

11 June 2018

The Personal Data Protection Commission
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Dear Sir/Madam,

**PDPC's Public Consultation on the Second, Third and Fourth Schedules to the
Personal Data Protection Act**

Thank you for the opportunity to provide feedback on the Second, Third and Fourth Schedules to the Personal Data Protection Act (**PDPA**).

We advise extensively in relation to the PDPA. In this context, our clients are generally small to medium enterprises (**SMEs**) and social service organisations (**SSOs**). If we were advising in only one of these sectors, we might find that some exceptions to consent in the Second, Third and Fourth Schedules to the PDPA are seldom, if ever, applied in practice. They might therefore appear to be no longer necessary or relevant. However, looking at their use across these two quite different sectors we find that all of them are generally relevant in various circumstances. In other words, we find that an exception that is rarely, if ever, relevant to SMEs is relevant quite often in the SSO sector, and vice versa.

In our attached submission, we analyse the 'business asset transaction' exception to consent. In summary, we consider that this exception should be amended to improve its workability in the context of sale of shares transactions, which are quite common and, of course, include initial public offerings (IPOs). In addition, we consider that it should be amended to support the sale of digital subscription businesses. Alternatively, it may be appropriate to subsume it into the proposed new exception for consent where collection, use and disclosure of personal data is necessary for business or legal purposes.

Our contact details are at the foot of this letter.

Yours faithfully



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We have the following comments on the 'business asset transactions' exceptions to the need for consent to collect, use and disclose personal data. (There may be other practical difficulties with this exception. This submission is not intended to 'cover the field' but merely analyses two situations we have encountered where the exception does not work.)

In summary, we consider that this exception should be amended to improve its workability in the context of sale of shares transactions, which are quite common and, of course, include initial public offerings (IPOs). In addition, we consider that it should be amended to support the sale of digital subscription businesses. Alternatively, it may be appropriate to subsume it into the proposed new exception for consent where collection, use and disclosure of personal data is necessary for business or legal purposes.

Definition of 'business asset transaction'

As the PDPC is aware, 'business asset transaction' means:

'the purchase, sale, lease, merger or amalgamation or any other acquisition, disposal or financing of an organisation or a portion of an organisation or of any of the business or assets of an organisation other than the personal data to be disclosed under paragraph 1(p) [of the Fourth Schedule to the PDPA]'

Our comments relate to:

- a purchase / sale of:
 - an organisation or
 - a portion of an organisation or any of the business assets of an organisation and
- the reference to 'other than the personal data to be disclosed under paragraph 1(p)'

Purchase / sale of an organisation

A typical purchase / sale of an organisation involves X and Y agreeing that X will sell to Y the shares that X holds in the capital of Z.

The need for purchaser due diligence where there is a single purchaser¹

A sale by X to Y of X's shares in Z may include the following two commercial due diligence requirements:

- First, part of the due diligence that Y needs to do prior to deciding:
 - whether or not to proceed to purchase X's shares in Z and/or
 - the price Y will pay for those shares,

often includes Y needing to collect information about employees, or at least key employees, of Z. Y may need to evaluate them and, for example, decide whether the purchase / sale transaction needs to include retention bonuses for them. Or Y may need to know what severance payments it may need to make if certain key management positions will not be retained after the acquisition of Z by Y.

Often, very few employees of Z are aware that the company for which they work might be sold, particularly when the potential sale / purchase is in its early stages – indeed, even the most senior employees of Z may not be aware of it. If X, Y and/or Z is listed on a stock exchange the fact that there is a potential acquisition may be price sensitive information, adding an obvious additional need for strict confidentiality. In these circumstances, it is not open to X to ask Z to have its employees, even its key employees, consent to a disclosure of their personal data for the purposes of Y doing its due diligence on the human resources aspect of the transaction.

- Second, part of the due diligence to be done by Y may be an examination of at least its biggest and/or most profitable and/or otherwise most significant customers or, in the case of a subscription-based business, an examination of its overall revenue generating customer base.

In many cases, such customers will be organisations (because Z conducts a B2B business) and the information to be disclosed to Y about them may be restricted to 'business contact information'. If so, it will be able to be disclosed:

- by X to Y (assuming that X, as Z's parent, holds such information) or
- by Z to Y,

¹ The sale of all the shares to a single purchaser is used here for illustrative purposes to avoid making the analysis more complicated than is set out here. However, the same analysis of the business asset transaction exception to consent holds true if only part of the issued shares in a company are sold or if new shares are issued, for example, for the purpose (in either case) of venture capital or other investment capital being injected into the company.

for due diligence purposes. However, one cannot entirely rule out the possibility of personal data being required in connection with personnel of such customer organisations.

More to the point, such customers may be individuals (because Z conducts a B2C business) and the information to be disclosed to Y about them would be personal data. For example, Z's business might be a digital subscription business aimed at consumers. Netflix is possibly the best-known example of such a business, but there are many other businesses, including in Singapore, that provide subscriptions to specialist movie categories and live broadcasts of sporting events. The most valuable asset of many digital platforms may also be individuals that form their customer base and these may be sold, as seen recently in the sale of Uber's South East Asian business.

The need for purchaser due diligence where there is an IPO or other underwritten transaction

A sale by X to a large number of purchasers of X's shares in Z may be done in an Initial Public Offering (IPO). Such a transaction is usually underwritten by merchant banks or other entities. (There may be a transaction involving X other than an IPO that involves underwriters and that results in the need for an underwriter to do due diligence on an organisation, including its employees and/or customers.) Underwriters will often include the same two due diligence requirements:

- First, due diligence on employees, or at least key employees, of Z. Again, obtaining the consent of such employees may not be feasible for confidentiality or other reasons.
- Second, due diligence on at least some of Z's customers including, if Z is a B2C business, customers who are individuals.

Fourth Schedule exception to consent to disclosure of personal data

Under the Fourth Schedule to the PDPA, consent is not required when an organisation discloses personal data if the personal data:

- (a) Is disclosed to a party or a prospective party to a business asset transaction with the organisation – in the above examples this seems:
 - to permit X (if it is an organisation) to disclose personal data to Y (the party or prospective party to the business asset transaction) about the employees and customers of Z if X happens to have such information itself

One might readily conclude, perhaps with little analysis, that a company or other business is an organisation when it holds the shares of a subsidiary that is part of its business.

But where the shares in Z are held by an individual who is not a share trader or a professional investor but merely an individual with a personal investment in Z for

some reason (perhaps to assist a family member or friend of X, for example) X might not be an 'organisation' within the meaning of the PDPA.

- not to permit Z (as the organisation) to disclose personal data to Y because Y is not a party or a prospective party to a business asset transaction with Z
- not to permit either X or Z to disclose personal data to any underwriter of Y because the underwriter is not a party or prospective party to the business asset transaction

Although the role of the underwriter may be an essential element to a business asset transaction, it is at least very difficult to argue that the underwriter is a party to the business asset transaction as such.

(b) is about an employee, customer, director, officer or shareholder of the organisation – in the above examples this seems:

- to permit X (if it is an organisation – see above) to disclose personal data about its own employees, customers, directors, officers or shareholders to Y and/or to the underwriters, but such a disclosure is not relevant to the business asset transaction in this example
- even if X has such information in connection with Z, not to permit X (as the organisation) to disclose personal data about employees, customers, etc. of Z (because Z is not the organisation to which the exception applies)
- to permit Z (as an organisation) to disclose personal data about Z's employees and customers to any underwriter of Y, but as outlined above Z is not the organisation to which the business asset transaction exception to consent applies

(c) relates directly to the part of the organisation or its business assets with which the business asset transaction is concerned – in the above examples this seems, if:

- X's shares in Z can be said to be a business asset of X (as an organisation) and
- it is possible to argue successfully that the personal data of Z's employees and customers relate directly to the sale of X's shares in Z to Y and
- X, as Z's parent, happens to have personal data about Z's employees and customers,

to permit X to disclose such personal data to Y without their consent for the purpose of the business asset transaction

Analyzing these clauses in this way results in a conclusion that:

- **perhaps**, if X:
 - is an 'organisation' as defined in the PDPA (versus X holding the shares in an essentially non-business setting) and
 - happens to have the employee and customer personal data of Z that is required by Y to do its due diligence

X **may be permitted** to disclose it to Y without the consent of the relevant individuals and

- even if the above two conditions are fulfilled, X **is not permitted** to disclose such personal data to the underwriters without the consent of the relevant individuals

Second Schedule exception to consent to collection of personal data

Unsurprisingly, the same analysis as set out above in relation to the disclosure of employee and customer personal data applies in the case of collection of such personal data without consent in accordance with the Second Schedule to the PDPA.

Conclusion

The 'business assets transaction' exception to consent is not available when the transaction is a sale of shares in a company, notwithstanding that a sale of shares is a very common form of business transaction in Singapore. Both mature businesses and startups are frequently sold either to a sole shareholder / consortium of shareholders or by way of IPO and investments into startups, in particular, are also generally necessary for them to expand their businesses, including internationally.

Purchase / sale of a portion of an organisation or any of the business assets of an organisation

A typical purchase / sale of a portion of an organisation involves X and Y agreeing that X will sell to Y a specified part of its business. For example, X's overall business might consist of:

- acquiring and exploiting distribution rights in movies or live broadcasts of sporting events (its '**Distribution Business**') and
- selling subscriptions to consumers of digital delivery to their home TVs and computers of such movies or live broadcasts (its '**Subscription Business**'),

and X proposes to sell its Subscription Business to Y. The sale will involve selling its list of subscribers which give rise to the revenue stream in its Subscription Business (its '**Subscriber Database**') and any other business assets that are part of its Subscription Business. The sale might also involve transferring to Y the employees of X who operate X's

Subscription Business so that they can continue to operate the Subscription Business after its sale to Y.

The need for purchaser due diligence

The sale of X's Subscription Business to Y may include the same two due diligence requirements as were discussed above:

- First, information about the employees of X who operate the Subscription Business for X and will be transferred to Y as part of the sale of the Subscription Business.
- Second, information about the Subscriber Database that constitutes the revenue stream being sold by X to Y.

Fourth Schedule exception to consent to disclosure of personal data

Under the Fourth Schedule to the PDPA, consent is not required when an organisation discloses personal data if the personal data:

- (a) is disclosed to a party or a prospective party to a business asset transaction with the organisation – in the above example this permits X (as the organisation selling its Subscription Business) to disclose personal data to Y (as the party or prospective party to the business asset transaction)
- (b) is about an employee, customer, director, officer or shareholder of the organisation – in the above example, this permits X to disclose to Y:
 - personal data about its employees that it will transfer to Y as part of the Subscription Business and
 - personal data about the individuals in its Subscriber Database and
- (c) relates directly to the part of the organisation (that is, the Subscription Business, which includes both:
 - X's employees that will be transferred to Y and
 - the Subscriber Database)

or its business assets (again, the Subscriber Database) with which the business asset transaction is concerned – in the above example this permits X to disclose personal data to Y about both such employees of X and the Subscriber Database

Analyzing these clauses in this way results in a conclusion that they enable X to provide personal data about employees and customers to Y without the consent of the relevant individuals for the purposes of a business asset transaction. (Of course, there are

confidentiality and notification requirements that also need to be satisfied, but it is the disclosures *per se* that are the subject of this submission.)

Second Schedule exceptions to consent to collection of personal data

Similarly, the same analysis as set out above in relation to the disclosure of employee and customer personal data applies in the case of collection of such personal data without consent in accordance with the Second Schedule to the PDPA.

The carve out from personal data that may be disclosed

However, the definition of 'business asset transaction' excludes personal data that is to be disclosed under the rules in paragraph 1(p) of the Fourth Schedule, which are the rules that are analysed above – in other words, business assets that comprise personal data does not fall within the scope of the business assets transaction exception from the need for consent to disclosure of personal data.

We see the logic in that outcome if the intention of the drafters of the business asset transaction exception to the need for consent was to prevent such exception from being used as a way to 'sell' personal data over and over again simply for, say, marketing purposes without obtaining the consent of the relevant individuals. The definition was, after all, drafted at a time when online subscription businesses were nascent (even if subscriptions businesses themselves – Reader's Digest comes to mind – were well-established).

With the emergence of digital subscription businesses, we recommend amending the business transaction exception to consent in a way that enables the *bona fide* sale, without consent of the relevant individuals, of personal data where that personal data comprises a Subscriber Database in the context of the sale of a Subscription Business.

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