January, 2021 No.8

This issue covers the following topics:

I. Personal Data Protection - Duties after your business faces a cyber-attack or hacking

Background

From time to time, there are news reports of hackers breaching computer systems through the use of ransomware or by other means resulting in, in many cases, the breach of personal data and the leakage thereof in large numbers. To many business operators who, in their normal course of business, are in possession of the personal data of their clients or customers to handle, this may lead to one of the most essential questions: "What do we do next?"

To address such question with respect to the soon-to-be-fully-enforced Personal Data Protection Act of 2019 ("**PDPA**") which is currently scheduled to be fully enforced from 1 June 2021 onwards, we will, in this article, discuss about the general duties of the business operators who act as data controllers and/or data processors under the PDPA once they face a cyber-attack or hacking that results in them being the victims of the breach of personal data after the PDPA becomes fully enforced. Importantly, the cyber-attacks or hacking may be regulated by and punishable under other relevant laws as well such as Cyber Security Act of 2019 or Computer Crime Act of 2007, however, such laws shall be discussed on another occasion.

1. Definition of the breach of personal data

Although the PDPA does not exactly define or stipulate what constitutes as a "breach" of personal data, it could be assumed that it covers a broad range of actions such as destruction, loss, alteration or change, disclosure, access, forwarding, storing, or other processing of personal data, regardless of whether such was done unlawfully or by accident[1]. Therefore, should personal data that is stored or handled by the data controllers and the data processors be subject to any of such actions, the following duties may likely apply to such data controllers and data processors even though such data controllers and data processors, along with the data subject (data owner), may only be the victims (not the offenders) of such 'breach' under the PDPA or other relevant laws[2].

1 2021. *Thailand Data Protection Guidelines 3.0*. [ebook] Bangkok: Research Center for Law and Development, Faculty of Law, Chulalongkorn University, pp.114-115. Available at: <https://www.law.chula.ac.th/wp-content/uploads/2020/12/TDPG3.0-C5-20201208.pdf> [Accessed 21 January 2021]

2 For example, the person who conducts the breach by unlawfully accessing, intercepting, damaging, altering, changing or adding the computer data or unlawfully causing suspension, deceleration, obstruction or interference to the computer system, shall

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

2. Duties of a data controller

A "data controller", who, by its definition under the PDPA, is the person or juristic person having the power and duties to make decisions regarding the collection, use or disclosure of the personal data (e.g. business operators, service providers, employers), is required to take the following actions[3]:

(i) Notifying the Office of the Personal Data Protection Committee ("**Office**") of the breach of the personal data without delay, where feasible, within seventy two (72) hours after having become aware of such breach. However, if such personal data breach is unlikely to result in risking the rights and freedom of the person, this notification requirement shall be exempted; and
(ii) Notifying the data subject of the breach of the personal data as well as remedial measures without delay if such breach has high risk to affect the rights and freedom of the person.

Provided, however, that the notification and exemption thereof shall be in accordance with the rules and procedures set forth by the Personal Data Protection Committee which is yet to be issued.

3. Duties of a data processor

A "data processor", who, by its definition under the PDPA, is the person or juristic person who operates in relation to the collection, use or disclosure of the personal data in accordance with the orders given by or on behalf of a data controller but not a data controller by itself (e.g. accounting firm being entrusted to do the pay rolls, call center service providers retained by other business operators), is required to notify the data controller of the personal data breach[4].

The PDPA does not specify the timeframe in which a data processor is required to make such notification to the data controller, however, it could be assumed that such timeframe should be in accordance with the data processing agreement (an agreement which the PDPA requires any data controllers, who are to assign the activities to collect, use or disclose the personal data to any data processor, to execute such agreement with such data processor so as to control such assigned activities as carried out by the data processor and to ensure such data processor's compliance with the PDPA).

4. Legal sanctions

It must be re-emphasized that, although the data controller and the data processor may be victims to the cyber-attacks or hacking and although it is their personal data storage system that is being breached, it is the data controller and the data processor who are required by the PDPA to comply with the duties as discussed in 1. and 2. above, where, non-compliance therewith may result in sanctions under the PDPA.

The PDPA sets forth three (3) types of sanctions, namely, civil liabilities, criminal penalties and administrative penalties. However, for the non-compliance with the duties as discussed in 1. and 2. above, and unless a data controller or a data processor is an accomplice, aider, abettor to or otherwise has intentionally been involved in the personal data breach, the legal sanctions which should be of immediate concern to such data controller or data processor would be civil liabilities and administrative penalties.

For civil liabilities, a data controller or a data processor who did not comply with the notification requirements above shall be required to compensate for the damage that occurred to the data subject regardless of whether such non-compliance with the PDPA was intentional or a result of negligence, unless such data controller or a data processor could prove that:

(a) such damage was caused by force majeure or a data subject's own act or omission; or
(b) it was an action taken in accordance with an order of an officer exercising his/her duties and power as provided by law.

---

likely be subject to, among other things, Sections 5, 7, 8, 9 or 10 of the Computer Crime Act of 2007.
3 Section 37 (4) of the PDPA
4 Section 40 (2) of the PDPA

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

It is worthwhile to note that the compensation under the PDPA is broader than that under the Civil and Commercial Code which is a general law, since it also includes "all the necessary expenses incurred by the data subject for the prevention of the damages likely to occur or which was paid to suppress the damage that has already occurred". Furthermore, the PDPA grants the power to the court to set punitive damages in addition to such compensation at the amount that the court deems appropriate, however, not exceeding two (2) times the amount of such compensation by taking into account (i) the severity of the damage, (ii) benefits obtained by the data controller or data processor, (iii) financial status of the data controller or data processor, (iv) remedial measures taken by the data controller or data processor and (v) the involvement of the data controller or data processor in the causation for damage.

For administrative penalties regarding the above notification requirements, a data controller who violated or did not comply therewith and a data processor who 'unreasonably' did not notify the data controller (who is thereafter required to notify the Office) shall be subject to a fine not exceeding THB 3,000,000. It is notable that, for a data processor, the non-compliance has to be "unreasonable", unlike the mere non-compliance of a data controller that could trigger the penalty.

5. Remarks

It is essential to note that compliance to the abovementioned notification requirements alone may not avert other sanctions whether those of the PDPA or of other relevant laws which may be applicable to data controllers and data processors as a consequence of the breach of personal data. Particularly, the breach of the personal data may, by itself, be interpreted as a violation of or non-compliance with the PDPA with respect to the duties of a data controller and of a data processor to provide appropriate security measures in order to prevent the unauthorized or unlawful loss, access to, use, alteration, changes or disclosure of the personal data (for the discussion regarding the current regulation on the security measures, please see the details here).

Lastly, in order to avoid such consequences, prudent business operators should, with the support of professional legal advisors, IT advisors etc., make necessary arrangements to prevent and prepare for the breach of personal data.

[Authors]

Yothin Intaraprasong
yothin_intaraprasong@noandt.com
Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. His primary practice areas are Corporate/M&A. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.

Yuyu Komine
yuyu_komine@noandt.com
Yuyu Komine is a Thai qualified lawyer working in the Bangkok office. His main area of practice is labor laws, foreign business laws, corporate and commercial matters, and recently enacted Personal Data Protection Act. His experience spans from advising clients on the handling of labor disputes such as strikes and factory lock downs, corporate and commercial issues, establishments and closures of foreigners' businesses, to handling of personal data. Also, as he is capable in Thai, Japanese and English, all of which at the first language level, he has a strong background in providing legal advice to both international and domestic clients.

Poonyisa Sornchangwat
poonyisa_sornchangwat@noandt.com
She is a Thai qualified lawyer based in the Bangkok office. She has been involved in several cross-border transactions, joint ventures and mergers & acquisitions, assisting Japanese companies which aim to expand their businesses into Thailand, and providing legal advice on corporate matters and legal compliance for several businesses, since 2015.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

II. Recent Movement on the Law on Climate Change

Background

Global climate change has become a major worldwide concern over the past several years as it has caused numerous observable impacts on the environment, e.g., rise in sea level, intense heatwaves, or flooding. Thus, in order to address the global problem of climate change and cooperate with the international community to tackle this problem, Thailand together with many countries ratified the Paris Agreement under the United Nations Framework Convention on Climate Change (the "**Paris Climate Agreement**") on 21 September 2016, and has been committed to achieving the objectives, which are to keep the increase of the global average temperature to well below two (2) degrees Celsius and to limit the temperature increase to one point five (1.5) degrees Celsius above pre-industrial level. This is the Paris Climate Agreement that the US President Joe Biden, in one of the first tasks on his inauguration day, just signed an executive order to re-join.

To implement the Paris Climate Agreement as agreed and accomplish its goals, Thailand, as one of the signatories, needs to direct efforts to, among others, reducing carbon emissions. Thailand expressed its nationally determined contribution to reduce greenhouse gas emissions twenty (20) to twenty-five (25) percent within the timeframe from 2021 to 2030[1]. To do so, the Thai government gave the green light for the preparation of the Bill on Climate Change (the "**Bill**"). To date, there has been a public hearing on the Bill, which started in September 2020 and for which five (5) sessions were held before its conclusion on 19 October 2020.

Key takeaways

On examination, the Bill prepared by the Office of Natural Resources and Environmental Policy and Planning ("**ONEP**") mainly establishes measures to collect information, such as in relation to carbon footprint, which is necessary for the assessment of emissions or the enhancement of the sinks in respect of greenhouse gases[2] in accordance with the Paris Climate Agreement.

Under the Bill, the Committee on Climate Change Policy (the "**Committee**") will be established in order principally to prepare plans with respect to climate change in Thailand, including a master plan for national climate change, a national operation plan for greenhouse gas reduction and the like, as well as to implement the foregoing. There will also be a national greenhouse gas inventory administered and managed by ONEP.

What seems to be significant here is the national greenhouse gas inventory. The national greenhouse gas inventory will be provided. It will also be disclosed to the public and contain information on the following as a minimum:

(1) Quantity of greenhouse gas emissions produced by human activities;
(2) Quantity of greenhouse gases contained in greenhouse gas absorption sources; and
(3) Quantity in respect of net reduction of greenhouse gases within the timeframe of greenhouse gas reduction plan.

In preparation for this national greenhouse gas inventory, there is a requirement for the introduction of a reporting duty directed at both the government sector and the private sector. This will impose on the government sector, e.g., Ministry of Industry, Ministry of Energy, and Ministry of Transport, the duty to report information regarding emissions, storage and reduction of greenhouse gases to ONEP. Likewise, the private sector also shares such corresponding obligations, as detailed below.

Possible Impacts on Private Sector

The potential impacts of the Bill on the private sector can be summarized as follows:

1. Reporting duties and corresponding rights

1 According to ONEP's letter no. 1007.2/13850 dated 20 October 2020 to UNFCCC Secretariat.
2 Section 5 of the Bill. "Greenhouse gases" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, nitrogen trifluoride, and other gases as to be prescribed in the ministerial regulation.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

The Bill stipulates obligations on certain private sector operators to report information for the preparation of the national greenhouse gas inventory. Specifically, when requested by ONEP or the government sector, the following persons will be obliged to report information regarding emissions, storage and reduction of greenhouse gases in order to assist the authorities in preparing the national greenhouse gas inventory:

(1) Operators of a factory business under the factory law;
(2) Operators under the law related to energy business operation;
(3) Owner of designated factories and designated buildings under the law related to promotion of energy conservation;
(4) Other persons as prescribed in ministerial regulations; and
(5) Other government sector which possesses the relevant information or has the duty to request the said information under other laws.

In addition, the Bill also establishes a protection clause for the disclosure of the information. Persons are prohibited from disclosing information on emissions, storage and reduction of greenhouse gas activity that ONEP or the government sector obtains or possesses which is information pertaining to a person or is a trade secret under the trade secrets law. Further, a person can request the Committee not to disclose such information if the information is disclosed to the public and will cause damage to a particular person.

2. Applying for financial support

A private organization related to the environment, a private sector, an entrepreneur or any other business is entitled to apply for a subsidy from the Environment Fund[3] established under the law related to the enhancement and conservation of the national environmental quality in order to support the following activities[4]:

(1) Operations in order to obtain information on emissions and storage of greenhouse gas activity or other necessary information;
(2) Operations in order to obtain the information on greenhouse gas reduction activity or other necessary information;
(3) Operation of projects or activity pertaining to greenhouse gas reduction;
(4) Operations in respect of projects or activity pertaining to climate change adaptation;
(5) Research, development of knowledge, technology and enhancement of capacity in operations for climate change; and
(6) Other activity as prescribed by the Committee.

3. Administrative penalties

With respect to the penalties, the Bill provides merely for administrative fines and daily fines for failure to report the information without reasonable cause, reporting false information or concealing information which is required to be reported. However, the amount of the fines remains unclear and under consideration. The penalty of a fine may be extended to directors as well if the offender is a juristic person and such offence is committed as a result of an order or an act of a director of such juristic person.

Conclusion

This can be regarded as a significant attempt by Thailand to contribute to tackling a global environmental problems such as global warming. The Bill is now under the consideration of the Ministry of Natural Resources and Environment, and, as the next step, will be submitted to the Office of Council of State. Hence, the Bill is in the preliminary stages and still has a long way to go. It has to undergo all necessary procedures before being enacted as an official and effective law and there is undoubtedly considerable room for modification along the way.

3 The Environment Fund is already established under the Enhancement and Conservation of the National Environmental Quality Act of 1992 and overseen by the Ministry of Natural Resources and Environment.
4 The subsidy or incentive from the Environment Fund has been granted to certain activities under the Enhancement and Conservation of the National Environmental Quality Act of 1992. The new law will be expected to clearly specify that the activities in relation to greenhouse gas would be eligible to apply for subsidy therefrom.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

[Authors]

Yothin Intaraprasong
yothin_intaraprasong@noandt.com
Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. His primary practice areas are Corporate/M&A. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.

Kwanchanok Jantakram
kwanchanok_jantakram@noandt.com
Kwanchanok graduated with a Bachelor of Law from Thammasat University in 2016 and obtained an LL.M. from Waseda University in 2020. She has represented local and multinational companies in various corporate projects and commercial transactions such as M&A, foreign investment law, financial regulation etc.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

III. Recent Movement towards Legalization of Mobile Applications for Taxi or Ride-hailing Services

On 21 December 2020, the Department of Transport issued the Draft Ministerial Regulation on Alternative Service Passenger Vehicles (not exceeding seven (7) seats) for public hearing purposes ("**Draft Regulation**"). Such Draft Regulation aim to regulate mobile applications for taxi or ride-hailing services and were long-awaited due to the illegality of mobile applications for Alternative Service Passenger Vehicles (defined below) in Thailand. As background, Alternative Service Passenger Vehicles have been operating in Thailand for many years now and generally, they can be seen as unregulated and illegal. The Draft Regulation aims to increase the regulations on these Alternative Service Passenger Vehicles and bring them into the mainstream registration system similar to the taxi licensing system. Also, the Department of Transport will have the power to approve mobile applications that meet qualifications and legalize transport platform services. Such Draft Regulation may signal the beginning of the legalization of Alternative Service Passenger Vehicles. Please note that this Regulation is applicable to only passenger services and not freight services (e.g., logistics).

The content of the Draft Regulation can be summarized as follows:

1. Definition and Requirements of Alternative Service Passenger Vehicles

"Alternative Service Passenger Vehicle(s)" are defined as personal vehicles that are to be registered as passenger vehicles for hire through mobile application for Alternative Service Passenger Vehicles ("**Application**"). There are four (4) types of vehicle (i.e., small, medium, large and utility vehicles) and one vehicle number can be registered per person. Their seats, life span, engine specifications of the vehicle and vehicle colors will be further regulated in order to meet the appropriate standards.

A vehicle that is registered as an Alternative Service Passenger Vehicle shall be marked to show that it is an Alternative Service Passenger Vehicle. Also, the vehicle number plate thereof will be in the format of a passenger vehicle plate, but in the vehicle registration book thereof will mention that this vehicle is registered as an Alternative Service Passenger Vehicle.

The driver shall ensure that they are dressed cleanly and appropriately.

2. Requirements of Applications

An Application for such services shall be licensed by the Department of Land Transport. Such Application shall contain the registration information of the driver or the possessor of the vehicle, the personal identification information of the driver, the routes, the distances, the vehicle plate number, the pre-determined fees and a system for tracking the vehicle's location and recording the origins and destinations of the vehicle for the period of at least one (1) month.

The pre-determined fees of such Application shall be calculated based on a formula that utilizes distance calculations, demand for rides, time slots, routes or zones, traffic conditions and weather conditions.

3. Public Hearing Results

During the public hearing late last year, various opinions were given on the Draft Regulation and we summarized the key issues of concern below.

Taxi drivers opposed the Draft Regulation because they may discriminate against and unfairly treat existing taxi drivers and made the following recommendations:

(1) Sustainable restructuring and training shall be provided for all drivers of passenger vehicles (including, existing registered taxi and Alternative Service Passenger Vehicle);

(2) Regulatory agencies shall ensure that all drivers of passenger vehicles are provided with equal treatment; and

(3) Equal standards shall be applicable to all drivers of passenger vehicles with respect to vehicle licensing costs and types of passenger vehicles.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

However, Application service providers, academics and regulatory agencies agreed that the Draft Regulation already sufficiently addressed the legal issues concerning Applications. However, the Draft Regulation will continue to be amended to sufficiently protect all drivers of passenger vehicles in terms of the liabilities of Application service providers. At present, the Ministry of Transport is reviewing the Draft Regulation and the recent public hearing results and it remains to be seen whether they will be published within this year.

In conclusion, this Draft Regulation represent one of the regulations that will accommodate digital platforms that provide services in Thailand and as Thailand moves towards digitalization of its economy, the law will adapt to meet evolving technologies and services.

[Authors]

Yothin Intaraprasong
yothin_intaraprasong@noandt.com
Yothin Intaraprasong is a partner at Nagashima Ohno & Tsunematsu, Bangkok office. He has been involved in providing legal advice on civil and commercial laws, focusing on foreign investments in Thailand. His primary practice areas are Corporate/M&A. He also represents a number of Japanese, Thai, and international clients in a wide range of ongoing business issues.

Luxsiri Supakijjanusorn
luxsiri_supakijjanusorn@noandt.com
Luxsiri is a Thai qualified lawyer, registered and licensed in Bangkok and fluent in both spoken and written Thai and English. She has a wide range of experience in commercial transactions (M&A, foreign investment law, contract drafting, personal data protection, anti-trust and general commercial law etc.).

This newsletter is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this newsletter but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced foreign attorneys from various jurisdictions, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)

6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

For more details on our overseas practice

If you would like the convenience of receiving future editions of the NO&T Thailand Legal Update by email direct to your Inbox, please fill out our newsletter registration form at the following link: https://www.noandt.com/en/publications/newsletter/thailand.html
Should you have any questions about this newsletter, please contact us at thailand-legal-update@noandt.com.
Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Thailand Legal Update.

© 2021 Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.