



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0018 OF 2024

JANE NJAMBI.....COMPLAINANT

-VERSUS-

CREDITWATCH INVESTMENT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8 (1) (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. The Complainant lodged a complaint against the Respondent and its product Cloudloan alleging that she has been receiving endless calls from the Respondent’s agents regarding a loan she had no knowledge of asking her to contact the borrower whom as alleged, she did not know.

B. LEGAL BASIS

- 2. Article 31 (c) and (d) of the Constitution of Kenya 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.

n4

4. Section 8 (1) (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 premised 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 January 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 16th January 2024 referenced ODPC/CONF/1/5 VOL 1 (720). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various sections of the Act. Further, the Respondent was asked to provide this Office with the following:
 - a. A response to the allegation made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. Details of how they obtained the Complainant's personal details;
 - d. The legal basis relied upon to engage with the Complainant's and whether or how they fulfilled the duty to notify under Section 29 of the Act;
 - e. Whether the Complainant consented to the processing of their personal data; and

IK

- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take again.
8. The Respondents responded to the allegations *vide* a letter dated 29th January 2024.
9. It is noteworthy that the parties attempted to mediate and settle the complaint outside this Office, however, the mediation was unsuccessful thereby necessitating the complaint to be determined as per Regulation 15 (8) of the Enforcement Regulations.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that she had been receiving calls in diverse dates in December 2023 up until the date of this complaint. The persons who allegedly contacted her indicated that they work with Cloud Loan.
11. She stated that the persons calling her asked her to contact a person whom she did not know to remove her contact from the Respondent's platform or ask him why he listed her as an emergency contact.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

12. The Complainant provided a video recording of a conversation she had with one of the agents who allegedly contacted her.
13. In the video recording, the agent explains that the Respondent got her number from the borrower of a loan taken from them. The agent stated that the borrower included her number when he was downloading the Respondent's Application to enable him apply for the loan.
14. The agent is heard to indicate that the Respondent assumed that the borrower has informed the Complainant of the use of her number to be listed as an emergency contact.

ii. THE RESPONDENT'S RESPONSE

15. The Respondent filed a response to the notification of complaint dated 29th January 2024 and received by this Office on 30th January 2024 and stated that Cloudloan, which is their product, is an online platform that issues loans to its clients.
16. The Respondent indicated that prior to issuance of the loans, it assigns the debtor to be a data processor in order to collect the information of an emergency contact who shall be contacted in the event the debtor is not reachable.
17. In this complaint, the Respondent stated that the debtor applied for a loan and as policy demands, he was required to provide the information regarding his emergency contact. The Respondent reiterated that the debtor is the data processor, processing the information of the Complainant on its behalf as the data controller.
18. Therefore, the Respondent intimated that, as the data processor, the debtor collected the information after obtaining the consent of the Complainant and forwarded the information to them so that his loan is processed.
- The Respondent availed its terms and conditions for their debtors.
19. The Respondent explained that when they were unable to reach the debtor, they contacted the emergency contact provided. The Respondent's agent then informed the Complainant that her contact information had been provided by the debtor. Consequently, the Respondent requested the Complainant to ask the debtor to remove her number as an emergency contact as the Respondent could not reach the debtor.
20. With regards to several people contacting the Complainant, the Respondent indicated that it has a lot of staff attached to the debt collection system and there was a possibility that the persons calling were not privy to the initial conversation with the Complainant. The Respondent indicated that they were working on a way to integrate their system for the staff attached to the debt collection department to work seamlessly.

21. The Respondent also indicated that they have implemented training policies that their staff undergo training to ensure they conform with the current data protection laws.

F. ISSUES FOR DETERMINATION

22. In light of the above, the complaint, the Respondent's response and evidence adduced, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

23. The Complainant is a data subject as per the definition under the Act and has rights as stipulated under the Act. Specifically, under Section 26 (a) the Complainant had the right to be informed of the use to which her personal data was to be put, in this case, the listing of her phone number as an emergency contact of a person who borrowed a loan from the Respondent.

24. Further, Section 26 (c) of the Act provides that a data subject has a right to object to the processing of all or part of their personal data. The Complainant did not want to be called by the Respondent's agent regarding a debtor whom she did not know. Therefore, she exercised her right to objection and she was still contacted by other agents of the Respondent.

25. From the Respondent's response, and the evidence adduced, the Complainant was not informed that her number was listed as an emergency contact by a borrower and her right to objection was not upheld by the Respondent.

26. Therefore, this Office finds that the Complainant's right under Section 26 (a) and (c) was infringed by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

27. The Act defines a data controller as a natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purpose and means of processing personal data.**

28. A data processor is defined as a natural or legal person, public authority, agency or other body which **processes personal data on behalf of the data controller.**

29. The Respondent in this case is a data controller as per the definitions of the Act.

30. According to Regulation 24 (1) of the Data Protection (General) Regulations, 2021 a data controller **shall** engage a data processor through a written contract. Regulation 24 (2) of the Data Protection (General) Regulations, 2021 provides that the contract envisaged under sub-regulation (1) shall include the following particulars—

(a) details including—

- i. the subject matter of the processing;
- ii. the duration of the processing;
- iii. the nature and purpose of the processing;
- iv. the type of personal data being processed;
- v. the categories of data subjects; and
- vi. the obligations and rights of the data controller;

(b) instructions of the data controller;

(c) duty on the data processors to obtain a commitment of confidentiality from any person or entity that the data processors allows to process the personal data;

(d) security measures subjecting the data processor to appropriate technical and organizational measures in relation to keeping personal data secure;

(e) provision stipulating that all personal data must be permanently deleted or returned on termination or lapse of the agreement, as decided by the data controller; and

(f) auditing and inspection provisions by the data controller.

31. From the above, the debtor or the borrower of a loan cannot be said to be a data processor as he or she is not processing personal data on behalf of the Respondent. The relationship between the Respondent and a Borrower cannot be said to comply with Regulation 24 above. The borrower only provides contact information for purposes of completing the application of the loan and it is the Respondent who determines the processing of that information. Therefore, the Respondent's argument that it assigns the debtor to be a data processor in collecting information regarding emergency contact is not correct.

32. Clause 5 of the Respondent's terms and conditions provides that:

"As a client/debtor availing our digital credit provision services, you expressly acknowledge and agree to act as the data processor in compliance with relevant laws..."

33. This Office notes that the above provision is against the confines of the Data Protection Act, 2019 and the Data Protection (General) Regulations, 2021 and the Respondent is directed to amend the same.

34. Having established that the Respondent is a data controller, there are certain obligations they had pertaining to this complaint.

35. Section 25 (a) and (b) of the Act provides for the principles of data protection and states that every data controller or data processor shall ensure that personal data is processed in accordance with the right to privacy of the data subject and processed lawfully, fairly and in a transparent manner in relation to any data subject. These principles of data protection were not adhered to when the Respondent collected the Complainant's contact information and processed it to endlessly call her regarding a borrower who she had no knowledge of.

36. Section 28 (1) of the Act provides that a data controller **shall** collect personal data **directly** from the data subject. Section 28 (2) of the Act gives instances where a data controller can collect personal data indirectly. However, the Respondent did not prove that it had any basis for indirect collection of the Complainant's personal data, specifically under Section 28 (2) (c) where a data controller can collect personal data indirectly where the data subject has **consented** to the collection from another source.
37. The Respondent stated that the borrower listed the Complainant as his emergency contact and therefore, the borrower had the consent of the Complainant in listing her as an emergency contact. This assertion is contrary from the provisions of Section 28 where a data controller is obligated to collect personal data only **directly** from the data subject unless the instances under Section 28 (2) are proven. In this complaint, none of those instances were proven by the Respondent.
38. Section 29 of the Act mandates a data controller or data processor to, before collecting personal data, inform the data subject of, *inter alia*, his rights under Section 26 of the Act, the fact that personal data is being collected and the purpose for collection of the personal data.
39. The Respondent confirmed through their response that the borrower forwards the emergency contact's information to them in order for the loan to be processed. This means that the Respondent collects the contact information from the borrower and does not inform the data subject that they have collected their personal data and the reasons and purpose for collection. Therefore, the duty to notify under Section 29 of the Act is not fulfilled by the Respondent.
40. As a data controller, the Respondent should notify the person being listed as an emergency contact that they have collected their number from a person intending to borrow a loan from them, inform him or her of their rights under the Act and the purpose for collection.
41. Section 30 of the Act provides for the lawful basis of processing personal data and states that a data controller or data processor **shall not** process personal

nk

data, **unless** the data subject **consents** to the processing for one or more specified purposes or the processing is necessary for the purposes listed in sub-section 1 (b). The Respondent stated that the borrower sought consent of the Complainant to list her as an emergency contact. It has been established that the borrower is not a data processor and therefore, from the response provided by the Respondent, they did not have the Complainant's consent to process her personal data.

42. Further to the above, Section 32 of the Act states that a data controller or data processor **shall bear the burden of proof** for establishing a data subject's consent to the processing of their personal data for a specified purpose. The Respondent's response did not discharge this burden as they did not prove that there was express consent from the Complainant in listing her as an emergency contact.

43. Section 41 of the Act provides for data protection by design or by default and states that every data controller or data processor shall implement appropriate technical and organizational measures designed to implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing.

The Respondent did not prove that it has put in place any measures to implement the principles of data protection.

44. In light of the above, this Office finds that the Respondent did not fulfil its obligations under the Act.

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

45. 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.

46. Section 65 of the Act provides 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. The Section indicates that damage included

financial loss and damage not involving financial loss including distress. Further, Regulation 14 (3) (e) of the Enforcement Regulations provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

47. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (a) and (c) were infringed upon by the Respondent. The Respondent failed to inform the Complainant the use of her personal data, and had him listed as an emergency contact without her express consent. Additionally, the Respondent is a repeat offender as this Office has received complaints of a similar nature. The Respondent has not adhered to the measures directed to them in previous Enforcement Notices that would uphold data subjects' rights.

48. In this regard, the Respondent is hereby ordered to pay the Complainant **Kenya Shillings Five Hundred Thousand (Kshs. 500,000)** for the infringement of her rights under Section 26(a) and (c) of the Act.


49. The Respondent is also in violation of several obligations under the Act as analyzed above and therefore, pursuant to Section 58 of the Act, an Enforcement Notice shall be issued against the Respondent.

G. FINAL DETERMINATION

50. The Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and non-compliance of its obligations under the Act;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Five Hundred (Kshs. 500,000)** as compensation;
- iii. An Enforcement Notice to issue against the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 4th day of April 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER



