



Personal Data Protection: Be ready for its full enforcement

CONSENT FROM A DATA SUBJECT - IS IT ALWAYS A MUST?

The Personal Data Protection Act B.E. 2562 (2019) (“**PDPA**”) will be fully effective in June 2021. The full enforcement is approaching hence readiness in terms of legal documentations, organization and technology is becoming critical when talking about preparation and implementation for many organizations. From a practical perspective, awareness of related parties within organization is very important for business operators to successfully implement for readiness and stay complaint.

Experience the future of law today.

According to the PDPA, one of the key concerns when processing personal data, whether when collect, use or disclose, a data controller and a data processor must have a lawful basis before or when processing personal data. This also leads to one of the most concerned issues, that is when the data controllers/processors are relying on a “**consent**” of a data subject. Questions often raised include whether a consent is always a must when you process personal data.

PDPA Alert

25 March 2021

WHAT ARE THE CONCERNS?

The data controller and the data processor should be careful when using the consent base, since a valid consent requires a high standard to obtain (i.e., it must be freely given, specific, informed and unambiguous), not to mention the cost associated with when implemented by organizations. If the legal requirements are not met to establish a valid consent, such consent will be invalid and cannot be relied on. Using an invalid consent in processing of personal data will be unlawful, and the data controller or the data processor may be subject to legal risks and liabilities.

Since withdrawal of consent can be done at any time by the data subject and in an easy manner as same as when granted, this might cause adverse effects to the business operators, especially when processing of personal data is still necessary. If the data subject has withdrawn his/her consent to process his/her personal data, potentially, on-going processing activity must be ceased upon the withdrawal, otherwise the data controller and/or the data processor may be subject to legal liabilities.

WHEN TO REQUEST A CONSENT?

Generally, in order to process personal data, the data controller and the data processor must determine purpose of processing the personal data and consider whether or not it is necessary to use, collect, and/or disclose personal data in order to accomplish such purpose. Then, legal basis available under the PDPA for processing personal data must be determined and established.

Based on the concerns regarding the consent discussed earlier, it is normally recommended that the data controller and data processor should consider the legal basis available under the PDPA prior to the consent base. If such processing activity does not fall into any of those bases, then a consent should be considered. For instance, the contract base will apply when a company would use personal data of its customers in order to perform contractual obligation of sales or services, whereas, the consent base is likely to be required when processing customer's personal data for marketing purposes, or when sensitive personal data is processed and exemptions set out by law are not met.

WHAT CONSTITUTES A VALID CONSENT?

Informed

This means the request for consent must provide the data subject with all necessary information regarding the processing of personal data, such as purpose of processing and the right to withdraw the consent.

Unambiguous

The request for consent must be clear and in manner for the data subject to easily understand the purpose of collecting, using, and/or disclosing his/her personal data. Additionally, it must be clearly distinguishable from other content.

Freely given

When seeking for consent, the data subject must be able to say 'no'. In other words, the request for consent must be clear affirmative reason, providing the data subject a choice to choose whether he/she wants the data controller or the data processor to

PDPA Alert

25 March 2021

process his/her personal data or not. Here, the conditionality and bargaining power must be taken into account. The data controller and the data processor must not make the data subject believe that the consent will lead to more desirable result other than to fulfill the purpose set. In addition, the right to withdraw a consent must be given. In particular, the withdrawal can be done by the data subject as easily as to give a consent. At the same time, the data subject must be informed by the data controller or the data processor about the risk of rejection/withdrawal.

Specific

The purpose of processing personal data must be specific. The data controller or the data processor must state all of its activities with such personal data in the request and cannot define the term that is too broad.

HOW TO ASK FOR CONSENT?

The request for consent must be explicit, made in a writing or via electronic means, normally, through the same channel that the personal data is gathered, to ensure that the data subject has aware of all conditions and his/her rights. Currently requesting for consents via electronic means is being used widely. However, as mentioned earlier, the request is subject to certain standard, thus, the form of request cannot be overlooked, while ensuring that the request satisfies all legal requirements.

DELOITTE'S OBSERVATION

Understanding of the related parties within the organization, as well as stakeholders, must be set and aligned that not all cases of processing personal data would require a consent. If not necessary as required by law, the consent base is not recommended to be the first choice for the data controller and the data processor due to its relative risks. In the case that the consent base must be applied, the data controller and the data processor must carefully determine a valid approach of getting a valid consent from the data subject.

For more information on how Deloitte can help you, please contact:

Sutthika Ruchupan
Legal Director

Tel: + 66 (0) 2034 0000 Ext 11473
Email: sruchupan@deloitte.com

Nattarin Kuwiboonsin
Legal Manager

Tel: 66 (0) 2034 0000 Ext 15007
Email: nkuwiboonsin@deloitte.com

PDPA Alert

25 March 2021

About Deloitte Legal

Deloitte Legal means the legal practices of DTTL member firms, their affiliates or their related entities that provide legal services. The exact nature of these relationships and provision of legal services differs by jurisdiction, to allow compliance with local laws and professional regulations. Each Deloitte Legal practice is legally separate and independent, and cannot obligate any other Deloitte Legal practice. Each Deloitte Legal practice is liable only for its own acts and omissions, and not those of other Deloitte Legal practices. For legal, regulatory and other reasons, not all member firms, their affiliates or their related entities provide legal services or are associated with Deloitte Legal practices.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Seoul, Shanghai, Singapore, Sydney, Taipei and Tokyo.

About Deloitte Thailand

In Thailand, services are provided by Deloitte Touche Tohmatsu Jaiyos Co., Ltd. and its subsidiaries and affiliates.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.

© 2021 Deloitte Touche Tohmatsu Jaiyos Advisory Co., Ltd.