



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1947 OF 2023

**BRANDON OMONDI T/A
BRANDON & ASSOCIATES ADVOCATES.....COMPLAINANT**

-VERSUS-

TRUEHOST CLOUD.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. This Complaint is in respect of the Complainant's claim that the Respondent, a company that provides email hosting services deleted the Complainant's company and or business e-mail accounts irregularly thereby causing loss of the Complainant's company and or business data.

B. LEGAL BASIS

2. The Constitution of Kenya 2010, under Article 31 (c) and (d), provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter known as 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the

processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals; establishing the legal and institutional mechanism to protect personal data and providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

4. Section 8 (f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) of the Act provides that a data subject who is aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.
5. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Enforcement Regulations) which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. BACKGROUND OF THE COMPLAINT

6. This Office received a complaint from the Complainant on 6th October 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, on 30th November 2023 this Office notified the Respondent of the complaint filed against it *vide* a letter dated 22nd November, 2023. The Respondent was required to respond to the complaint.
8. The Respondent responded to the notifications of the complaint *via* a Replying Affidavit dated 14th December 2023 and received by the Office on the same day.

9. This determination is therefore as a result of analysis of the complaint as received and the response from the Respondent.

D. NATURE OF THE COMPLAINT

i. THE COMPLAINANTS' CASE

10. The Complainant avers that on 31st January 2023, he made Order no. 8xxxxxxx8 seeking to procure from the Respondent, Email Hosting Services for Cloudroom Mail 2 in respect to an email domain.
11. The Complainant states that he paid for the registration of the Domain, which services encompassed, *inter alia*, DNS Management, Email Forwarding, and ID Protection, for a period of one (1) year (hereinafter 'the Email Hosting Services').
12. Upon registration of the domain, the Complainant states that he created 2 email accounts for the purposes of carrying out his business and practice as an Advocate of the High Court of Kenya. The Complainant further stated that he subsequently created a third email account which he has been using since July 2023 for the purposes of sending and receiving communication in respect of payment of legal fees by his clients.
13. According to the Complainant, he has been in continuous use of the Domain together with the Email Accounts, and she has been using since July 2023 for the purposes of sending and receiving communication in respect of payment of legal fees by my clients.
14. The Complainant states that he has been in continuous use of the Domain together with the Email Accounts and has been settling all the invoices in respect thereof as and when they fall due for payment.
15. That, with particular reference to the month of September 2023, the Respondent sent to the Complainant the invoice dated 3rd August 2023 which was due and payable on 3rd September 2023. The Complainant settled the invoice on 4th

September, 2023 and that the Respondent acknowledged the said payment on the same date via e-mail at 9:46 AM.

16. The Complainant states that he continued to use the Email Accounts until Saturday, 16th September 2023 when he unceremoniously lost access to all the Email accounts. Distraught by the foregoing incident, the Complainant reached out to the Respondent's customer care and was instructed to reset his password *via* a password reset link that was sent to him *via* his recovery email address.
17. That pursuant to the Respondent's directions, he reset his password on Monday 18th September, 2023 and was finally able to access one of the Email accounts however all the emails that he had hitherto sent and received were marked as 'undefined' and he could not access any of them.
18. The Complainant states that the other two emails accounts were disabled. They may and/or had been removed and were inaccessible.
19. The Complainant avers that he brought to the Respondent's attention the foregoing challenges and feverently beseeched the Respondent to ameliorate them as a matter of urgency. That instead of acting swiftly to address his grievances, the Respondent engaged him in a litany of pointless e-mail correspondences that yielded no reliefs to him.
20. According to the Complainant, on 20th September 2023, he reported to the Respondent that he had lost all the data in the e-mail accounts, including the emails that he had sent and received since January, 2023 as well as the email signatures for the said Email Accounts.
21. That in an ill-advised attempt to mislead the Complainant, one of the Respondent's agent and/or employee wrote to the Complainant on 21st September 2023 at 7:20 pm purporting that they had done a follow-up on the issue and established that the system terminated the service when it expired on 03/09/2023, just before the

Complainant renewed it. That upon renewal, the service was recreated as a new service, hence why he was not able to see old email data.

22. The Complainant further stated that the Respondent informed him that when a service is terminated, it will be completely removed from the system including its backups.

23. According to the Complainant, the above statements from the Respondent's agent and/or employee were false, malicious and baseless.

24. The Complainant stated that the Respondent's conduct is illegal and unlawful as the same violates the Act and the Constitution of Kenya.

ii. THE RESPONDENT'S RESPONSE

25. The Respondent responded to the allegations fronted against it *vide* a Replying Affidavit deponed on 14th December, 2023.

26. In its response, the Respondent's Systems Engineer at Truehost Cloud stated that it is indeed true that in January 2023, the Complainant engaged the Respondent for the provision of email hosting services.

27. That the Complainant purchased the email service *vide* the Respondent's website and agreed to be bound by the terms and conditions of the service. He stated that the salient terms of the service include:-

- a. Services are offered for specified periods of time depending on the subscription and should be renewed before the period lapses.
- b. If not renewed by the expiry date, the Complainant's service will then be suspended.
- c. The Respondent will not be held responsible for loss of any data hosted in a service not renewed.
- d. Services not renewed will be terminated permanently within 24 hours of expiry.

- e. The Complainant specifically acknowledges and agrees that in no event shall **the Respondent's total aggregate liability exceed the total amount paid by the Complainant** for the particular services that are the subject of the cause of action.
28. On 3rd August 2023, the Respondent forwarded to the Complainant an invoice of even date for payment of the subscription fee for the month of September 2023 which fee was due and payable on 3rd September 2023. That the Complainant acknowledges receipt of the invoice at **paragraph 10 of the Complainant's affidavit.**
29. The Respondent avers that however, in breach of the terms the service agreement, the Complainant did not pay the subscription fee on the date as a result of which the service was automatically suspended and terminated in twenty-four hours. **Consequently, the Complainant's allegation at paragraph 11 of the Affidavit that he had access to the email service up to 16th September 2023, is false.** This is so because the suspension process is automated and is activated immediately when the service is not renewed.
30. That the termination of the service was confirmed to the Complainant *via* email of 21st September 2023, and a printout was thereby annexed.
31. The Respondent states that it was a clear term of the agreement of parties that in the event the Complainant failed to renew the services by payment of the subscription fee on the due date, the services would be suspended and the Respondent would not be liable for loss of any data hosted in the instance of non-renewal.
32. The Respondent further averred that it is the Complainant's failure to renew the service on time that gave rise to the loss of the data. That the Complainant is the author of his misfortune and the Respondent cannot be held liable for any loss that occurred as enumerated by the Complainant.
33. The deponent stated that the data held in the Complainant's email accounts is permanently lost and cannot be retrieved and that the Complainant's domain name shall be deregistered from the Respondent's system and on expiry of the services,

the Respondent shall not renew the same following which the data therein shall be completely removed from the Respondent's records.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

34. As part of his evidence, the Complainant adduced:-

- a. his law practicing certificate/ license for the year 2023;
- b. copies of invoices received from the Respondent;
- c. email threads between him and the Respondent;
- d. a screenshot of the Respondent's email confirming the registration of the domain; and
- e. a demand letter.

II. THE RESPONDENT'S EVIDENCE

35. In response to the Complaint, the Respondent submitted –

- a. a copy of the terms of service between the Complainant and the Respondent;
- b. a copy of the invoice dated 3rd August 2023,
- c. the termination of service e-mail dated 21st September 2023; and
- d. the Respondent's statement of compliance with the data protection laws.

F. ISSUES FOR DETERMINATION

36. The following issues fall for determination by this Office:

- i. Whether there was a violation of the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS A VIOLATION OF THE ACT.

37. The Complainant alleged that the Respondent, being a service provider for company domain email hosting services, deleted the data that was contained in three e-mail addresses that were created by the Complainant for his Law Firm - Brandon Associates and Advocates.

38. The preamble of the Data Protection Act, 2019 is clear on the general purpose of the Act being, 'to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors', among others.
39. Section 2 of the Act defines **Personal data** to mean 'any information relating to *an identified or identifiable natural person.*' A **data subject** is defined as, 'an identified or identifiable natural person who is the subject of personal data.' Subsequently, an **identifiable natural person** under the Act is defined to mean *a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental economic, cultural or social or social identify.'*
40. Section 56 (1) of the Act provides for locus of who can lodge a complaint before the ODPC, reads as follows:-
- 56. Complaints to the Data Commissioner*
- (1) *A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act. [Emphasis]*
41. In that regard, this Office is guided on the nature of complaints it can admit, who a 'proper' Complainant is, that is, a data subject who is aggrieved by a decision of any person under the Act.
42. Section 27(c) of the Act is instructive on the exercise of rights under the Act by data subjects and provides that a right conferred on a data subject may be exercised by a person duly authorized by the data subject.
43. Consequently, incorporated, unincorporated, or other juristic persons cannot complain about personal data infringements under the Act since they are not regarded as data subjects. This position was taken by this Office in **ODPC COMPLAINT NO. 677 OF 2022 ALLEN WAIYAKI GICHUKI & ANOTHER - VS – FLORENCE MATHENGE & ANOTHER.**

44. After a thorough examination of the filed Complaint it is evident that the Complainant created three e-mail addresses; info@brandonlaw.co.ke, accounts@brandonlaw.co.ke, and brandon@brandonlaw.co.ke. From the evidence adduced before this Office, it is evident that the first two e-mail accounts, info@brandonlaw.co.ke and accounts@brandonlaw.co.ke, were used for the carrying out of the firm's business while the last one, brandon@brandonlaw.co.ke was used by the Complainant for correspondence with his clients.
45. By the Complainant's own admission, the first two e-mail accounts, info@brandonlaw.co.ke and accounts@brandonlaw.co.ke, were used for the carrying out of the firm's business. No evidence was adduced by the Complainant to demonstrate that the same contained personal data. The only e-mail that contained personal data was his personal email brandon@brandonlaw.co.ke which identifies the Complainant. As such, this Office has no mandate to determine any matter relating to business data. As discussed above and as regards the firm being a juristic person incorporated and registered as a law firm in Kenya, this Office has no mandate with regards to the data belonging to the law firm.
46. That being said, this Office will confine itself to the data contained in brandon@brandonlaw.co.ke which constitutes personal data that falls squarely within the ambit of the Act. Further from the evidence adduced before this Office, we note that in addition to this e-mail having personally identifiable information, the Complainant had also created an e-mail signature for this e-mail address. The e-mail signature also contains the Complainant's personal data. The signature contains the Complainant's name and qualifications which identify him.
47. Having established that the only e-mail that contained personal data is the Complainant's e-mail, we will now proceed to address the question of whether the Complainant's rights as a data subject concerning this one e-mail address were violated.

48. Section 26 of the Act provides for the rights of a data subject. It provides:-

26. Rights of a data subject

A data subject has a right –

- (a) To be informed of the use to which their personal data is to be put;*
- (b) To access their personal data in custody of data controllers or data processor;*
- (c) To object to the processing of all or part of their personal data;*
- (d) To correction of false or misleading data; and*
- (e) To deletion of false or misleading data about them.*

49. From the complaint, the Complainant, a data subject, stated that he tried to access his e-mail address brandon@brandonlaw.co.ke only to find out that it had been disabled and/ or removed. It was inaccessible and he could not access it. Upon finding out it was inaccessible, he reported the issue to the Respondent who responded by telling him that the system terminated the service when it expired on 3rd September 2023 before he renewed it.

50. From the evidence adduced to this Office, the email info@brandonlaw.co.ke was still operational and had not been terminated as at 13th September 2023. Since the email brandon@brandonlaw.co.ke was also hosted on the same domain, it ought to have been accessible as at 13th September, 2023. In light of the above we find that the complainant's right to access his personal data, that is, his email – brandon@brandonlaw.co.ke was violated.

II. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

51. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

52. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent

violated the Complainant's right to access his personal data, it therefore follows that there has been a violation of the Complainant's rights by the Respondent.

53. Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

54. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

55. As such, the complainant rightfully claimed for the remedy of compensation against the Respondent. Consequently, the Respondent is hereby directed to compensate the Complainant Kshs. **250,000/= (Two Hundred and Fifty Thousand shillings Only)** for the violation of his right.

56. Further as to the remedy sought to compel the Respondent to de-activate, de-register and delete of the Complainant's Domain Name and e-mail we note that the Respondent has undertaken to deregister the Complainant's domain name from its system and it shall not renew the same following which the data therein shall be completely removed from the Respondent's records.

57. We note that this is tantamount to a request for erasure. The Respondent is therefore enjoined to give effect to this right to erasure in respect of the Complainant's personal data.

G. FINAL DETERMINATION

58. In the ultimate, the Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable for violation of the Complainant's right to access his personal data.

- ii. The Respondent is ordered to Compensate the Complainant **KES 250,000/= (Two Hundred and Fifty Thousand Kenya Shillings Only)** for the unlawful processing of the Complainant's personal data.
- iii. The Respondent is hereby directed to delete the Complainant's personal data from its systems and records within **7 (seven) days** from the date hereof.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 3rd day of January 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**