24 May 2011

The Asia Internet Coalition (AIC) is an industry association founded by eBay, Google, Nokia, Skype and Yahoo!. Incorporated in Hong Kong, the AIC seeks to promote the understanding of Internet policy issues in the Asia-Pacific Region.

The AIC welcomes the decision by the authorities to develop a Personal Information Protection regime for the Philippines. Given the rapid changes in technology, people communicate, transact and interact in new and different ways. As an industry association representing global Internet players, the AIC hopes to be a relevant partner as the authorities develop a Personal Information Protection regime. It is from this perspective that the AIC offers its comments.

Specific Comments

Three legislative bills have been proposed for discussion by the Senate. They are:

- HBN 4115 – An Act Protecting Individual Personal Data In Information and Communications Systems in the Government and in The Private Sector, Providing Penalties in Violation Thereof, and For Other Purposes (Reps. Romulo R., Yap S., Jalosjos C., Tinga S. and Palmones, A.);

- SBN 355 – An Act Protecting Individual Personal Information and Communications Systems in the Government and the Private Sector, Creating For the Purpose a National Data Protection Commission, and For Other Purposes (Sen. Trillanes); and

- SBN 2236 - An Act To Increase the Security of Sensitive Data Maintained by the Government (Sen. Defensor Santiago).

As SB 2236 pertains more to the protection of sensitive government data, our comments for the purposes of this submission will focus on HB 4115 and SB 355 instead.

Comments for HB 4115

RE: Section 3(b) - We would appreciate it if the Senate could clarify what the definition of "specific" is, or alternatively, delete this word altogether. This term is too vague, and could conceivably be broadened to require the data subject to be informed on the specific nuts-and-bolts processes that would take place when

collecting or processing the subject's data, and be required to give consent to each and every process.

We would also appreciate it if the Senate could replace the word "executed" with "expressed" or "conveyed", as the former implies that the data subject would have to go through a formal process to indicate consent.

RE: Section 3(g) - With respect to this provision, we would encourage the Senate to remove the phrase " or any opinion whether true or not" from the definition of personal data. There is an unnecessary broadening of the definition of "information", with no requirement for this phrase in the APEC Privacy Principles, nor precedent for it in any of the major data privacy acts, such as the EU, OECD or Madrid Declaration.

We would also encourage the Senate to consider adding the following clause that has been underlined into the phrase "or when put together with other information would directly identify an individual". As the amount of data created explodes, the binary definition of personal data becomes even less helpful. Humanity currently produces more digital information every three days than it did in the entire period up to 2003. Advances in statistical analysis also make it very difficult to say with certainty that a specific piece of information could never be linked to an identified individual, given substantial effort and enough related data. As such, without this caveat, almost every type of data could be considered as "personal data", which would be too sweeping and unreasonable.

RE: Section 3(h) - We note that the Bill is silent on the obligations of intermediary service providers. Hosting platforms should not be considered data controllers for the purposes of this Bill as they simply facilitate transactions between third parties on the Internet. When a user types in a keyword into a Search portal, the portal merely facilitates the transfer of data between content sites and the user and does not "control" the data. In this regard, we would also appreciate it if the Senate would include a clause to exempt intermediary service providers.

RE: Section 3(l) – It has been extremely difficult for other jurisdictions to arrive at a sensible definition of "sensitive information" in the Internet environment, while avoiding risk of being too all encompassing. This would be made all the more difficult for the Philippines given the way in which personal information has been defined in 3(g), where "any opinion, whether true or not" is included. As such, we reiterate the need to take out this phrase as indicated in our comments to Section 3(g).

We also ask that the Senate make a distinction between information that a person has declared, e.g. through Government collected statistics, and information that is inferred or extrapolated from a person's online behaviour. We consider that information that has been declared may fall within the definition of sensitive information, subject to consent levels appropriate to sensitive data. However, inferences about interests are neither sufficiently precise nor specific to a user to create the risks of harms traditionally associated with truly sensitive data.

We also consider the category of "philosophical affiliations" to be too broad in this context. With respect to the inclusion of "sexual life," we suggest that the Senate consider the breadth of this notion and determine what specificity could be added to provide needed guidance for practitioners. Including a reference to "health information" is also concerningly broad. We completely understand and agree that medical records should be treated as sensitive and hence, the inclusion of a reference to "health information" is onerously broad. We urge the Senate to revisit these categorisations with great rigor as they are likely to significantly shape many business practices and the current definitions do not provide the clarity that would normally be sought from provisions triggering affirmative consents to collection of specific types or categories of sensitive information

RE: Section 4(d) - We propose exempting personal information processed for the purposes of research. In this regard, the clause can read, "Likewise, this Act shall not apply if personal information is processed for research, journalistic, artistic or literary purposes."

RE: Section 5(a): We note that the act will apply to the processing of personal information of Philippine citizens extra-territorially. We would like to highlight that for some services where users are not required to register in order to access, it may be rather difficult for a service provider to determine true citizenship. Therefore, we seek further discussion on how the Senate expects service providers to arrive at this determination. Ideally, we would prefer a formulation that appears to be closer to the version proposed by SEC 5 of SB 355 instead.

RE: SEC 10 (a): We propose amending para (a), to read as follows "the data subject has given his or her ~~unambiguous~~ consent which must be given in writing, electronic form, or through any other similar means of express consent, according to the circumstances". The inclusion of an "electronic form" of consent would make it consistent with the definition of "Consent" as outlined in SEC 3(b) of HB 4115. We also propose removing the word "unambiguous" as this could be extended to include an acknowledgement of the specific nuts-and-bolts processes of how the personal information is processed, which as noted in our comments to para 3(b) would be impossible.

RE: Section 15(d) - We would like the word "immediately" to be taken out from the line "Dispute the inaccuracy or error in the personal information and have the personal information controller correct it immediately and accordingly, unless the request is vexatious or otherwise unreasonable". We believe that this would be technically impossible. Our experience with takedown requests has shown that many requests are incomplete and imprecise. Sometimes the requests are sent to the wrong department and take time to reach the right person. We acknowledge that timely removal is necessary to protect the rights of individuals, but recommend more flexibility for personal information controllers to respond constructively and according to the information that is given by the requestor. Alternatively, we recommend the term "commercially reasonable period" instead.

Comments for SB 355

RE: SEC. 4. Definition of "Personal information" – We would encourage the Senate to remove the phrase " or any opinion whether true or not" from the definition of personal data, as well as add the following word that has been underlined into the phrase "or when put together with other information would directly identify an individual" for the same reasons outlined in our comments to Section 3(g) in HB 4115.

RE: SEC 4. Definition of "Consent of the data subject" -- SB 355 defines this to include "any freely given, *specific* and informed expression of will…". As in the case of HB 4115, we would recommend that the Senate clarify what the definition of "specific" is, or delete this word for the same reasons outlined in our comments for HB 4115.

As in the case of HB 4115, we also note that SB 355 is silent on the obligations of intermediary service providers. Hosting platforms should not be considered data controllers as they simply facilitate transactions between third parties on the Internet. When a user types in a keyword into a Search portal, the portal merely facilitates the transfer of data between content sites and the user and does not "control" the data. In this regard, we would also appreciate it if the Senate would include a clause to exempt intermediary service providers.

RE: SEC. 4. Definition of "Sensitive Personal information" – As noted in our comments to Section 3(l) in HB 4115, it has been extremely difficult for other jurisdictions to arrive at a sensible definition of "sensitive information" in the Internet environment, while avoiding risk of being too all encompassing. This would be made all the more difficult for the Philippines given the way in which personal information has been defined in 3(g), where "any opinion, whether true or not" is included. As such, we reiterate the need to take out this phrase as indicated in our comments to Section 3(g).

We also ask that the Senate make a distinction between information that a person has declared, e.g. through Government collected statistics, and information that is inferred or extrapolated from a person's online behaviour. We also consider the category of "philosophical affiliations" to be too broad in this context. In this regard, we urge the Senate to revisit these categorisations with great rigor as they are likely to significantly shape many business practices and the current definitions do not provide the clarity that would normally be sought from provisions triggering affirmative consents to collection of specific types or categories of sensitive information

RE: SEC 5 "Scope" -- We propose exempting personal information processed for the purposes of research. In this regard, the clause can read, "Likewise, this Act shall not apply if personal information is processed for research, journalistic, artistic or literary purposes."

RE: SEC 10. Criteria for Lawful Processing of Personal Information -- We propose amending para (a), to read as follows "the data subject has given his or her ~~unambiguous~~ consent which must be given in writing, electronic form, or through any other similar means of express consent, according to the circumstances". The inclusion of an "electronic form" of consent would make it consistent with the definition of "Consent" as outlined in SEC 4 of SB 355. We also propose removing the word "unambiguous" as this could be extended to include an acknowledgement of the specific nuts-and-bolts processes of how the personal information is processed, which as noted in our comments to HB 4115 would be impossible.

RE: SEC 11. Sensitive data and Privileged Data – We propose amending para (d) to read "processing is necessary to achieve the lawful, non-commercial objectives of public, private and philanthropic organizations, and their associations; Provided, such processing is only confined and related to the bona fide members of these organizations or their associations". Often, corporate entities have philanthropic arms that also process data to yield useful social science research. For instance, search queries on flu symptoms can be used to predict flu trends in regions. Concerns about abuse would be checked by the stipulation already included in this clause that this processing has to be for "non-commercial objectives". As such, it should not matter if this data is processed by public or private entities, as long as the intent is non-commercial.

RE: SEC 13. Storage of Data – We suggest that this time limitation on the storage of personal data be removed, as it is often difficult for companies to anticipate which data points will prove to be relevant upon the launch of a new product. These data points often provide signals for improving the product and even in some cases, preventing abuse.

In conclusion, we thank you for taking the time to review our comments, and look forward to further engaging you on this. Should you have any further queries, please do not hesitate to contact director@asiainternetcoalition.org should you require further information on the contents of this submission.

John Ure
Executive Director
Asia Internet Coalition