



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0174 OF 2024

VICTORY LOCH OWINO.....COMPLAINANT

-VERSUS-

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA.....1ST RESPONDENT

PHILIP KAKAI.....2ND RESPONDENT

OLIVE GITAU.....3RD RESPONDENT

ANDREW BULEMI.....4TH RESPONDENT

WYCLIFFE BICHANGA.....5TH 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 1st Respondent alleging that it shared her personal data with various aspirants who then called, texted and emailed her severally during the 1st Respondent’s election campaign period without her consent.

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.
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 27th January 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the 1st Respondent of the complaint filed against it *vide* a letter dated 8th February 2024 referenced ODPC/CONF/1/5 VOL 1 (789). In the notification of the complaint, the 1st 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 allegations made against it by the Complainant;
 - b) Any relevant materials or evidence in support of its response;

- c) Details of all the Complainant's personal data that was shared with the aspirants;
 - d) Details of all the aspirants with whom the Complainant's personal data was shared;
 - e) The legal basis relied upon to share the Complainant's personal data with aspirants without her consent;
 - f) Evidence as to whether the Complainant consented to the sharing of her personal data;
 - g) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - h) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
 - i) Any other information you wish the Office to consider.
8. The 1st Respondent responded to the allegations *vide* a letter dated 29th February 2024.
9. From the 1st Respondent's response and as part of this Office's investigations, the Office enjoined the 2nd, 3rd, 4th and 5th Respondents pursuant to Regulation 12 (1) of the Enforcement Regulations.
10. The 2nd, 3rd and 4th Respondents responded to the notification of complaint *vide* letters dated 26th March 2024, and the 5th Respondent responded *vide* a letter dated 1st April 2024.

D. NATURE OF THE COMPLAINT

11. The Complainant alleged that the 1st Respondent conducted elections in September 2023. Before the elections, they sent out consent forms asking members of the institute whether their information could be shared with aspirants for campaign purposes. She stated that she did not consent to my information being given to aspirants.
12. Additionally, she indicated that the 1st Respondent did not inform her of what data was being shared with aspirants. She did not consent because she was of the view that, among other things, she was incapable of making an informed decision.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

13. The Complainant stated that prior to the 1st Respondent's election in September 2023, the Institute sent out consent forms to its members asking whether their information could be shared with aspirants for campaign purposes.
14. She indicated that she did not consent to her information being given to the aspirants. However, despite purporting to seek consent, and despite her not giving consent, the 1st Respondent still shared her data with the aspirants.
15. The aspirants, together with their agents, went ahead to call, text, and email her severally during the 1st Respondent's campaign period.
16. She emailed the 1st Respondent to provide clarity on her consent but didn't receive any response and 1st Respondent did not inform her of what data was shared with the aspirants.
17. The Complainant stated that the 1st Respondent's attempt at obtaining consent did not fulfil the informed consent criteria as they did not inform the electorate what information was to be shared, under what circumstances, and the safeguards employed.
18. The aspirants lacked a basis for processing her data and the 1st Respondent should be held vicariously liable having been the original data controller.
19. The Complainant sought, among others, compensation of KES. 500,000 for every instance in which her data was shared with the aspirants, damages of KES. 500,000 for not being able to vote in the 2023 elections, enforcement notice, and audit of the 1st Respondent's data protection practices, and the Institute be required to share their data protection policy on their website with contacts for addressing data subjects' issues.

ii. THE 1ST RESPONDENT'S RESPONSE

20. The Respondent filed a response to the notification of complaint dated 29th February 2024 and indicated that it holds council elections every year as stipulated by the First Schedule (Election of the Chairman) and Second Schedule (Election of a Council Member) of the Accountants Act 2008 as read with the 5th Schedule of The Accountants Regulations 2022.

21. The Institute is mandated by the law to prepare and furnish candidates with a campaign register and a voter register as stipulated under Schedule 5 of the Accountants Regulations 2022.
22. The 1st Respondent denied that it gave out the Complainant's name or details in the campaign register that was circulated to the aspirants. They attached evidence in the form of records and logs of the list sent out by their ICT department.
23. The 1st Respondent stated that it circulated consent forms to all its members to facilitate the generation of the campaign register as required by law on 16th August 2023.
24. As an additional precaution, the Institute double-checked all the emails to ensure members who did not give consent were not included in the campaign register.
25. The 1st Respondent indicated that it informed and cautioned the aspirants on the provisions of the Data Protection Act regarding the circulation of campaign material to consenting members only.
26. The Institute stated that it placed reliance on provisions of the Accountants Act 2008 and Accountants Regulations 2022 in providing the aspirants with names and contact details of the members who consented to receive campaign material and messages.
27. The 1st Respondent alleged that it gave candidates access to the voter register for inspection. The voter register included the registration number, name, and status of the respective members as mandated by the Accountants Act and Regulations thereof.
28. The 1st Respondent stated that the Complainant did not give consent, as such, her name was not included in the campaign register shared with candidates.
29. The Institute indicated the measures they have undertaken to be compliant with the Act including development of a Data Protection Policy and lodging an application to be registered as a data controller and processor with this Office.

iii. THE 2ND RESPONDENT'S RESPONSE

30. The 2nd Respondent filed an initial response to the notification of the complaint vide a letter dated 26th March 2024 and stated that his extent of his significant involvement in the complaint was undisclosed.
31. He stated that he was not a data controller or processor and the data in issue was not disseminated to third parties or handled in a manner that violates the Complainant's privacy and that the data was not erroneous or misleading.
32. The 2nd Respondent indicated that the Complainant's personal data was readily available from multiple sources authored by the Complainant as it was contained in a public record; the Complainant has deliberately made the data public and has implicitly consented to the collection of her data from another source; no prejudice has been occasioned to the interests of the data subject; and there is no indication that her personal data was used other than for the purpose which is lawful, specific and explicitly defined.
33. The 2nd Respondent stated that the complaint relates to an election dispute which is governed under the Accountant's Act and that its resolution is time-bound.
34. He indicated that there was nothing private in the Complainant's contacts, name, and standing in the profession as her full name and standing are readily accessible from the membership, her peers, classmates, colleagues, and so forth, the Complainant has not demonstrated that her details were not disseminated from any of the mentioned sources.
35. The 2nd Respondent indicated that the elections in question were for the Complainant's professional body and it is not far-fetched that people known to the Complainant and allied to any of the contestants will be keen to reach out to every member of the profession.
36. He stated that the Complainant's name and number are not in the exclusive control and possession of the 1st Respondent.
37. He stated that the Complainant does not seek any specific recourse to warrant his joinder as a 2nd Respondent in the Complaint and the request for damages is unsustainable and extreme under the circumstances.
38. The 2nd Respondent alleged that this Office lacks jurisdiction over the issues at hand as they transcend the mandate of this Office. He indicated that in that

premise, therefore, the notice was unlawful and unconstitutional in the following regards;

- a) The Complainant failed to exhaust the existing mechanism under the Accountants Act;
- b) The notice violates the fundamental right to association and political parties;
- c) The notice undermines the statutory powers conferred to the 1st Respondent by the Accountants Act;
- d) Elevating the claimant's right to privacy at the expense of a public body;
- e) Violation of the principles of national values under Article 10 and in particular on the aspects of upholding the rule of law and democracy;
- f) Taking directions on the exercise of a statutory duty from a complainant;

39. He requested this Office to withdraw the said notice failure to which he shall be constrained to resort to court action to challenge the unconstitutionality of this Office's actions.

iv. THE 3RD RESPONDENT'S RESPONSE

40. The 3rd Respondent filed her response on 26th March 2024 and stated that during the campaign period, she was not issued, nor did she have access to any form of campaign register or database that contained personal data, including email addresses of the respective voters.

41. The email address in question, along with other information was acquired through the informal sharing networks that were widely utilized during the intense activity of the campaign period.

42. She stated that there was no malintent to her action as the sharing of campaign material was a singular act done without any intention to harass, harm, or otherwise engage the complainant beyond the campaign's context;

43. The 3rd Respondent stated that she did not use the Complainant's personal data for any other purpose.

44. She expressed interest in amicably resolving the matter with the Complainant through Alternative Dispute Resolution.

45. The matter was referred to negotiation on 4th April 2024 with the parties able to successfully resolve the complaint resulting in the Complainant withdrawing the complaint against the 3rd Respondent on 9th April 2024.

v. THE 4TH RESPONDENT'S RESPONSE

46. The 4th Respondent filed his response to the notification of complaint on 26th March 2024 and opposed being enjoined as a Respondent in this complaint.

47. He denied liability for all allegations framed against him and stated that all the information that came his way was freely circulating on social media and different digital campaign forums.

48. He stated that all candidates were freely circulating the information, in support of their campaign agenda and doubted the motive behind the Complainant singling him out in exclusion of all other candidates.

49. During the campaign period, all prospective candidates had a lawful obligation to be provided by the institute with specified personal data. He stated that he did not have access to such data since the same is under the custody of the institute.

50. He indicated that the Complainant is a member of the 1st Respondent and that the Institute is the custodian of some of the Applicant's personal data by virtue of her membership.

51. He stated that the complainant should be barred from lodging a complaint as such sharing of data is protected under Section 45 (a) (i) of the Act over permitted grounds of processing sensitive personal data.

52. The 4th Respondent alleged that he had no capacity to infiltrate into the 1st Respondent's database to retrieve any data aimed at jeopardizing the Complainant and that she remained subscribed to receiving his emails and had the option of unsubscribing from receiving the emails.

53. He alleged that the Complainant impliedly consented to receive emails from his email list just like any other member of the institute during the campaign period.

54. The 4th Respondent stated that the 1st Respondent's elections are conducted subject to well-laid down procedures in the Accountants Act, and any conflicting provisions between the provisions of the Data Protection Act and the Accountants Act ought to be left to the Courts for proper interpretation.

vi. THE 5TH RESPONDENT'S RESPONSE

55. The 5th Respondent filed his response on 1st April 2024 and stated that the allegations of a potential violation of Sections 25, 26, 29, 30, and 32 are unsubstantiated and no such onus of proof ought to be pegged on an individual who under the law is not a registered Data Controller nor a Processor neither is he obligated to register as such.
56. He alleged that Complainant's personal data was availed to him from friends and colleagues in the profession and not from the 1st Respondent or any other registered data controller or processor.
57. He stated that the Complainant's personal data was used strictly to disseminate election-related information to the accountants where the Complainant is also included and was not shared with any third parties.
58. On the first contact, he informed the member of the intention to seek a vote and support, if a negative response was given, no further communication was given to the member.
59. He alleged that the Complainant did not signify any denial or notify the member as to their wishes of not being keen to participate in the elections.
60. The 5th Respondent indicated that the names the Complainant alleges as being "uncommon" are publicly published and are available on the Google search engine. He stumbled upon the Complainant's full name while confirming whether the client was a certified accountant after his supporters gave him a list of CPAs in their circles.
61. Additionally, he stated that the names of the Complainant are readily found on the LSK Advocates search engine and that readily pops up when you search her name and as such it will be unjust to penalize a public institution for a data breach that is non-existent

F. INVESTIGATIONS UNDERTAKEN

62. Investigations conducted by this Office took into account the documents presented to this Office as evidence by the Complainant and the Respondents, the 1st Respondent's 2023 campaign register and its 2023 voter register as well as the Accountants Act and the Regulations.

63. It was established that The 1st Respondent prepared a voter register and a campaign register as required by law, and shared the campaign register via mail to, among others, the 2nd, 3rd, 4th, and 5th Respondents on 25th August 2023.
64. The 1st Respondent, as mandated by the Accountant's Act, sent an email on 17th August 2023 to its members requesting their consent to be included in the campaign register and giving them till 22nd August 2023 to do so.
65. The campaign register contained the names, membership numbers, emails, and phone numbers of all the consenting members and the voter register contained the names and membership numbers of all the ICPAK members who are eligible to vote.
66. It is noteworthy that the voter register contained the details of the Complainant excluding her email address and phone number.
67. A scrutiny of the campaign register revealed that it did not contain the Complainant's details.
68. The 2nd Respondent sent campaign text messages to the Complainant on various dates in September 2023; the 3rd Respondent sent campaign emails and text messages to the Complainant on various dates in September 2023; the 4th Respondent sent campaign emails to the Complainant on various dates in September 2023.
69. The Complainant wrote to the 1st Respondent on 15th September 2023, requesting them to confirm that she did not give consent for her details to be issued for campaigns but the request did not elicit any response from the 1st Respondent.
70. The Complainant's name and membership number are listed on the 1st Respondent's website; however, the listing does not contain her phone number and email address which was used by the aspirants.
71. The 2nd, 4th and 5th Respondents stated that the Complainant's personal data was freely circulating on, among others, social media and different digital campaign forums but did not provide proof of the same.
72. The procedure for obtaining personal data for use in campaigns is clear and strictly outlined in the Accountant's Regulations.

73. Part G of the Fifth Schedule of the Accountants Regulations 2022 on voters and campaign register states that;

1. "...The Council shall prepare the campaign and voters' registers.
2. The campaign register shall consist of all members of the Institute at the commencement of each campaign year.
3. The Council shall request for consent from members to avail their details to the candidates prior to the commencement of the campaign period and upon being obtained, the campaign register consisting of names of all members, telephone, and e-mail contacts of consenting member..."

74. From the above, it is clear that the only data supposed to be used by the aspirants for their campaigns was the one shared by the 1st Respondent.

G. ISSUES FOR DETERMINATION

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

- i. Whether this Office had jurisdiction to handle this complaint;
- ii. Whether there was an infringement of the Complainant's rights under the Act;
- iii. Whether the Respondents fulfilled their obligations under the Act; and
- iv. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THIS OFFICE HAD JURISDICTION TO HANDLE THIS COMPLAINT

76. The 2nd Respondent indicated that this Office lacked jurisdiction to handle this complaint as it transcends our mandate and therefore the issue of jurisdiction must be dealt with first.

77. Section 3 of the Act gives the object and purposes of the Act which is to regulate the processing of personal data; to ensure that the processing of personal data of a data subject is guided by the principles set out in Section 25; to protect the privacy of individuals and to provide data subjects with rights and remedies to

protect their personal data from processing that is not in accordance with this Act.

78. Further, Section 8 (1) (a) of the Act mandates the Office to oversee the implementation of and be responsible for the enforcement of the Act and Section 9 gives this Office the power to conduct investigations on own initiative, or on the basis of a complaint made by a data subject or a third party.

79. This complaint was based on an alleged infringement of the Complainant's privacy rights as her personal details were used without her consent. Therefore, this Office had jurisdiction to handle this complaint and as such investigated the complaint as mandated under the Act.

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

80. The Complainant is a data subject under the definitions of the Act and as such, is entitled to the rights as provided 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, her phone number and email address being used by aspirants to campaign during the 1st Respondent's elections.

81. The 1st Respondent ensured that it sought consent from the Complainant to include her personal details in the campaign register. She did not consent and therefore her name was not included in the campaign register which was shared with the aspirants.

82. The 2nd, 4th and 5th Respondents did not inform her of the use of her personal data and proceeded to call and send her emails and text messages yet she did not consent to the same.

83. This Office therefore finds the 2nd, 4th and 5th Respondents liable for infringement of the Complainant's rights under Section 26 (a) of the Act.

III. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

84. 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. 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.
85. All the Respondents in this complaint fit into the definition of data controllers and data processors.
86. With regards to consent, 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**.
87. The 1st Respondent indicated that the Accountants Act mandated them to obtain consent from their members on whether they want their details on the campaign register. The Complainant did not consent to this and therefore her personal details were not included in the campaign register.
88. In this regard, the 1st Respondent fulfilled its obligations with regards to obtaining consent under the Act and discharged the burden placed on them under Section 32 of the Act.
89. The 2nd Respondent indicated that the Complainant's personal data was readily available from multiple sources and in a public record. Section 28 (1) of the Act provides that a data controller or data processor shall collect personal data directly from the data subject. Only the Complainant's name and ICPAK's membership number were available and not her phone number nor her email address as she did not consent to these details being in the campaign register. These details were also not on LSK's advocates search engine as indicated by the 5th Respondent.
90. The 4th Respondent stated that during the campaign period, all prospective aspirants had a lawful obligation to be provided by the 1st Respondent with specified personal data. However, the voter's register provided to this Office by the 1st Respondent indicated that it was only the Complainant's name and her

member number that were available. Therefore, the 4th Respondent did not provide proof as to where exactly he retrieved the Complainant's personal data in order to call and text her during his campaign.

91. The 5th Respondent indicated that the Complainant's personal data was availed to him from friends and colleagues in the profession, contrary to the provision of Section 28 (1) of the Act. Further, the Complainant's contact details are not available on LSK advocates search engine as he alleged.

92. The 2nd, 4th and 5th Respondents therefore did not collect the Complainant's personal number directly from her for purposes of campaigning.

93. In light of the above, this Office finds that the 2nd, 4th and 5th Respondents did not fulfil their obligations under the Act.

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

94. 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.

95. 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.

96. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (a) were infringed upon by the 2nd, 4th and 5th Respondents. These Respondents failed to inform the Complainant of the use of her contact details and proceeded to call and text her without her consent.

97. The 2nd, 4th and 5th Respondents also did not collect the Complainant's personal data from her and failed to prove that her personal details were available publicly.

98. In this regard, the 2nd, 4th and 5th Respondents is hereby ordered to pay the Complainant **Kenya Shillings Fifty Thousand (Kshs. 50,000)** each for the violation of her rights under section 26(a) the Act.

H. FINAL DETERMINATION

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

- i. Complaint against the 1st Respondent is dismissed.
- ii. The 2nd, 4th and 5th Respondents are hereby found liable for infringement of the Complainant's rights under section 26(a) and non-compliance of their obligations under the Act;
- iii. The 2nd, 4th and 5th Respondents to each pay the Complainant **Kenya Shillings Fifty Thousand (Kshs. 50,000)** as compensation;
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 25th day of April 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

KENYA

