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Gretchen Tucker is a Bermuda and UK qualified barrister. She provides advice and representation in connection with regulatory and statutory compliance, administrative decision making and processes, statutory interpretation, policy development and legal reform. She also advises clients on their interactions with Bermuda government watchdogs and regulators.

Gretchen works closely with our Corporate attorneys to advise commercial organisations on transactional employment and privacy issues arising from mergers & acquisitions, business re-organisations and strategic planning as well as compliance with the soon to be fully in force, Personal Information Protection Act 2016.

In January 2019, Gretchen established a new sub-committee of the Bermuda Bar Council for the Advancement of Privacy Law and Appropriate Regulation of the Legal Industry (APLLI) and currently sits as the Chairperson of APLLI.



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- Regulatory & Compliance
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INTRODUCTION

Data protection law in Bermuda is currently comprised of a complex set of sectoral law, regulator guidance and common law precedents established by the Bermuda courts.

Island Newcomer: PIPA

The Personal Information Protection Act 2016 (PIPA) is, however, intended to become the principal piece of legislation regulating the right to personal informational privacy in Bermuda.

Despite Bermuda's status as a British Overseas Territory, the European Union (EU) regulations are not part of Bermuda's current legal system and EU Directives are, accordingly, not automatically implemented into Bermuda law. Notwithstanding this, the introduction of PIPA has caused the Government of Bermuda to consider the commerce opportunities that would arise from an "adequacy determination" from the EU Commission, once PIPA is fully in effect. Specifically, an adequacy determination would allow for the free flow of personal information between Bermuda and any EU member state, together with the increasing number of non-EU states who have obtained such determinations. This would increase economic opportunities for international businesses operating from Bermuda by helping to satisfy international privacy compliance requirements and placing them on a level playing field with those organisations based in many of Bermuda's competitor jurisdictions that are already deemed adequate by the EU Commission.

Once PIPA is fully in force, it is expected that the data protection framework will be supplemented by an official body of determinations and guidance issued by the Privacy Commissioner (**Commissioner**) and decisions rendered by the Bermuda courts interpreting the legislation. In the meantime, a new body of jurisprudence has been issued by the Information Commissioner which considers the protections afforded to personal information in the context of regulating the public's access to records held by Bermuda public authorities.

Existing sectoral laws in Bermuda are significantly older than The Personal Information Protection Act 2016 (PIPA)

As of the date of the issuance of this Guide, a Commissioner has not yet been appointed and the substantive provisions of PIPA which will regulate the use of personal information are not in force within the jurisdiction. PIPA was originally expected to come fully into force by the end of 2018. In the absence of an appointed Commissioner, the new implementation period for the substantive provisions of the legislation have yet to be confirmed by the Government of Bermuda.

Sectoral Law

Existing sectoral laws in Bermuda are significantly older than PIPA. While it is generally anticipated that the existing data protection law will remain in force once PIPA is fully operative, it is worth noting that PIPA expressly provides that consequential amendments to other statute can be made by the Government of Bermuda Minister responsible for information and communication technologies policy and innovation (**Minister**) where it appears to be necessary or expedient for the purposes of the legislation

BEESMONT INSIGHTS

CONSTITUTIONAL PRIVACY PROTECTION

Chapter 1 of the Bermuda Constitution expressly establishes that every person in Bermuda is entitled to protection for the privacy of their home and other property, subject to respect for the rights and freedoms of others and for the public interest.

In advance of the appointment of the Commissioner, a significant constitutional step has already been taken by the Governor of Bermuda through the exercise of his powers under the Bermuda Constitution to protect and support the mandate of the Privacy Commissioner and to ensure the independence of the Office of the Privacy Commissioner.

The Governor has delegated his constitutional powers to the Privacy Commissioner, significantly reducing the risk of governmental influence over the Office of the Privacy Commissioner

Acting in accordance with the recommendation of the Bermuda Public Service Commission, the Governor issued the Bermuda Public Service (Delegation of Powers) Amendment Regulations 2018 (Regulations) on 11 January 2018.

Through these Regulations, the Governor has delegated his constitutional powers to both the Information Commissioner (responsible for the enforcement of PATI) and the Commissioner to exercise control over the appointment, removal and disciplinary control of the public officers assisting in the discharge of the functions of their independent offices. This watershed measure has significantly reduced the risk of governmental influence over these offices and is thoroughly welcomed as part of good governance for the administration of these offices and in preparation for an adequacy application.



PIPA | BASIC CONCEPTS

The PIPA Draft Model and its corresponding Explanatory Notes were released in 2015.

Adoption of International Privacy Standards

The Explanatory Notes confirmed that the PIPA Model was based on the following eight international privacy principles:

1. personal information shall be used fairly and lawfully;
2. personal information shall be used for limited specified purposes;
3. personal information shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are used;
4. personal information shall be accurate and, where necessary, kept up to date;
5. personal information used for any purpose shall not be kept for longer than is necessary for that use;
6. personal information shall be used in accordance with the rights of individuals;
7. personal information shall be kept securely; and
8. personal information shall only be transferred to third parties (including international transfers) where there is a comparable level of protection.

The Explanatory Notes define privacy as “the expectation that confidential personal information disclosed in private will not be disclosed to third parties, when that disclosure would cause either embarrassment or emotional distress to a person of reasonable sensitivities.”

According to the Explanatory Notes, the PIPA Draft Model provided a light regulatory environment but which had been prepared so that an application for

Privacy: the expectation that confidential personal information disclosed in private will not be disclosed to third parties, when that disclosure would cause either embarrassment or emotional distress to a person of reasonable sensitivities

EU adequacy might be made. In this context, the Explanatory Notes confirmed that the purpose of PIPA was “to govern the use of personal information by organisations in a manner that recognises both the need to protect the human rights of individuals in relation to their personal information and the need of organisations to use personal information for purposes that are legitimate.”

PIPA | KEY DEFINITIONS & SCOPE

Key Definitions

Key definition in PIPA are as follows:

- **Personal Information**
any information about an identified or identifiable individual
- **Sensitive Personal Information**
any personal information relating to an individual's place of origin, race, colour, national or ethnic origin, sex, sexual orientation, sexual life, marital status, physical or mental disability, physical or mental health, family status, religious beliefs, political opinions, trade union membership, biometric information or genetic information.
- **Organisation**
any individual, entity or public authority that uses personal information.
- **Use/Using**
use or using in relation to personal information: carrying out any operation on personal information, including collecting, obtaining, recording, holding, storing, organising, adapting, altering, retrieving, transferring, consulting, disclosing, disseminating or otherwise making available, combining, blocking, erasing or destroying it.

Scope of Application

PIPA will apply to every organisation that uses personal information in Bermuda where that personal information is used wholly or partly by automated means and to the use, other than by automated means of personal information, which form, or are intended to form, part of a structured filing system.

Regulatory Jurisdiction

PIPA does not apply to:

- the use of personal information for personal or domestic purposes;
- the use of personal information for artistic, literary or journalistic purposes with a view to publication in the public interest in so far as is necessary to protect the right to freedom of expression;
- the use of **business contact information** (an individual's name, position name or title, business telephone number, business address, business e-mail, business fax number and other similar business information) for the purpose of contacting an individual in their capacity as an employee or official of an organisation;
- personal information about an individual who has been dead for at least 20 years/ personal information about an individual that has been in existence for at least 150 years;
- personal information transferred to an archival institution where access to the personal information was unrestricted or governed by an agreement between the archival institution and the donor of the personal information before the coming into operation of PIPA;
- personal information contained in a court file and used by a judge of any court in Bermuda, used as part of judicial administration or relating to support services provided to the judges of any court in Bermuda, but only where such personal information is necessary for judicial purposes;
- personal information contained in a personal note, communication or draft decision created by or for an individual who is acting in a judicial, quasi-judicial or adjudicative capacity; and
- personal information used by a member of the House of Assembly or the Senate where such use relates to the exercise of his political function and the personal information is covered by parliamentary privilege.

PIPA | THE PRIVACY COMMISSIONER

INTRODUCTION TO THE REGULATOR

The Office of the Privacy Commissioner will be established as a public office for the enforcement of PIPA. The Privacy Commissioner (Commissioner) is to be appointed by the Governor of Bermuda after consultation with the Premier, who shall first have consulted with the Opposition Leader.

Main powers, duties and responsibilities

The main powers, duties and responsibilities of the Commissioner are threefold and can be summarised as follows:

- **Investigation & Resolution of Complaints**

conduct investigations or inquiries concerning compliance with PIPA and attempt to resolve complaints by negotiation, conciliation, mediation or otherwise.

- **Education & Industry Guidance**

1. comment on the implications for protection of personal information in relation to an organisation's existing or proposed programmes.
2. approve **binding corporate rules** (personal information protection policies approved by the Privacy Commissioner which are adhered to by an organisation for transfers or sets of transfers of personal information) for transfers of personal information to an overseas third party.
3. binding corporate rules are defined under PIPA as.
4. give guidance and recommendations of general application to an organisation on matters relating to its rights or obligations under PIPA; and
5. establish or assist with the establishment of certification mechanisms and associated rules for the purpose of demonstrating compliance with PIPA (and may, without prejudice to their tasks and powers, delegate the operation of a certification

mechanism to an independent certification body with the appropriate level of expertise in relation to the protection of personal information).

- **Orders & Enforcement Activity**

1. issue formal warnings, admonish an organisation and bring to its attention any failure by the organisation to comply with PIPA;
2. agree a course of action with an organisation;
3. issue orders in connection with inquires and to permit an organisation to transfer personal information to an overseas third party (for use either on behalf of the organisation or for that overseas third party's own business practices) where the organisation has reasonably demonstrated that it is unable to comply with PIPA's statutory procedure for organisations to assess the level of protection provided by an overseas third party for personal information (provided the transfer does not undermine the rights of the individual).
4. authorise an organisation to disregard one or more requests for access to personal information, medical records or rectification, blocking, erasure or destruction of personal information if the requests would unreasonably interfere with the operations of the organisation or amount to an abuse of the right to make those requests because of their repetitious or systematic nature or are otherwise frivolous or vexatious.

Sanctioning powers

On completing an inquiry, the Commissioner must dispose of the matters by making an order or issuing a formal warning or public admonishment.

- If the inquiry relates to an organisation's decision to give or refuse to give access to all or part of an individual's personal information the Commissioner may, by order:

1. direct the organisation to give the individual access to all or part of their personal information that is under the control of the organisation;
2. confirm the decision of the organisation;
3. require the organisation to reconsider its decision concerning access; or
4. direct the organisation to refuse the individual access to all or part of their personal information.

- If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

1. confirm that a PIPA obligation imposed on an organisation has been performed;
2. require that a PIPA obligation imposed on an organisation be performed (including requiring an organisation to take specific steps to remedy a breach of the legislation);
3. confirm that a right set out in PIPA has been observed;
4. require that a right set out in PIPA be observed;
5. confirm an organisation's decision not to correct, erase, delete or destroy personal information;
6. specify that personal information is to be corrected, erased, deleted or destroyed by an organisation (and (i) how such personal information is to be corrected, erased, deleted or destroyed and (ii) may, if reasonably practicable, require the organisation to notify third parties to whom the personal information has been disclosed of the correction, erasure, deletion or destruction);
7. require an organisation to stop using personal information in contravention of PIPA;
8. confirm a decision of an organisation to use personal information;

1. require an organisation to destroy personal information used contrary to PIPA; and
2. require an organisation to provide specific information to persons in the event of a breach of security.

The Commissioner may, alternatively, make an order as they consider appropriate or may issue a formal warning or public admonishment if the above-mentioned orders would not be applicable. A copy of an above-mentioned order may be filed with the Registrar of the Supreme Court and, after filing, the order is enforceable as a judgment or order of that Court.

Codes of Practice & Ministerial Regulations

The Minister will be required to issue codes of practice, after consultation with the Commissioner, with best practice advice for organisations generally, or for specific types of organisations, to comply with PIPA. The Privacy Commissioner may also be consulted by Minister in connection with the Minister's passing of general regulations for the carrying out of or giving effect to the purposes of PIPA.

PIPA TIMELINE

Historical Development of the Legislation

- 10 July 2015 Draft Model of PIPA published by The Department of E-Commerce, Ministry of Economic Development
- 1 July 2016 Draft PIPA Bill tabled in the Bermuda Parliament
- 1 July 2016 [Ministerial Statement by the Minister of Economic Development](#)
- 21 July 2016 [Legislative Brief on Draft PIPA Bill delivered by the Minister of Economic Development](#)
- 27 July 2016 [PIPA receives the Royal Assent](#). As Bermuda is a British Overseas Territory, all parliamentary bills must be given Royal Assent on behalf of the British Monarch, as represented by the Governor of Bermuda, in order to become law.
- 2 December 2016 Discreet administrative provisions of PIPA come into force to enabling the recruitment of a Privacy Commissioner and the creation of the independent Office of the Privacy Commissioner.
- 3 February 2017 [Ministerial Statement by the Minister of Economic Development on the Implementation of PIPA's Administrative Provisions](#)

