

Name of Paper	Extracted from Proposed Advisory Guidelines		Comments from Manulife (Singapore) Pte. Ltd.
Proposed Advisory Guidelines on the Personal Data Protection Act for Selected Topics - Photography		<u>Does a photographer need to obtain an individual's consent to take a photograph of the individual?</u>	-
	2.2	An image of an identifiable individual captured in a photograph is personal data about that individual. Among other obligations, the Data Protection Provisions require consent from the individual to be obtained for the purposes of the collection, use or disclosure of his personal data. Exceptions to this Consent Obligation may apply depending on the circumstances, for example where the photographer is acting in his personal or domestic capacity (such as an individual taking photographs for his own personal purposes at a gathering for family and friends).	-
	2.3	<p>A professional photographer who takes a photograph of an identifiable individual in the course of his business will be required to obtain consent unless he is taking the photograph on behalf and for the purposes of another organisation pursuant to a contract in writing. In such a situation, the other organisation will be required to comply with the Data Protection Provisions.</p> <p>Similarly, if the photographer is an employee acting in the course of his employment with an organisation, he will not be required to comply with the Data Protection Provisions and instead his employer will be required to comply. In this regard, it would be advisable for employers to put in place systems and processes to prevent employees from engaging in conduct that could cause the organisation to breach the Data Protection Provisions.</p>	-

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	2.4	<p><u>Example: Photo-taking by an individual acting in a personal or domestic capacity</u></p> <p>Diana, an employee of Organisation XYZ, attends Organisation XYZ's corporate social responsibility event. At the event, she meets her friend Dawn. During a break in the programme, they have a personal chat and catch up on each other's personal lives. During the chat, Diana takes a photograph of the two of them to update her friends of the encounter via social media. Diana then uploads the photograph and displays it on her personal social media page.</p> <p>In this instance, Diana would likely be considered to be an individual acting in a personal or domestic capacity, and would not be required to comply with the Data Protection Provisions in respect of the photo-taking and subsequent disclosure of the photograph via her social media account.</p>	-
	2.5	<p><u>Example: Photo-taking by an individual acting as an employee</u></p> <p>Eric, another employee of Organisation XYZ, is tasked by the management of Organisation XYZ to take photographs at the corporate social responsibility event and publish them on Organisation XYZ's webpage. In this instance, as Eric is an employee acting in the course of his employment with Organisation XYZ where he takes photographs for his assigned purpose, he would not be required to comply with the Data Protection Provisions. Organisation XYZ would be required to comply with the Data Protection Provisions instead, although Organisation XYZ may, as a practical measure, assign Eric to ensure its compliance with certain obligations, such as obtaining consent from the individuals that Eric takes photographs of.</p>	<p>What type of consent should Eric obtain? (I.e.: verbal or written)</p> <p>Does Eric have to obtain such consent (verbal or written) for each photo taken?</p> <p>If the individuals willingly to pose for Eric, it should be considered as deemed consent (refer to 2.11). Why is there a need to obtain verbal / written consent by Eric again?</p>
		<p><u>Does a photographer need to obtain an individual's consent to take a photograph of the individual in a public place?</u></p>	

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	2.6	<p>The PDPA sets out various exceptions to the Consent Obligation. An organisation may wish to evaluate whether any exception applies in respect of its particular circumstances. In particular, there is an exception for the collection, use and disclosure of personal data that is publicly available. For example, when the individual appears at an event or location that is open to the public, taking a photograph of the individual would likely be collection of personal data that is publicly available for which consent is not required. In this regard, the Commission has set out that a location or event would be considered “open to the public” if members of the public can enter or access the location with few or no restrictions, and generally a location would less likely be considered “open to the public” if there are more restrictions to access. Further, there can be private spaces within public spaces, and a location is not open to the public merely because members of the public may look into the premises or location. Please refer to the Key Concepts Guidelines for a more detailed discussion on this exception.</p>	-
		<p><u>How may an individual’s consent be obtained for photo-taking at a private event/space?</u></p>	<p>If the company is able to rely on the deemed consent by adopting 2.10, is the photographer still required to obtain verbal / written consent for each photograph?</p>
	2.7	<p>The Data Protection Provisions do not prescribe the ways in which consent may be obtained for photo-taking. As set out in the Key Concepts Guidelines, consent can be obtained in various ways. Generally, as a good practice, 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.</p>	<p>By registering themselves by the counter before entering into the main event hall, in the list, a note to inform the individuals that photo-taking will be taken during the event for the publication in Company’s website/Facebook etc.</p> <p>In our view this qualifies as “obtaining consent that is in writing or recorded in a manner”</p>
	2.8	<p>In addition, organisations may wish to note that consent may be deemed to have been given by an individual in situations where the individual voluntarily provides his personal data to an organisation for a purpose, and it is reasonable that he would voluntarily provide the data. In the context of phototaking, deemed consent may potentially apply where the individual voluntarily permits a photograph to be taken of him.</p>	<p>When does it cross the line from “does not voluntarily permit” to “voluntarily permits”.</p> <p>Where the individual enters an area voluntarily and can see there are photographers present and he chooses to remain, that should in our view constitute “voluntarily permit” even in the absence of the measures stated in the guidelines in 2.10 below or “voluntarily posing”.</p>
	2.9	<p>Please refer to the Key Concepts Guidelines for further elaboration on the Consent Obligation.</p>	-

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	<p>2.10 <u>Example: Deemed consent for photo-taking at private function</u></p> <p>Organisation ABC holds a private function for a select group of invited clients and wishes to take photographs of attendees for its internal newsletter. If Organisation ABC intends to rely on deemed consent, measures that Organisation ABC may take to better ensure that the attendees are aware of (and accordingly, more likely to be deemed to have consented to) the purpose for which their photographs are collected, used and disclosed, could include:</p> <p>a) Clearly stating in its invitation to clients that photographs of attendees will be taken at the function for publication in its internal newsletter; or</p> <p>b) Putting up an obvious notice at the reception or entrance of the function venue to inform attendees that photographs will be taken at the event for publication in its internal newsletter.</p>	-
	<p>2.11 <u>Example: Posing for photo-taking</u></p> <p>Kevin attends Organisation ABC's private function. During the function, Organisation ABC's photographer informs Kevin that she is taking photographs for publication in Organisation ABC's internal newsletter, and asks Kevin to pose for his photograph to be taken. By voluntarily posing for his photograph to be taken, Kevin would be deemed to have given consent for the photograph to be collected, used or disclosed for the stated purpose.</p>	See comment under 2.8 above
	<p><u>Is a photographer required to obtain consent from individuals in the background when a photograph is taken?</u></p>	
	<p>2.12 As noted above, consent will generally be required for taking a photograph of an identifiable individual although consent may be deemed to have been given, or an exception may apply, depending on the circumstances. This is true as well for identifiable individuals who are in the background when a photograph is taken. It should also be noted that where an individual in the background is not identifiable from the photograph, the photograph will not constitute personal data of that individual.</p>	<p>In our view it is impractical to require verbal / written consent from identifiable persons in the background.</p> <p>See comment under 2.8 above</p>

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		<p><u>Do professional photographers need to sign contracts with the event organizer before they can provide photography services at an event?</u></p>	
	2.13	<p>The PDPA does not prescribe the contractual arrangements that organisations may wish to enter into in order to ensure that they comply with their obligations under the PDPA. Where they do enter into such a contract, the PDPA provides that the performance of a contractual obligation shall not be an excuse for contravening the PDPA.</p>	-
	2.14	<p>The Act does not require a professional photographer to enter into a contract with an event organiser. However, it would be a good practice for the parties to enter into a contract. Generally, if a professional photographer is engaged by an organisation to take photographs of identifiable individuals and wishes to be considered a data intermediary processing personal data on behalf of and for the purposes of the organisation pursuant to a contract that is evidenced or made in writing⁶, the photographer should enter into such a contract, which may set out (among other things) each party's responsibilities and liabilities, including whether the photographer is to process personal data on behalf of and for the purposes of the organisation that engaged him. The organisation on whose behalf the photographer is taking the photographs may also wish to provide in a contract for what the photographer should do in order to ensure that the organisation does not contravene its obligations under the PDPA</p>	-
	2.15	<p>Where the photographer is not a data intermediary processing personal data on behalf of and for the purposes of the organisation pursuant to a contract that is evidenced or made in writing, he would be subject to the obligations under the Data Protection Provisions, unless any relevant exception applies.</p> <p>For example, the photographer would be required to obtain consent on or before taking a photograph of an identifiable individual, unless an exception to the Consent Obligation applies.</p>	-

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	<p>2.16 <u>Example: Whether a professional photographer is a data intermediary processing personal data on behalf of and for the purpose of another organisation pursuant to contract evidenced or made in writing</u></p> <p>Abel, a freelance photographer, is hired by Organisation ABC to be its photographer at its private function. Abel and Organisation ABC sign a contract that clearly states (among other things) that Abel will be taking photographs at the function on behalf of and for the purposes of Organisation ABC, and that Organisation ABC will obtain consent from the attendees. In such an instance, Abel will be considered a data intermediary processing personal data on behalf of and for the purposes of another organisation pursuant to a contract that is evidenced or made in writing, and</p> <p>Abel need not obtain consent from the individuals he takes photographs of at the event.</p> <p>After the function, Abel selects some of the photographs and publishes them on his webpage to promote his work. Abel will not be considered a data intermediary processing personal data on behalf of and for the purposes of another organisation pursuant to a contract that is evidenced or made in writing in relation to such publication, and will be required to comply with the Data Protection Provisions, including obtaining consent from the individuals in the photographs in order to use or disclose the photographs for this purpose.</p>	-
	<p><u>Does the exception for collection of personal data “solely for artistic or literary purposes” apply to the taking of individuals’ photographs?</u></p>	
	<p>2.17 In accordance with paragraph 1(g) of the Second Schedule, an organisation is permitted to collect personal data about an individual without the individual’s consent if the personal data is collected solely for artistic or literary purposes”.</p> <p>Such collected data may also be used or disclosed for purposes consistent with the purpose of collection.</p>	-

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	<p>2.18 The terms “artistic” and “literary” are not specifically defined in the PDPA. The Commission is of the view that it would likely be in line with the purpose of the PDPA for these terms to take their ordinary meanings. However, the Commission notes that the parameters as to what would constitute “artistic” purposes may be strongly subjective.</p> <p>Accordingly, while organisations taking photographs solely for artistic or literary purposes may rely on the exception, where it is feasible for organisations to obtain the individual’s consent before taking a photograph of the individual or where it is uncertain that an organisation’s purpose would be considered solely “artistic” or “literary”, the Commission would advise organisations to do so as a best practice.</p>	-
	<p><u>Can individuals withdraw consent for the publication of photographs, or request under the PDPA for the removal of photographs that have been published?</u></p>	
	<p>2.19 The PDPA provides that individuals may at any time withdraw any consent given or deemed to have been given under the PDPA for the collection, use or disclosure of their personal data for any purpose by an organisation by giving reasonable notice to the organisation. An organisation that receives notice of the withdrawal of consent must (among other things) cease, and cause its data intermediaries and agents to cease, to collect, use or disclose the photographs, as the case may be (unless an exception applies).</p>	-
	<p>2.20 Where an organisation has already collected the personal data, the withdrawal of consent will only apply to its continued use or future disclosure.</p> <p>However, this does not affect an organisation’s collection, use and disclosure of personal data without consent where this is required or authorised under the PDPA or other written law. In such cases, organisations may decide to consider refraining from any future collection, use or disclosure of the personal data as a matter of discretion.</p>	<p>If the withdrawal of consent applies to its continued use or future disclosure, will it affect those photographs (with consent – verbal / written or deemed consent) that are already uploaded in the Corporate’s webpage / Facebook?</p> <p>i.e.: have to remove the photograph within a reasonable time after receiving the withdrawal notice from an individual?</p>

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	2.21	Where photographs of an identifiable individual have been taken (for example, where a photograph is used for marketing purposes) but have yet to be published in a publicly available manner, the individual may withdraw consent for the collection, use or disclosure of the photographs in accordance with the PDPA. The withdrawal of consent would affect all continued use and future disclosure	<p>This is not practical as the marketing materials with the photographs might have been printed in hardcopy but not yet published in a publicly available manner (i.e.: timing differences).</p> <p>If a company need to remove those photographs, there will be additional cost and effort.</p>
	2.22	The PDPA does not provide a right for individuals to request that an organisation ceases to retain their personal data per se. Thus, an organisation which receives a notice of withdrawal of consent for publication of a photograph is not necessarily required to delete that photograph from all its records and documents, and may retain personal data in accordance with the Retention Limitation Obligation (e.g. where retention is necessary for legal or business purposes). However, where the organisation's activities involving the personal data are in breach of the Data Protection Provisions, the organisation may be directed by the Commission to (among other things) cease retaining such personal data.	-
	2.23	<p><u>Example: Withdrawal of consent for publication in annual report</u></p> <p>Organisation ABC publishes a photograph of a client, Mr Y, in its annual report distributed to shareholders and clients. Mr Y subsequently withdraws his consent to the publication of the photograph. Organisation ABC is required under the PDPA to cease future publication of the photograph, unless such disclosure without Mr Y's consent is required or authorised under the PDPA or other written law, for example, if the photograph is already publicly available. However, it is not required to recall copies of its annual report, which had been circulated prior to the withdrawal, so as to remove the photograph. It may also be able to continue to retain the photograph subject to the Retention Limitation Obligation.</p>	<p>There should be a requirement that the withdrawal of consent be reasonable.</p> <p>As mentioned above a lot of cost is likely incurred in producing such documents and a prohibition from further dissemination arising from an arbitrary withdrawal of consent is unreasonable.</p>

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	2.24	<p><u>Example: Collection in breach of Data Protection Provisions</u></p> <p>Jessie informs Organisation XYZ that it had collected her personal data without her consent by taking an identifiable photograph of her, and asks it to destroy the photograph. Organisation XYZ determines that its collection (and any subsequent use or disclosure) of Jessie's personal data may have been in breach of the Data Protection Provisions. In this case, Organisation XYZ should cease any further use or disclosure of Jessie's personal data.</p> <p>Where continued retention of Jessie's personal data constitutes a breach of the Data Protection Provisions, Organisation XYZ should also cease such retention.</p>	-
		<p><u>Does the PDPA affect the copyright in a photograph?</u></p>	
	2.25	<p>The Data Protection Provisions do not affect any right or obligation by or under other laws, including the Copyright Act. Hence, the PDPA does not affect when copyright subsists in a work or the rights of a person who owns copyright under the Copyright Act.</p> <p>Nevertheless, organisations must comply with the Data Protection Provisions when collecting, using or disclosing personal data in such a work. For example, an organisation that seeks to take a photograph of an individual would need to comply with the Consent Obligation, unless an exception under the PDPA applies (as discussed above).</p>	-

General comments:

1. Does photography include video-recording? If yes, do the same requirements apply to video-recording? (i.e.: to obtain verbal / written consent). How to deal with the “withdrawal of consent” from the video clip? If 1 individual who wants to withdraw, does it mean that the whole video clip cannot be used in the future despite there are no withdrawal from the rest? Also, in the video clip, most may not be the identifiable individuals, so the “valid” withdrawal of consent will have to be requested from the “speaker”?
2. What about charity events that an Organisation held? Our understanding is that charity events should not fall within the definition of a specified message as an offer to supply good or services, no consent will be needed.

Please correct us if our understanding is incorrect.

3. For Lucky Draw Winners, if their photos are uploaded / printed on Corporate website / Facebook / eNewsletter etc, so long as their written consent (e.g.: on the lucky draw slip, during the collection of the prize) is obtained for the Company to use for publications, the Company is able to use their photos. However, if the winner withdraws consent, does it mean that the Company must take down the photo from the Corporate website / Facebook / eNewsletters immediately even if the photo is printed on any materials? Or the Company is unable to use the photo for future use (i.e.: not to be used for another campaign, event, lucky draw, new printing job of Newsletter)