

27 April 2012

Daniel Lim Ying Sin (in personal capacity)
Director
Stamford Law Corporation
10 Collyer Quay #27-00 Ocean Financial Centre | Singapore 049315
T: +(65) 6389 3019 | F: +(65) 6389 3096
daniel.lim@stamfordlaw.com.sg

To:
Ministry of Information, Communications and the Arts

MICA_DP_Bill_Consultation@mica.gov.sg.

Dear Sir

Public Consultation on the Proposed Personal Data Protection Bill

The views expressed herein are personal and responsibility for errors lie with me.

My comments and suggestions are as follows:

Section 2, definition of “domestic”: Instead of the word “home”, which has a wider meaning, I suggest replacing with the more precise “household”.

Section 2, definition of “employee”: The word “employee” is tied in with the legal concepts distinguishing a contract for service or a contract of services. By including a volunteer including an unpaid volunteer within this definition, the lines may be blurred and difficult to ascertain. What would the status of a ‘consultant’ be? This should be clarified.

Section 4(2): The blanket exemption given to data intermediaries who merely have a contract with the responsible organization needs further thought and elaboration. There is no guidance here that the contract must enable the organization to comply with the PDPA and empowers the organization to enforce compliance with the PDPA or a direction given by the DPC. Take an example where the organization is foreign-based where it is already recognized that enforcement may be difficult against such an organization. If the organization uses a local data intermediary, it would be unacceptable if nothing can be done with respect to the organization which is overseas, when it is easy to address a breach by allowing certain limited powers that can be directed at the data intermediary. I suggest, first, the contract must have terms as mentioned above. Second, the DPC must have power to give direction to the organization to enforce those contract terms effectively. Third, to address a situation where the data intermediary refuses to comply with the enforcement action taken against it by the organization, or where the organization simply refuses to comply with the PDPA or DPC, the immunity granted to the data intermediary should be capable of being lifted. Depending on the culpability of the data intermediary, the data intermediary can then be made jointly responsible or simply required to comply with directions given by the DPC to stop the breach. In other words, a blanket exemption allows for a loophole that can be exploited cunningly between an overseas organization and the data intermediary, whether in collusion or otherwise. Regardless of responsibility under Parts III – VI, it should be prudent to provide that

data intermediaries must comply with regulatory, directive and investigatory powers of the DPC. Currently, section 31 does not allow the DPC directive powers because they are directed only at the organization that is in non-compliance with Parts III – VI (the very parts that data intermediaries are exempted from). The investigatory powers of the DPC under the Eighth Schedule appear wide enough to cover data intermediaries.

Section 5: The Singapore link should be broadened and simplified. Under (2)(a)(i), the Singapore link to individuals with a need for physical presence in Singapore at the time of collection leaves Singapore residents who are travelling overseas vulnerable. Mobile devices and interconnectivity renders it irrelevant to the individual where he is located eg., a person who is shopping in Johor Bahru who decides to book a restaurant for the evening dinner. The restaurant would not even know where the person is located. Accordingly, this link alone affords insufficient protection to Singapore residents. It is suggested that an additional Singapore-link should be residence in Singapore or Singapore citizens.

(2)(a)(ii) may be better understood if it refers to storage instead of location.

With respect to simplification, (2)(b)(i), (2)(d)(i) & 2(e)(i) are identical just as are (2)(b)(ii), (2)(c)(ii), (2)(d)(ii) & 2(e)(ii). In other words, the only non-identical factor is the word “disclosure” in 2(c)(i). All of 2(a)-(e) can be compressed.

I suggest as follows:

- “(2) For the purposes of subsection (1), personal data has a Singapore link in any of the following circumstances:
- (i) the personal data is collected from an individual in Singapore;
 - (ii) the personal data is that of a Singapore citizen or an individual ordinarily resident in Singapore;
 - (iii) the personal data is stored in Singapore;
 - (iv) the personal data is used in Singapore; or
 - (v) the personal data is disclosed (whether by reception or transmission) in Singapore.”

Section 17: I note that the deemed consent provision is more encompassing than originally proposed. Accordingly, it would be misplaced to rely the positive feedback received on deemed consent. The original para 3.32 of the original consultation states: “If, at the time the consent is deemed to be given, **the purpose is considered to be obvious to a reasonable person, and the individual voluntarily provides the personal data to the organisation for that purpose**, then the individual would be deemed to have consented to the collection, use or disclosure of his personal data by an organisation for that purpose”.

As drafted in the proposed Bill, the requirement of “obvious” has been left out. I suggest that having a deeming provision for mere “reasonableness” without the additional element of “obvious” is simply too wide. Every organization will predictably seek to rely on this deeming provision and the PDPA may potentially lose effectiveness.

I also point out that it is not clear whether in falling within the deeming provision, an organization must still comply with sections 16 and 22. I submit that, for example, if the organization used deceptive or misleading practices or failed to notify of the

purpose, that there should not be deemed consent. Accordingly, it should be made clear that section 17 remains subject to sections 16 and 22.

I would also query whether the relaxed deeming provision will be recognized internationally as giving reciprocal protection, or whether it is too lax such that Singapore does not benefit from reciprocal recognition with, for example, the EU.

Indeed, now that the detailed exceptions have been published as Schedules 3 – 7, I suggest that there is no need for a general deeming provision. There is in fact an overlap between, say, paragraphs (a), (b) and (f) of the Third Schedule, which are effectively deeming provisions. I therefore suggest that the cleanest approach would be to delete section 17.

Section 23(b): There should be an amendment as underlined: “information about the ways in which the personal data referred to in paragraph (a) has been ~~or~~ and may have been used by the organisation”. There is no reason why an organization should be able to elect between either of these two classes of information, both should be provided upon request.

Section 40, definition of “voice call”: the reference to “pressing buttons on a telephone handset or similar device” is dated. A large number of devices today are touch-enabled and do not have buttons to be pressed.

Section 46 (1): I suggest adding “frequency” to the “form and manner” of reporting.

Section 46 (5): As currently drafted, it can be construed that the Commission will pay for each terminated Singapore number, instead of paying for each report of terminated numbers. This should be corrected.

Section 47: I note that the requirement specified in the earlier consultations that organizations will have to register themselves with the Commission has been left out. This was a good requirement for enforcement purposes and should be re-inserted.

Section 47(3)(b): I note that there is no provision allowing for the subscriber or user to withdraw consent, as described in the earlier consultations. This should be re-inserted.

There is also no equivalent to section 21 with respect to the DNC Registry and I suggest that there should be one, or for section 21 to also apply to the DNC regime.

Yours faithfully
Daniel Lim

[end]