

# Regulations with data export limitations bring Singapore's data privacy law into force

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On 2 July 2014, the data protection provisions of Singapore's Personal Data Protection Act 2012 (PDPA) came into force, following an 18 month transition period for companies to prepare for compliance.<sup>1</sup> To complete the process, the Personal Data Protection Regulations 2014 (PDPR) were made on 15 May 2014, the most important aspects of which concern data exports.

## Data export regulations

Organizations to which the PDPA applies may not transfer personal data outside Singapore except in accordance with regulations. The Act requires the regulations 'to ensure that organisations provide a standard of protection to personal data so transferred that is comparable to the protection under this Act'.<sup>2</sup> The PDPR require that the transferring organisation ('the organisation that transfers the personal data from Singapore to the country or territory outside Singapore') must comply with the PDPA while it retains possession or control of the data (irrespective of where the data is located).<sup>3</sup> It must also<sup>4</sup>

*take appropriate steps to ascertain whether, and to ensure that, the recipient of the personal data in that country or territory outside Singapore (if any) is bound by legally enforceable obligations ... to provide to the transferred personal data a standard of protection that is at least comparable to the protection under the Act.*

Regulation 10 specifies that 'legally enforceable obligations' may include laws, contracts, binding corporate rules (BCRs) or 'any other legally binding instrument'. The inclusion of 'laws' means that a transferring company may therefore argue that it has transferred the data to a country with protection comparable to Singapore and that is all that is needed. However there are no provisions for regulations or the Personal Data Protection Commission (PDPC) to create a 'whitelist' of countries satisfying this requirement, it could only be tested by a complaint to the PDPC. After export, the data subject's rights will then arise from the law of the other country, in relation to actions taking place in that country.

For a contract to comply with Regulation 10 it must 'require the recipient to provide a standard of protection for the personal data transferred to the recipient that is at least

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<sup>1</sup> For PDPC summaries of the key obligations of organisation under the PDPA, see <http://www.pdpc.gov.sg/news/press-room/page/0/year/2014/organisations-to-comply-with-data-protection-requirements-starting-2-july-2014#sthash.GHCvTpz7.dpuf>

<sup>2</sup> PDPA (Singapore), s. 26(1).

<sup>3</sup> PDPR, s. 9(1)(a).

<sup>4</sup> PDPR, s. 9(1)(b).

comparable to the protection under the Act' and 'specify the countries and territories to which the personal data may be transferred under the contract'.<sup>5</sup> This is contract between the exporter ('transferring organisation') and the overseas recipient. There is no requirement under the PDPA that the data subject be made aware of such exports, or such contracts. Even if the data subject is aware, and the contract does impose the required obligations, there are significant problems to be overcome before the data subject can sue the foreign recipient for failing to comply. Although Singapore has reformed the doctrine of privity of contract so as to allow third parties for whose benefit contracts are made to enforce those contracts (Contracts (Rights of Third Parties) Act 2001), the contract must purport to confer a benefit on the data subject, and must identify the data subject as a member of a class of beneficiaries.

For BCRs to comply with Regulation 10, they must require every recipient related to the transferring organisation, to provide a standard of protection for the personal data transferred to the recipient that is at least comparable to Singapore's protections. The BCRs also must specify: the recipients to which they apply; the countries and territories to which the personal data may be transferred under them; the rights and obligations they provide; and that they may only be used for recipients that are related to the transferring organisation. Once again, data subjects will usually be unaware of any exports and unable to enforce BCRs.

What might 'any other legally binding instrument' include? It would be interesting to see, for example, if a US or Japanese company will claim to be sufficiently 'bound' by certification under the APEC Cross-border Privacy Rules system. Will it satisfy the Singaporean Act to claim that APEC CBPRs requires 'a standard of protection that is at least comparable to the protection under the Act', if there is no realistic prospect of financial or other penalties for non-compliance under APEC CBPRs?

There are also exceptions to the data export requirements, for data in transit between two other destinations, and for data 'publicly available in Singapore' (which is generally exempt from the Singaporean Act). Exports are also exempt (similar to Article 26 of the Directive) if (i) with the data subject's consent (qualified as below), or (ii) necessary to fulfill a contract with the data subject, or (iii) clearly for their benefit. Exports necessary for transactions covered by the 3<sup>rd</sup> or 4<sup>th</sup> Schedule to PDPA,<sup>6</sup> are also exempt provided the transferor has taken reasonable steps to ensure the recipient will not use the data for other purposes.<sup>7</sup>

Data subjects are given some protection against unjustifiable claims that they have consented to exports. Consent will be negated in three situations: (i) if the data subject has not previously been 'given a reasonable summary in writing of the extent to which the personal data to be transferred to that country or territory will be protected' to Singaporean standards; (ii) if there is a requirement of consent which is not reasonably necessary to the supply of the goods or services; or (iii) if there is any misleading or deceptive conduct involved.

Singapore's approach is very thorough and not easily classified – it is *sui generis*. It probably gives individual data subjects few opportunities to protect themselves against unprotected exports, unless an export becomes publicly notorious. However, it does impose obligations on

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<sup>5</sup> PDPR, s. 10(2).

<sup>6</sup> These schedules are very lengthy and complex sets of exemptions from use and disclosure obligations. For a summary, see G Greenleaf *Asian Data Privacy Laws* (OUP, forthcoming, 2014), Chapter 10, section 3.1; or see G Greenleaf 'Singapore's Personal Data Protection Act 2012: Scope and Principles (with so Many Exemptions, it is only a 'Known Unknown')', *Privacy Laws & Business International Report*, Issue 120, December 2012, pgs 1, 5-7.

<sup>7</sup> PDPR, s. 9(3).

companies which, if not observed, could result in PDPC enforcement action if something goes badly wrong.

## The PDPA settles in – Business caution needed

With the PDPA's data protection components coming into force, other aspects of its operation are being clarified. They have a common feature that businesses involved with Singapore need to be aware of considerable regulatory detail or there are considerable risks involved.

### Other regulations

Other aspects of the PDPA concern implementation aspects of requests for access, and the exercise of rights concerning deceased persons. The Personal Data Protection (Enforcement) Regulations 2014 set out many practically important procedural matters concerning review and reconsideration applications, directions by the Commission, and exercise of powers of investigation. Additional regulations have also been made specifying 'prescribed law enforcement agencies', for purposes of exemptions under the Act.

### Public Consultations on new proposed Guidelines

The Personal Data Protection Commission (PDPC) completed public consultations on proposed Guidelines for the education, healthcare and social service sectors, and also on the Act's effect on photography, May-June 2014. The proposed Guidelines and submissions received are available,<sup>8</sup> but the Guidelines are not yet completed. Businesses in any sector will need to check that they are aware of guidelines relevant to them.

### Monetary Authority of Singapore confirms exemption

A feature of Singapore's PDPA is that all existing laws take precedence over PDPA provisions. This has been illustrated by a consultation exercise carried out by the Monetary Authority of Singapore (MAS) concerning its Notices on Prevention of Money Laundering and Countering the Financing of Terrorism. The effect of these AML/CFT Notices is, in summary, 'to impose on the financial institutions [in Singapore] the general obligation to conduct due diligence before starting a business relationship with the customer, to monitor the business relationship and to refer any unusual or suspicious activity to the authorities for follow-up'.<sup>9</sup> The question thereof arose, as Chan puts it, of 'how financial institutions are to deal with the large amount of information obtained through the customer due diligence process, in light of the new privacy requirements laid down by the PDPA?'

The result was that the Notices now 'make clear that the PDPA rules concerning the right of access, the right of correction, and the disclosure of purpose of use would generally not apply to personal data derived from the customer due diligence process'. However 'one exception would be with respect to certain basic identification data as well as other personal data which the customer has provided to the financial institution (as distinguished from personal data on the customer which the financial institution has derived or obtained from its own efforts).<sup>10</sup>

This illustrates how limited the operation of the PDPA is likely to be in many aspects of the operation of the private sector in Singapore where businesses are required to act in

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<sup>8</sup> < <http://www.pdpc.gov.sg/personal-data-protection-act/public-consultations>>

<sup>9</sup> Eric Chan, Partner, Shook Lin & Bok 'Singapore – MAS Finalises Policy Posture On The PDPA And Its Impact On AML/CFT Obligations Of Financial Institutions' (Conventus Law website, 28 July 2014) < <http://www.conventuslaw.com/singapore-mas-finalises-policy-posture-on-the-pdpa-and-its-impact-on-amlcft-obligations-of-financial-institutions/>>

<sup>10</sup> Chan 'Singapore – MAS Finalises Policy Posture'.

accordance with existing legislation, but also that making such distinctions may well be complex.