



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0372 OF 2024**

**KEVIN KIPROTICH RONO.....COMPLAINANT**

**-VERSUS-**

**SBM BANK KENYA.....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 alleging that he was receiving multiple emails from the Respondent with regards to PIN/Password/One-Time-Password (OTP) alerts, log in notifications, various alerts, account statements and promotional offers despite raising the issue with the Respondent multiple times.

**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 '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 premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter '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 4<sup>th</sup> March 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 19<sup>th</sup> March 2024 referenced ODPC/CONF/1/5 VOL 1 (875). 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 allegations made against them by the Complainant;
  - b) Any relevant materials or evidence in support of their response;
  - c) The lawful basis relied upon to process the Complainant's personal data;
  - d) Evidence as to whether the Complainant consented to the processing of his personal data and sharing to third parties;
  - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;

- f) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again;
- g) Any other information they wished the Office to consider.

8. The Respondent filed a response to the notification of complaint on 9<sup>th</sup> April 2024.

#### **D. NATURE OF THE COMPLAINT**

9. The Complainant alleged that since May 2023 up to the time of filing this complaint, he received 327 emails from the Respondent despite not being a customer or having any relations with the Bank. The emails consisted of PIN/Password/One-Time Password (OTP) alerts, login notifications, transaction OTPs, Account to Mpesa transaction alerts, password reset alerts, account statements and promotion and offers.

#### **E. SUMMARY OF EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant stated that his email address is [k\\*\\*\\*nr\\*\\*o@gmail.com](mailto:k***nr**o@gmail.com) which contains his name as a personal identifier.
11. He alleged that he made numerous calls to the Respondent through their official customer care line instructing them to stop using his email as he does not bank with them. The Respondent then subsequently raised several ticket numbers but they did not take any action. The Complainant attached a call log as proof of the same.
12. The Complainant also indicated that he wrote to the Respondent five times on diverse dates in August 2023 instructing them to stop using his email address and no action was taken. He attached the emails sent to the Respondent as proof of the same.
13. The Complainant requested for various remedies including compensation.

## ii. THE RESPONDENT'S RESPONSE

14. The Respondent filed a response dated 12<sup>th</sup> April 2024 and stated that the email address [k\\*\\*\\*nr\\*\\*o@gmail.com](mailto:k***nr**o@gmail.com) was provided to them by one of their customers with a similar name as the Complainant who opened a bank account on 12<sup>th</sup> April 2023. The Respondent enclosed copies of the account opening forms filled by the customer during the onboarding process.
15. The Respondent stated that the email address provided by the customer was accurately captured by themselves and the purpose of the email was to facilitate quick and efficient communication between them and the customer.
16. The Respondent stated that it had no capacity to verify whether the email address belonged to a different person as it relied on data or information as provided by the customer.
17. The Respondent indicated that the Complainant was not a customer of the bank and therefore it cannot be in breach of its confidentiality or data privacy obligations as it cannot have divulged his personal data since the Bank has neither collected nor stored any of his personal data.
18. The Respondent stated that upon receipt of the complaint, they reached out to the customer who admitted that he had inadvertently provided them with an email address which was the Complainant's email address.
19. The Respondent alleged that the customer then provided the correct email address which was [k\\*\\*\\*nr\\*\\*oo@gmail.com](mailto:k***nr**oo@gmail.com).
20. The Respondent stated that it expunged the Complainant's email address from its database to ensure that the Complainant does not continue to receive any emails from the Bank and that it captured and updated the customer's correct email address.

## F. INVESTIGATIONS UNDERTAKEN

21. After careful analysis of the evidence adduced by the parties to this complaint, it was established by this Office that the Respondent, through their email address [i@sbmbank.co.ke](mailto:i@sbmbank.co.ke) sent multiple emails related to their

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customer's account activity to the Complainant between 27<sup>th</sup> May 2023 to 4<sup>th</sup> March 2024.

22. The Complainant contacted the Respondent *via* phone call on 6<sup>th</sup> December 2023 and 20<sup>th</sup> January 2024 and through email on 21<sup>st</sup> August 2023 and 28<sup>th</sup> August 2023 requesting them to correct the issue but his request was not acted upon.

23. Contrary to the Respondent's assertion, the email provided by their customer in his personal account application form provided by them as evidence was [k\\*\\*\\*nr\\*\\*oo@gmail.com](mailto:k***nr**oo@gmail.com) and not [k\\*\\*\\*nr\\*\\*o@gmail.com](mailto:k***nr**o@gmail.com). The first email address has a "double o" and the second one a "single o".

24. It was therefore evident that the Respondent did not capture their customer's email address correctly at the time of onboarding and therefore, the allegation that it is the customer who provided the Complainant's email is false.

25. Regulations 7, 8, and 10 of the Data Protection (General) Regulations, 2021, on restriction to the processing of personal data, objection to the processing of personal data, and rectification of personal data requires the Respondent, as a data handler, to within 14 days comply with a data subject's request.

26. From the above, it is evident that the bank did not take any reasonable immediate steps to restrict the processing of the Complainant's personal data when he disputed the accuracy of the personal data. This is evidenced in the period that the Bank took to correct the issue which was after it received the notification letter from this Office.

## **G. ISSUES FOR DETERMINATION**

27. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was a violation of Complainant's rights under 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 COMPLAINANT'S RIGHTS UNDER THE ACT

28. Section 26 of the Act provides for the rights of a data subject under the Act. As such, the Complainant had the right to object to the processing of all or part of their personal data.
29. Personal data is defined under Section 2 of the Act as any information relating to an identified or an identifiable natural person. An identifiable natural person under the Act means a person who can be directly or indirectly, by reference to an identifier such as a name, identification number, location data, **an online identifier** or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity.
30. The Complainant's email address is therefore his personal data as envisaged under the Act.
31. Section 36 of the Act also provides for the right of a data subject to object to the processing of their personal data, unless the data controller or data processor demonstrates compelling legitimate interest for the processing which overrides the data subject's interests, or for the establishment, exercise or defence of a legal claim.
32. The Respondent did not demonstrate any of the factors under Section 36.
33. Regulation 8 of the Data Protection (General) Regulations, 2021 (the General Regulations) stipulates that pursuant to Section 36 of the Act, a data subject may request a data controller or processor not to process all or part of their personal data, for a specified purpose or in a specified manner.
34. Sub-regulation (3) of the above Regulation states that a data controller shall, without charging any fee, comply with a request for objection **within fourteen days** of the request.
35. The Complainant was well within his rights in requesting the Respondent to stop using his email address to send him emails that were not relevant to him. The Respondent took over a year, and the intervention of this Office, to correct

the email address in their system and input their customer's correct email address.

36. As a data controller and data processor, the Respondent had an obligation under Section 25 of the Act to lawfully and accurately process their customer's personal data. However, they wrongfully captured their customer's email address leading to the sending of numerous emails to the Complainant's email address.

37. Despite requests to correct the same, the Respondent failed and or neglected to do so and therefore it continuously processed the Complainant's personal data unlawfully, contrary to the principles of data protection under Section 25 of the Act.

38. Therefore, the Respondent unlawfully processed the Complainant's personal data for over a year and failed to uphold the Complainant's rights under Section 26 (c) of the Act and the attendant Regulations.

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

39. 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.

40. Section 65 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."*

Further, Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

41. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's rights under Section 26 (c) of the

Act that was infringed by the Respondent. The Respondent failed uphold the Complainant's right to objection by failing to correct the email address in their system despite numerous requests by the Complainant to address the same. Moreover, the Office notes that it took over one year for the Respondent to act and it only took the intervention of this Office for the same to be addressed.

42. This Office further takes into consideration the fact that Respondent unlawfully processed the Complainant's personal data and continued to send him emails despite his numerous requests to correct the error on their system. From the investigations conducted, it is evident that the Respondent did not capture their customer's email address correctly at the time of onboarding and therefore, the allegation that it is the customer who provided the Complainant's email is false.

43. This Office therefore awards the Complainant **Kenya Shillings Four Hundred and Fifty Thousand Shillings (Kshs. 450,000)** as compensation for the infringement of the Complainant's right to object under Section 26 (c) of the Act and the unlawful processing of the complainant's personal data without any justification for over a year.

44. Based on Regulation 14 (2) (e) of the Enforcement Regulations, the Respondent is directed to ensure that it collects personal details from its customers in an accurate manner to avoid such incidents.

#### **H. FINAL DETERMINATION**

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

- i. The Respondent is found liable for unlawfully processing the Complainant's personal data;
- ii. The Respondent is hereby ordered to compensate the Complainant **Kenya Shillings Four Hundred and Fifty Thousand Shillings (Kshs. 450,000)**; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 31<sup>st</sup> day of may 2024.



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**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**



