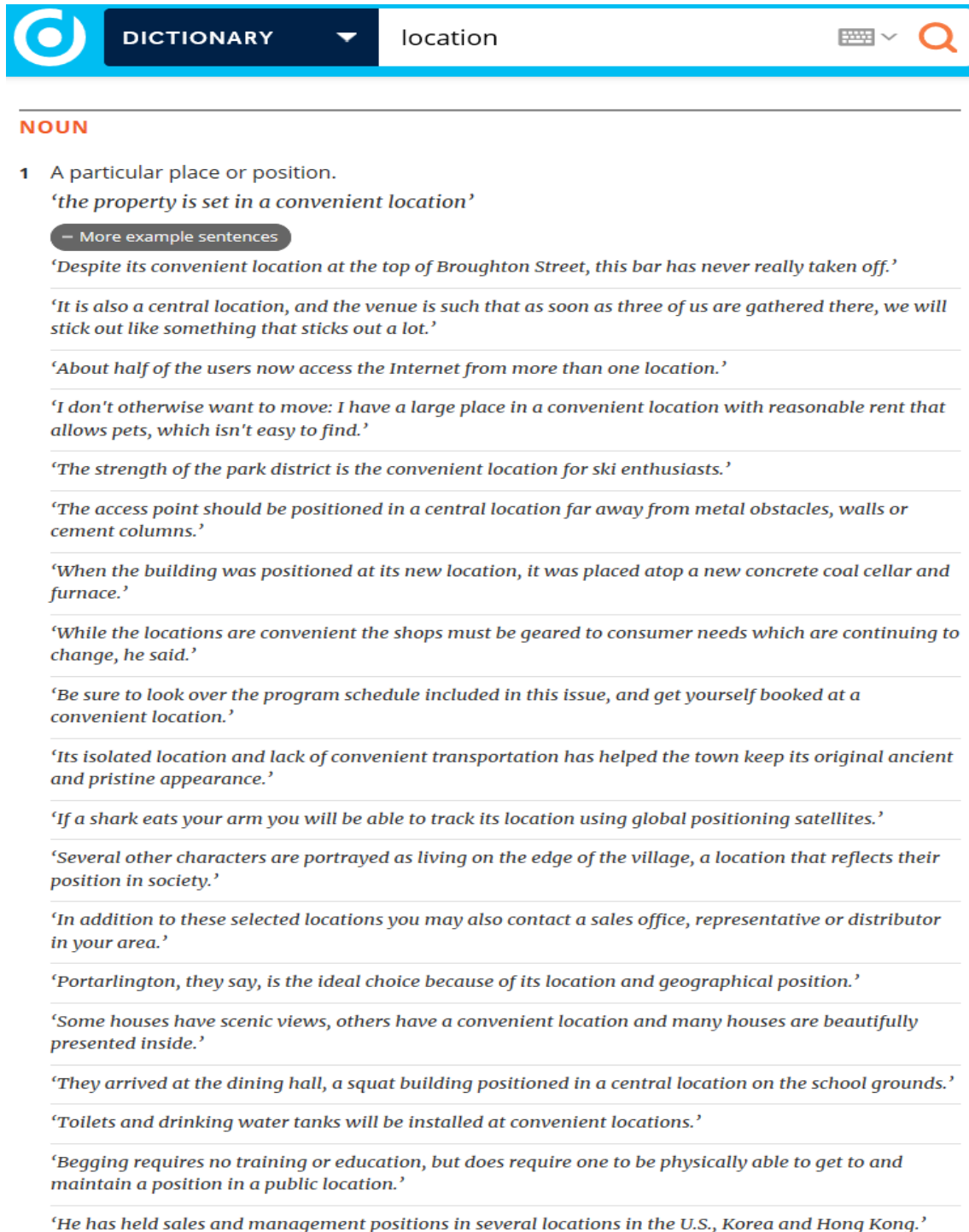
(emphasis added)

Based on the above definition, whether the image of Steve Job can be considered to be publicly available would depend on whether the word ‘location’ in the definition refers to the unenclosed space where the private event was held, in which case the location can arguably be said not to be open to the public, or the restaurant itself, in which case the location was open to the public. It is to be noted here that the definition only requires one factor, either the event or the location to be open to the public to make the personal data publicly available.

The clarification sought here is whether the word ‘location’ in the definition of the term ‘publicly available’ refers to the spot where a particular individual is or the whole and bigger place of which the spot forms a small part.

The word 'location', as can be gathered from the examples given by Oxford Dictionary, as shown in Picture B below, seem to refer to a complete area such as a building or a country, rather than a spot or an area within a unit space such as a restaurant.

Picture B



The screenshot shows the Oxford Dictionary interface. At the top, there is a search bar with the word "location" entered. Below the search bar, the word "location" is listed as a noun. The first definition is "A particular place or position." followed by the example sentence "the property is set in a convenient location". Below this, there is a button for "More example sentences" and a list of 15 example sentences illustrating the use of the word "location" in various contexts, such as "Despite its convenient location at the top of Broughton Street, this bar has never really taken off.", "It is also a central location, and the venue is such that as soon as three of us are gathered there, we will stick out like something that sticks out a lot.", "About half of the users now access the Internet from more than one location.", "I don't otherwise want to move: I have a large place in a convenient location with reasonable rent that allows pets, which isn't easy to find.", "The strength of the park district is the convenient location for ski enthusiasts.", "The access point should be positioned in a central location far away from metal obstacles, walls or cement columns.", "When the building was positioned at its new location, it was placed atop a new concrete coal cellar and furnace.", "While the locations are convenient the shops must be geared to consumer needs which are continuing to change, he said.", "Be sure to look over the program schedule included in this issue, and get yourself booked at a convenient location.", "Its isolated location and lack of convenient transportation has helped the town keep its original ancient and pristine appearance.", "If a shark eats your arm you will be able to track its location using global positioning satellites.", "Several other characters are portrayed as living on the edge of the village, a location that reflects their position in society.", "In addition to these selected locations you may also contact a sales office, representative or distributor in your area.", "Portarlinton, they say, is the ideal choice because of its location and geographical position.", "Some houses have scenic views, others have a convenient location and many houses are beautifully presented inside.", "They arrived at the dining hall, a squat building positioned in a central location on the school grounds.", "Toilets and drinking water tanks will be installed at convenient locations.", "Begging requires no training or education, but does require one to be physically able to get to and maintain a position in a public location.", "He has held sales and management positions in several locations in the U.S., Korea and Hong Kong."

Based on the above analysis, it appears that Steve Job in Picture A was at a location, namely, the restaurant, which was open to the public, and hence, his image could be considered to be publicly available despite the fact that the event that he was attending was not open to the public.

In the writer's view, to hold otherwise that the word 'location' in the definition of the term 'publicly available' refers to the unenclosed space where the private event was held and not the restaurant itself, would lead to the challenge that a single table space at a restaurant where 2 individuals are seated could then be considered to be at a location that is not open to the public. Hence, one can imagine how this extended meaning of 'location' can be used to argue that any tiny area and space within a larger place can be said to be private and is not open to the public.

The clarification of this group of exceptions revolving around the term 'publicly available' will be helpful and useful as almost every one of us very often is invited to attend private events like a relative's wedding that is held in a function room of a hotel and before entering it, would be in the open space outside it for cocktail drinks. We would therefore like to know whether our faces at such private events are publicly available for photographers to take without our consent.

(B) To seek adjustment and clarification on the scope of the following exception:-

4. Section 17(1) & Second Schedule – Collection of personal data without consent

“ An organisation may **collect** personal data about an individual without the consent of the individual in any of the following circumstances:

- (m) the personal data was provided to the organisation by another individual to enable the organisation to provide a service for the personal or domestic purposes of **that other individual**”

(emphasis added)

The reason for seeking clarification and adjustment to this exception is again best explained and illustrated by the situation described in Picture C below.

Picture C

Exemption from Obligation to Get Consent to Collect
Second Schedule - Collection of personal data without consent
<p>Lilian of Global Travel is collecting the names, dates of birth, IC numbers and addresses of (1) Seng's daughters, (2) his brother and (3) staff members for arranging their air tickets and hotel rooms for their coming tour.</p> <p>Does Lilian need the written consent of all the individuals for the collection?</p>

In the above situation, a travel agency is given personal data of several individuals by another individual so that air tickets and hotels rooms can be arranged for all of them. This is a situation that is commonly encountered by travel and other service agencies, hence, the reason for this feedback.

Based strictly on the wording of this exception, by virtue of the phrase, 'that other individual', the exception only allows the travel agency to collect the personal data of all the individuals, namely, Seng's daughters, brother and his staff, without their consent, only with regard to services for Seng, as he is 'that other individual', but not for services for any of the other individuals. For that, the agency has to secure their separate consent, even just to collect their personal particulars.

The writer feels that this is rather restrictive and asks whether this restriction is necessary. There is no conceivable reason why this exception cannot be extended to the services to be rendered to the other individuals. Such an extension will then do away with the need for Seng to produce consent letters from the other individuals to enable

the agency to collect the latter's personal particulars. Such a useful extension of the application of this exception can easily be done by replacing the existing phrase 'that other individual' with '**the individual or** that other individual'. In fact, such an extension is done and can be seen in another exception to collect personal data, namely, Section 17(1), Second Schedule, (b), which states, "the collection is necessary to respond to an emergency that threatens the life, health or safety of **the individual or another individual;**"

(C) To seek adjustment and clarification on the scope of the following group of exceptions:-

5. Section 17(1) & Second Schedule – Collection of personal data without consent

"An organisation may **collect** personal data about an individual without the consent of the individual in any of the following circumstances:

(b) the collection is **necessary** to respond to an **emergency** that threatens the life, health or safety of the individual or another individual;"

6. Section 17(2) & Third Schedule – Use of personal data without consent

"An organisation may **use** personal data about an individual without the consent of the individual in any of the following circumstances:

(b) the use is **necessary** to respond to an **emergency** that threatens the life, health or safety of the individual or another individual;"

7. Section 17(3) & Fourth Schedule – Disclosure of personal data without consent

"An organisation may **disclose** personal data about an individual without the consent of the individual in any of the following circumstances:

(b) the disclosure is **necessary** to respond to an **emergency** that threatens the life, health or safety of the individual or another individual;"

Emergency

All the exceptions mentioned above require an emergency to trigger their application. The writer had been asked by several Data Protection Officers whether these exceptions are applicable if an emergency arguably has not occurred yet as in the scenario described in Picture D below.

Picture D

Exemption from Obligation to Get Consent to Use
Section 17(2):- Third Schedule – Use of personal data without consent
<p>Song visits Clean clinic with a severe headache and the doctor prescribes an immediate shot of penicillin.</p> <p>Nurse Nervy wants to know whether she can call Song’s mother, Sing, on her mobile number given by Song in their clinic record as her next-of-kin to check whether Song is allergic to any medicine, in particular, penicillin.</p>

The argument put forward by the Data Protection Officers was that until the penicillin shot was given and a bad allergic reaction had occurred, there was yet to be an emergency.

The writer is of the view that this exception can be said to have been designed to include the prevention of emergency and situations close to or leading to an emergency. If indeed this is the wider purpose of this exception, then perhaps, doubts can be erased by amending the relevant clauses to read as ‘the collection (use, disclosure) is **necessary** to respond to an emergency **or emerging emergency** that threatens the life, health or safety of the individual or another individual;’

Necessary

Next, these exceptions, as well as various other exceptions in the Second, Third and Fourth Schedules, require the collection, use and disclosure to be ‘necessary’ for the matters stated in the respective exceptions. In the aforesaid group of exceptions, the stated requisite necessity is ‘to respond to an emergency’.

The writer is of the view that perhaps the requisite triggering condition can be loosen a bit so as to allow the exceptions to apply when the collection, use or disclosure is ‘required’ rather than only when they are ‘necessary’ for the respective matters mentioned. For this, the writer proposes for the aforesaid group of exceptions to be amended to read as: ‘the collection (use, disclosure) is **required** to respond to an emergency **or emerging emergency**’.

This amendment is sought for a practical reason. It is quite difficult for an ordinary staff to determine what is necessary in a medical situation, Similarly, it is equally quite difficult for a non-legally trained staff to determine whether the collection of certain personal data is necessary for an investigation or proceedings for purpose of the exception in Second Schedule para (c), or that the collection of certain personal data is necessary in the national interest for the purpose of the exception in Second Schedule para (d).

CONCLUSION

FEEDBACK ON EXCEPTIONS TO CONSENT

The writer would therefore like to conclude as follows:

1. Clarification is sought here on whether the word ‘location’ in the definition of ‘publicly available’ refers to a spot such as an unenclosed space of a restaurant or the whole restaurant itself, for purpose of the exceptions of paragraphs (c) of the Second and Third Schedules of the Act, and paragraph (d) of the Fourth Schedule of the Act.
2. Request is made for the consideration of amending the exception in paragraph (m) of the Second Schedule of the Act to read as “the personal data was provided to the organisation by another individual to enable the organisation to provide a service for the personal or domestic purposes of **the individual or that other individual;**” with the words underlined added.
3. Request is made for the consideration of amending the exceptions in paragraph (b) of the Second, Third and Fourth Schedules of the Act by substituting the word

‘necessary’ with the word ‘required’, and adding the underlined words ‘or emerging emergency’, as shown here below:-

Second Schedule

“An organisation may **collect** personal data about an individual without the consent of the individual in any of the following circumstances:

- (b) the collection is **required** to respond to an **emergency or emerging emergency** that threatens the life, health or safety of the individual or another individual;”

Third Schedule

“An organisation may **use** personal data about an individual without the consent of the individual in any of the following circumstances:

- (b) the use is **required** to respond to an **emergency or emerging emergency** that threatens the life, health or safety of the individual or another individual;”

Fourth Schedule

“An organisation may **disclose** personal data about an individual without the consent of the individual in any of the following circumstances:

- (b) the disclosure is **required** to respond to an **emergency or emerging emergency** that threatens the life, health or safety of the individual or another individual;”

Gn Chiang Soon
6 June 2018