

1 April 2013

BY EMAIL ONLY

THE PERSONAL DATA PROTECTION COMMISSION
Email: pdpc_consultation@pdpc.com.sg

Dear Sirs

PUBLIC CONSULTATION ON PROPOSED REGULATIONS AND ADVISORY GUIDELINES ON KEY CONCEPTS AND SELECTED TOPICS IN THE PDPA

1. ATMD Bird & Bird LLP is a law firm with a data protection practice. We are in a global association with Bird & Bird LLP which has a strong data protection practice in Europe and Asia. We act for a number of clients on privacy issues.
2. We welcome and support the Personal Data Protection Act 2012 and the proposed advisory guidelines and regulations, which were published on 5 February 2013.
3. Please find enclosed a submission by ATMD Bird & Bird LLP for the public consultation in relation to these documents. We hope that the PDPC will give due consideration to this submission.
4. Please contact us if you have any questions on this submission. We look forward to continuing to engaging the PDPC on any further proposals.

Yours faithfully


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**ATMD BIRD & BIRD LLP
SUBMISSION TO PERSONAL DATA PROTECTION COMMISSION
1 APRIL 2013**

**PUBLIC CONSULTATION ON PROPOSED REGULATIONS AND ADVISORY
GUIDELINES ON KEY CONCEPTS AND SELECTED TOPICS IN THE PDPA**

A. SUMMARY OF MAJOR POINTS

1. More clarity is needed on the requirements of the Data Protection Officer. The Guidelines should confirm whether this individual must be employed within the organisation or alternatively, whether this person can be a non-employee of the organisation, such as an officer in a related entity or an employee of an unrelated third party. We also seek confirmation that Singapore-based organizations may have their Data Protection Officer based out of Singapore.
2. For overseas transfers of data to third party organisations which are not data intermediaries, we seek clarification as to whether these third parties are required to respond to access and correction requests.
3. The PCPC should provide an indication of whether it intends to apply for European Union adequacy.
4. "Transfers" out of Singapore should exclude transfers that are unintentional or merely in transit out of Singapore. Due to the dispersed network of servers and nodes of modern computer systems, data being sent from one party to another in Singapore may sometimes be routed temporarily out of Singapore. This should not constitute a "transfer" of data under the PDPA.
5. We seek clarification on how correction requests should be dealt with by organisations to whom personal data is disclosed, where they do not make a correction.
6. Organisations should not be required to verify information in instances when the personal data provided by the individual is deliberately inaccurate.
7. We also welcome more clarity on various aspects of how the PDPA will apply to employment obligations.

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B. COMMENTS

Data Protection Officer

8. We refer to Paragraphs 19.4 and 19.5 of the Proposed Advisory Guidelines on Key Concepts in the Personal Data Protection Act (“**the Guidelines**”). Section 11(3) of the PDPA requires organisations to designate “one or more individuals to be responsible for ensuring that the organisation complies with the Act.” This individual can delegate to another individual the responsibility conferred by that designation (Section 11(4)).
9. The Guidelines should not require the designated individual or delegated individual to be based in Singapore. Organisations may wish to designate or delegate a person based outside Singapore.
10. Even though this individual may be physically overseas, safeguards can be put in place to ensure the individual is readily contactable by individuals in Singapore. This would deal with the concerns of Section 19.7 of the Guidelines, which recommends as a best practice that “business contact information of the relevant person should be readily accessible from Singapore, operational during Singapore business hours and in the case of telephone numbers, be Singapore telephone numbers”.
11. The Guidelines should specify whether designated individuals, as opposed to delegated individuals, must be employees of the organisation to whom the PDPA applies. At the very least, the Guidelines should clarify that delegation to non-employees is allowed, so that compliance with the act may be outsourced to, for instance, a regional privacy officer.
12. Finally, as a practical matter, the PDPC should indicate whether the requirement to provide business contact information of the designated person would be satisfied by a generic email and contact information (e.g. privacyofficer@companyname.com) without specifying the identity of the responsible individual.

Access

13. With regard to Paragraph 7.7 of the Positions for Proposed Regulations under the PDPA (“**the proposed Regulations**”), the proposed Regulations state that “[w]here the transfer is between an organisation in Singapore and a third party outside Singapore, the Commission considers that it may not be practical to require foreign organisations to respond to access and

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correction requests in respect of the personal data transferred *since they would not have direct contact with the individuals in Singapore.*” [emphasis added]

14. Since presumably access requests can be made when an organization collecting personal data is based outside Singapore, it would seem inconsistent that when an organization in Singapore transfers data to a third party outside Singapore that the access requirement does not apply.
15. We wish to also confirm that all third parties outside Singapore will not be required to provide access, even in the case where they are related entities.

European Union adequacy

16. In relation to Section 7 of the proposed Regulations, the Commission has noted that “some jurisdictions like the EU have detailed and comprehensive frameworks governing the transfer of personal data outside its jurisdiction. Specifically, the EU prohibits the transfer of personal data to another jurisdiction outside of the EU unless the European Commission has determined that the other jurisdiction offers an adequate level of protection (“EU adequacy”). More information on this is available on the EU website at http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm.
17. We request that the PDPC sets out its position on seeking EU adequacy. Meeting standards under EU adequacy would allow Singapore to be seen as a safe place to process or outsource the processing of data. Furthermore, this will encourage organisations which possess data originating in the EU to transfer data to or through Singapore.

Data transfers to exclude personal data in transit

18. We also suggest that personal data *in transit* outside of Singapore should not be considered a transfer under the PDPA when there is no intention to *transfer* this information out.
19. For instance, if email from an organisation in Singapore is routed through a server in another country, this could technically amount to a transfer outside Singapore.

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20. Our suggestion is that where personal data merely passes outside Singapore in transit, then this should not be considered a data transfer. This position is endorsed by the data protection authority in the UK¹.
21. The PDPC should also consider providing a definition of transfer or provide a non-exhaustive list of what activities would be considered a transfer of personal data.

Correction

22. Paragraph 14.17 of the Guidelines refer to Section 22 of the PDPA, which requires an organisation to annotate personal data in its possession or under its control when it does not make a correction to the personal data and when this is in response to a notification of a correction made by another organisation.
23. In respect of the annotating organisation, we seek clarification from the PDPC whether the request for correction must then be sent onwards to organisations to whom the annotating organisation has disclosed personal data and for *how long* the organisation is expected to maintain the record of annotation. This requirement appears to be fairly onerous.

Accuracy

24. Paragraph 15.7 of the Guidelines requires an organisation “to be alert to the circumstances where it should not make a presumption” that the personal data provided directly by the individual is accurate. Paragraph 15.7 also requires that “where the currency of the personal data is important, the organisation should take steps to verify that the personal data provided by the individual is up to date”.
25. Paragraph 15.7 appears to impose an excessive burden on organisations. If the organisation collects personal data from the individual concerned and that individual chooses to provide inaccurate data, it would appear inequitable for the burden to fall on the organisation to have to review such information and determine if it is reasonable to rely on as part of the compliance with the PDPA. If the rationale for the PDPA is to protect the personal data of the

¹ *The Eighth Data Protection Principle and international data transfers*, UK Information Commissioner (2006) <http://www.ico.org.uk/upload/documents/library/data_protection/detailed_specialist_guides/international_transfers_legal_guidance_100706.pdf> at 1.3

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individual, it would seem that where the inaccurate information comes from the individual, that organizations should not have an additional responsibility towards that individual to check the information.

Employment comments for PDPA advisory guidelines

25. The following comments relate to the section on “Employment” under Section 5 of the Advisory Guidelines on Selected Topics.

26. How does the PDPA apply to reference checks during recruitment?

In relation to paragraphs 5.3 and 5.4 with regard to reference checks, it would be helpful to include a guideline for ex-employers who receive requests for references relating to ex-employees, where the disclosure is not for the ex-employer’s evaluative purposes. We understand that even in this situation, the consent exception for disclosure of personal data which is “necessary for evaluative purposes” will apply.

27. How does the PDPA apply to employment records of employees?

At paragraph 5.15, the draft guidelines suggest that organisations must obtain the consent of employees prior to the collection, use and disclosure of employment records. However, it seems to us that employment records would fall within the consent exception for “managing or terminating an employment relationship”. Please consider revising paragraph 5.15.

28. What is the difference between the exception for evaluative purposes and the exception for the purpose of managing and terminating an employment relationship?

Paragraph 5.21 suggests that the exception for managing and terminating employment relationships is meant to apply to more administrative operations, such as the use of personal data for payment. The description “administrative operations” is too narrow, as the range of purposes for managing and terminating an employment relationship is wide. For example, in addition to payments of salary, the management of an employment relationship may require the following (without limitation):

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- Benefits administration
- Management of employee records, for example, on medical leave, annual leave, retirement
- Employee authentication, security services
- Talent development, career development

It would be helpful to provide a non-exhaustive list of types of activities which would, and which would not, be covered by the phrase “managing and terminating an employment relationship”.

29. On a related point, it would be helpful to include a guideline on the meaning of “employee”, including any types of workers which would not be considered “employees”. We suggest that the meaning of “employee” be as inclusive as possible so that the intention of reducing organisations’ administrative burden in managing its workforce is achieved.

C. CONCLUSION

26. We trust that the PDPC gives due consideration to the submissions presented in this document. We look forward to working closely with the PDPC on any further information and assistance as requested.

