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PDPC Issues Decision on Access Obligation and the Evaluative Purpose Exception in Relation to Artificial Intelligence Systems and Deterministic Algorithms

Introduction

The Personal Data Protection Act ("**PDPA**") protects against the misuse of individuals' personal data by regulating the management of such personal data. It sets out the various obligations on the part of businesses and organisations dealing with personal data, as well as the exceptions to these obligations.

In *[redacted] v HSBC Bank (Singapore) Limited* [2021] SGPDPC 3, the Personal Data Protection Commission ("**PDPC**") issued its decision (the "**Decision**") on the obligation to provide access to personal data in an organisation's possession as well as the exception allowing organisations to deny access to opinion data for evaluative purposes, both in the context of Artificial Intelligence ("**AI**") systems and deterministic algorithms.

The Applicant had sought a copy of the respondent Bank's internal evaluation report regarding his unsuccessful credit card application. The Bank provided the report, but redacted certain opinion data. While the complainant took issue with the redaction, the PDPC held in favour of the Bank and affirmed the Bank's decision not to provide the Applicant with access to the redacted personal data, finding that the redaction fell within the applicable exception to the access obligation.

Notably, the redacted data pertained to opinion data auto-generated by the bank's AI algorithms. With AI becoming an increasingly common tool for financial institutions and other organisations for making business evaluations, this Decision may thus have significant impact on the disclosure obligations of these organisations relating to the data produced by such AI systems.

The Bank was successfully represented by Rajesh Sreenivasan and Justin Lee of Rajah & Tann Singapore LLP. In this Update, we provide a summary of the case and highlight the key points and impact of the Decision.

Brief Facts

The Applicant had unsuccessfully applied to the Bank for a credit card. He then requested the Bank to provide him with a copy of the Bank's internal evaluation report prepared for the purpose of evaluating his credit card application ("**Report**").



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The Bank provided the Applicant a copy of the Report but with some fields redacted ("**Redacted Data**"). The Bank's position was that they were not obliged to disclose the Redacted Data to the Applicant as it constituted opinion data kept solely for an evaluative purpose ("**Evaluative Purpose Exception**").

The Applicant subsequently made a review application under the PDPA to challenge the Bank's position. The PDPC thus had to consider:

- (a) Whether the Report constituted personal data of the Applicant; and
- (b) If so, whether the Evaluative Purpose Exception (or any other exception) applied so as to justify the Bank's redaction of the Redacted Data from the Report.

The PDPC's Decision

The PDPC accepted the Bank's position, affirming the Bank's refusal to provide the Applicant with access to the Redacted Data.

Obligations and exceptions under the PDPA

The PDPA sets out the data protection obligations of organisations in their processing of personal data. Personal data is defined as data about an individual who can be identified (a) from that data; or (b) from that data and other information to which the organisation has or is likely to have access.

Of these obligations, the Access Obligation gives a data subject the right to access personal data about him that is in an organisation's possession or under its control. However, the PDPA also provides certain exceptions to the Access Obligation, including the Evaluative Purpose Exception, which allows an organisation to decline providing access to "opinion data kept solely for an evaluative purpose".

Whether the Report constituted personal data

The PDPC found that the Report (including the Redacted Data) constituted personal data of the Applicant and was thus subject to the Access Obligation unless any exception applied. The Report contained information about the Applicant, who was identifiable from the information, and was prepared for the purpose of making a decision concerning his application for credit card facilities.

However, the PDPC accepted that the Redacted Data in the Report constituted opinion data for purposes of the Evaluative Purpose Exception. The Bank submitted that the Redacted Data was derived after an analysis of primary data based on business rules that were expressed in its proprietary algorithm. The PDPC was satisfied that the Redacted Data was not merely a reproduction of personal data obtained from a third-party source, nor were they the result of simple arithmetic operations; they were expressions of opinions after data processing.

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Whether the Evaluative Purpose Exception applied

As set out above, the Evaluative Purpose Exception provides an exception to the Access Obligation for opinion data kept solely for an evaluative purpose. The PDPA defines an "evaluative purpose" to include "for the awarding of contracts, awards, bursaries, scholarships, honours or other similar benefits". The PDPC clarified that this would cover a range of decisions, some of which would be in the nature of a bilateral relationship (e.g. contracts, bursaries and scholarships), and some of which would be a unilateral conferment of a status (e.g. honours or similar benefits).

Here, the Bank was using the opinion data to evaluate whether to award a contract to the Applicant (the contract in this case being for the provision of credit card services), and the PDPC found that this fell within the Evaluative Purpose Exception.

A notable element to the Decision was the PDPC's finding that, even though the Bank had declined to provide the Applicant with the Redacted Data, the Bank had nevertheless acquitted itself from the perspective of accountability and disclosure of policies and practices by providing to the Applicant: (a) the Bank's Principle for the Ethical Use of Big Data and AI; and (b) the Bank's Credit Decisioning Policy Statement. These publications provided information about how AI is used in an ethical manner by the Bank and how technology is used by the Bank to conduct credit facility assessments. The PDPC found the disclosure of these publications relevant as they provided a description of the type of opinions that the majority of the Redacted Data conveyed.

In this regard, the transparency and accountability demonstrated by the Bank in providing the Applicant with information about how it uses data and technology to conduct credit facility assessments can be said to have been a key factor in the PDPC's Decision to affirm the Bank's reliance on the Evaluative Purpose Exception in declining to provide access to the Redacted Data.

Why This Decision Matters

The PDPC's Decision is particularly relevant in light of the increasing reliance on AI systems for business evaluations and assessments, whether relating to external contracts, customer onboarding or internal operational matters. As such data may include a combination of personal data and opinion data generated using deterministic algorithms (which organisations would seek to keep confidential), it is important to distinguish what is subject to disclosure and what is exempt.

The position taken by the PDPC in this Decision is highly notable in this regard as it highlights the more pragmatic approach taken by the Singapore regulator compared to other jurisdictions such as the EU and the US. In a set of recent decisions, the Dutch Courts ordered Uber and Ola to provide their drivers with more information regarding the inner workings of their automated decision making processes, such as the criteria adopted by their AI systems in assessing penalties and deductions to be imposed on

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drivers, thereby opening the "black box" within which such AI systems operate to greater public scrutiny. In contrast, the PDPC's Decision indicates the PDPC's acceptance that the inner workings of AI systems need not be disclosed to data subjects as long as the organisation is sufficiently transparent in terms of how it utilises such automated technology in processing personal data.

The unique nature of AI algorithms and its role in business operations and decision making, particularly in the context of data protection, seems to be a topic of consideration across various jurisdictions. Organisations should be aware and keep updated on the respective judicial treatments of these systems to better assess the applicable obligations and requirements.

In essence, the pragmatism exhibited by the PDPC in this decision puts Singapore squarely in the frame as one of the best jurisdictions in the world, from a regulatory standpoint, to run AI systems and conduct data analytics provided organisations ensure adequate transparency and accountability policies are maintained.

In light of the PDPC's Decision, organisations should also ensure that they implement and maintain adequate policies pertaining to the use of these AI algorithms which can be disclosed to data subjects upon request. The existence and disclosure of such policies would enable organisations to demonstrate the level of transparency and accountability expected by the PDPC in the use of AI systems and deterministic algorithms, thereby allowing organisations to preserve the confidentiality of their AI systems and opinion data generated therefrom. Our team would be happy to assist in the preparation of such policies if required.

For further queries, please feel free to contact our team below.

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