



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0784 OF 2024 CONSOLIDATED WITH ODPC

COMPLAINT NO. ODPC COMPLAINT NO. 0916 OF 2024

JANUARIES ROBERT KIOKO.....1ST COMPLAINANT

FERDINAND WANGA MAKANI..... 2ND COMPLAINANT

-VERSUS-

METROPOLIS STAR LAB KENYA LTD.....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 Office received complaints against the Respondent alleging that the Respondent has continuously been sending the 1st and 2nd Complainants ('the Complainants') unsolicited promotional and direct marketing messages through Whatsapp even after they had objected to receiving the said messages.

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 complaints from the Complainants on 11th June 2024 and 2nd July 2024 respectively. The complaints were 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 Respondent of the complaint filed against it *vide* letters dated 24th June 2024 and 26th July 2024. The notification letters were referenced ODPC/CONF/1/5 VOL II (16) and ODPC/CONF/1/5 VOL II (58) respectively. The Office in the said Notifications of Complaint for the two complaints requested the Respondent to furnish the Office with –
 - a) A response to the allegations made against it by the Complainant;
 - b) A contact person who can provide further details as regards the complaint;
 - c) Any relevant materials or evidence in support of its response above;
 - d) A detailed description of whether they fulfill data subject's rights and how the same is achieved;
 - e) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;

- f) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again; and
- g) Any other information it wished the Office to consider.
8. In the interest of fair justice, and pursuant to Regulation 11 of the Data Protection (Complaints Handling Procedures and Enforcement) Regulations, 2021, the Office further informed the Respondent of the options of -
- a. Reviewing the complaint and summarily resolving the same to the satisfaction of the Complainant, or
 - b. Resolving the complaint through mediation, negotiation and/or conciliation, as the alternative dispute resolution (ADR) mechanisms provided for by the Act and the Regulations.
9. The Respondent responded to the said notification letters on 22nd July 2024 and 12th August 2024.
10. Pursuant to Regulation 9 of the Enforcement Regulations the two complaints were consolidated and considered jointly.

D. NATURE OF THE COMPLAINT

11. The Complainants alleged that the Respondent has continuously been sending them marketing messages even after they had opted out of their marketing messages using the opt out options that the Respondent had provided.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

First Complainant's case

12. It was the 1st Complainant's case that the Respondent has continuously been sending him marketing messages *via* WhatsApp even after opting out of their marketing messages.
13. The 1st Complainant contends that the Respondent has indicated in its communication to respond "STOP" to unsubscribe and he has replied as such repeatedly and the messages persisted.

14. The 1st Complainant further contended that he has never given his consent to receive marketing messages.
15. In his reply to the Respondent's response dated 1st August 2024, the 1st Complainant further stated that he has never granted the Respondent consent to process his personal data for the purpose of marketing of their services and the Respondent lacks a lawful basis for processing his personal data for such purposes.
16. The 1st Complainant further stated that he followed the option given in the Respondent's communication to stop receiving further messages as advised in their communications and the expectation that he should have joined another Whatsapp channel to seek support lacks transparency as it does not indicate what support he would be seeking and amounts to attempting to further processing of his personal data without his consent and infringement of his data subject rights.
17. He maintained that he has made several attempts to stop the Respondent from sending the marketing messages but they haven't stopped.
18. As part of his evidence, the Complainant adduced:-
- a) A sworn affidavit to support his complaint
 - b) A certificate of electronic evidence producing the messages that he has persistently been receiving from the Respondent.

Second Complainant's case

19. It was the 2nd Complainant's case that the Respondent has constantly been sending him Whatsapp marketing messages without obtaining his consent to do so.
20. The 2nd Complainant further contended that he has constantly objected to receiving the said messages through the Respondent's "Stop" function but the more he objects, the more messages he receives. To him the "Stop" option on the Respondent's messages was not functional.
21. In his reply to the Respondent's response dated 15th August 2024, the 2nd Complainant maintained that he only visited the Respondent's lab once for specific service at which visit he did not consent for the processing of his data and/ or to

receiving marketing messages. He further maintained that each time he responded with 'Stop' it would only lead to more marketing messages which would ask him if he is seeking support wanting him to click on an unverified link which might have exposed him to more harm.

22. To support his complaint the 2nd Complainant adduced a certificate of electronic evidence. He also brought his electronic gadget to this Office for forensic audit and verification.

ii. THE RESPONDENT'S RESPONSE

23. The Respondent in its response to the 1st Complainant's Complaint dated 22nd July 2024, stated that the 1st Complainant utilized the Respondent's services on 29th September 2021 and on 15th July 2024.

24. The Respondent confirmed that the Complainant did attempt to stop the promotional message but the stop functionality at that time had some operational challenges hence he was prompted and directed to respond to the Whatsapp link which was shared immediately.

25. The Respondent stated that the use of the WhatsApp link was a temporary solution provided till the actual fix was implemented in the system. However, the 1st Complainant instead opted to text back at the automated system instead of clicking on the WhatsApp link provided.

26. The Respondent submitted that the Complainant did not follow the instructions on the response for his request to be actioned and that they had implemented a process with internal stakeholders to action client requests during that period and if the Respondent had responded on the WhatsApp link then his number would have been promptly deleted.

27. The Respondent averred that the Complainant's number was acquired organically when he utilized their services and the few messages sent were part of greetings, awareness and was done in good faith.

28. The Respondent further stated that they have engaged their service provider to ensure that they are fully compliant with the policies and guidelines of this office.

29. With respect to the 2nd Complainant's Complaint, the Respondent stated that the 2nd Complainant utilized their services on 16th March 2024 and he is their regular customer.
30. The Respondent denied all the allegations brought by the 2nd Complainant against it.
31. The Respondent further conceded that during the time period within which the 2nd Complainant alleged that he received the marketing messages, the STOP functionality at that time had some operational challenges, hence the client was prompted and directed to respond to the Whatsapp link which was shared immediately. The Respondent stated that this was a temporary solution provided till the actual fix was implemented in the system.
32. The Respondent stated that the 2nd Respondent opted to text back at the automated system instead of clicking on the Whatsapp link provided.
33. The Respondent contended that the 2nd Respondent did not follow the instructions on the response for his request to be actioned.
34. On 30th August 2023, the Respondent further submitted that at all material times when they were collecting the Complainants' data they were notified that the same was being collected and may be used for marketing purposes as well as notifying them of any information relating to the services rendered to them.
35. To support its position, the Respondent further adduced its operational manuals and policies.

G. INVESTIGATION UNDERTAKEN

36. On 21st August 2024, upon summoning the 2nd Complainant to this Office, a forensic audit was conducted on the 2nd Complainant's electronic gadget to verify the evidence adduced by him.
37. On 23rd August 2024, this Office conducted a site visit at the Respondent's premises for purposes of investigating the Respondent's databases, operations and systems.
38. During the site visit, the Office interrogated the Respondent's modes of operations. Related to the Complaint, among others, it was established that:

- a. The Complainants' data was obtained when the Complainants had previously sought the Respondent's services.
 - b. The Respondent had a data controller-data processor relationship with an entity referred to as yellow.ai which operated their marketing and promotional messages.
 - c. In as much as the Respondent had conceded that the stop functionality had some operational challenges, the Office found that the purported challenges were yet to be fixed as at the date of the site visit. During the site visit the Office tested the opt-out options provided in the Respondent's messages. Even after the test, the Office continued receiving the messages despite the use of the opt-out option.
39. Following the investigation, it was also confirmed that the Respondent's opt-out mechanism was not operational as at the date of the site visit investigation.

H. ISSUES FOR DETERMINATION

40. It is an undisputed fact in this case that the Complainants' personal details and data were obtained from the Complainants when they visited the Respondent's premises for its medical services.
41. The following issues therefore fall for determination by this Office:
- i. Whether the Respondent fulfilled its obligations under the Act;
 - ii. Whether there was an infringement of the Complainants' rights under Section 26 of the Act and its attendant regulations; and
 - iii. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT.

42. Contextually, as it relates to this issue, the following questions arise:

- a. Did the Respondent process the Complainants' personal data lawfully?**
- b. Was the Respondent's opt-out mechanism functional as required by the law?**
- c. Does the data controller and processor relationship between the Respondent and its service provider fall within the law?**

Did the Respondent process the Complainant's personal data lawfully?

43. It was the Complainants' position that they did not consent to receiving the promotional messages from the Respondent.

44. It was the Respondent's position that when it collected the Complainants' data they were notified that the same was being collected and may be used for marketing purposes as well as notifying them of any information relating to the services rendered to them. The Respondent further contended that by the Complainant's affirming their signatures on the on the Lab request form they had consented to receiving the messages.

45. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data and states that, "*a data controller or processor shall not process data unless the data subject consents to the processing for one or more specified purposes or the processing is necessary for the reasons given in subsection (b).*"

46. Section 37 of the Data Protection Act provides that a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained express consent from a data subject; or is authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.

47. Regulation 14 (1) of the Data Protection (General) Regulations 2021 ('the General Regulations') further provides that for the purposes of Section 37 (1) of the Act, a data controller or processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction.

48. Further, Regulation 14 (2) of the General Regulations provides that a data controller or data processor is considered to use personal data to advance commercial interests where personal data is used for direct marketing through:-

- a) sending a catalogue through any medium addressed to a data subject;
- b) displaying an advertisement on an online media site where a data subject is logged on using their personal data; or
- c) sending an electronic message to a data subject about a sale, or other advertising material relating to a sale, using personal data provided by a data subject.

49. By sending the promotional messages directly to the Complainants' phone numbers, the Respondent was involved in direct marketing as defined above.

50. On its part, Regulation 15 of the General Regulations sets out the permitted commercial use of personal data as follows:-

15. Permitted commercial use of personal data

(1) A data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where-

- (a) the data controller or data processor has collected the personal data from the data subject;*
- (b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;*
- (c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;*

(d) the data controller or data processor provides a simplified opt-out mechanism for the data subject to request not to receive direct marketing communications; or

(e) the data subject has not made an opt-out request.

(2) A data controller or data processor shall not transmit, for the purposes of direct marketing, messages by any means unless the data controller or data processor indicates particulars to which a data subject may send a request to restrict such communications without incurring charges. (Emphasis supplied)

51. As can be seen from the above, consent of the data subject is crucial for the use of personal data for direct marketing.

52. From the evidence adduced and investigations undertaken by this Office, the Respondent did not inform the Complainants that their personal data would be used for direct marketing when they were obtaining the Respondent's services. The Respondent's contention that by signing the Lab Request form, the Complainants had consented to receiving the promotional messages, lacks merit as the purpose of the patients signing the lab request form was limited to receiving laboratory services only and not direct marketing.

53. The Office however notes that the Respondent has provided a quality policy, control of records policy and complainants management policy all policies aimed at addressing its client's data retention and usage in the facility.

Was the Respondent's opt-out mechanism functional as required by the law?

54. The Complainants contended that they had tried using the opt-out in the Respondent's messages repeatedly but they continued to receive the messages incessantly despite them utilizing the opt-out option.

55. The Respondent on its part admitted that during the period within which the Complainants alleged they received the marketing messages, the STOP functionality had some operational challenges due to a technical error on the part of its systems provider.

56. As such, it therefore follows that by the Respondent's own admission, the opt-out mechanism availed to the Complainants was not functional at all material times when they were receiving the marketing messages from the Respondent. Additionally, as noted earlier from the investigation, the said opt-out mechanism was still not functional when this Office went to conduct investigations upon the Respondent.

57. Before we pen off on this question, we would like to bring to the attention of the Respondent Regulation 16 of the Data Protection (General) Regulations 2021 which provides as follows with respect to features of an opt-out message.

16. Features of an opt out message

(1) An opt out mechanism contemplated under regulation 15 (1) (d) shall:-

(a) have a visible, clear and easily understood explanation of how to opt out

(b) include a process for opting out that requires minimal time and effort;

(c) provide a direct and accessible communication channel;

(d) be free of charge or where necessary involve a nominal cost to a data subject; and

(e) be accessible to persons with a disability

Does the Data Controller and Data Processor relationship between the Respondent and its service provider fall within the law?

58. In its submissions, the Respondent stated that the fault was not on its part but on the part of its service provider, Yellow AI.

59. On this relationship between the Respondent and its service provider we note that the Respondent has not provided this Office with a data sharing agreement between themselves and their service provider as required by Section 42 (2)(b) of the Act. The Respondent submitted to this Office an agreement for provision of chatbot services for marketing and an ISO certification for the said service provider.

60. On interrogation of the Agreement for the provision of chatbot services for marketing this Office notes that the same does not cover the aspects of data sharing and/or any aspect of data processing agreement between the Respondent as the data controller and the service provider as the data processor.

61. This Office therefore finds that as far as issue no (I) is concerned, the Respondent did not fulfill its obligations as required by the Act.

II. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANTS' RIGHTS UNDER SECTION 26 OF THE ACT AND ITS ATTENDANT REGULATIONS.

62. It was the Complainants' position that the Respondent continued sending them unsolicited promotional messages even after they had told the Respondent to stop sending them the said messages.

63. The Respondent acknowledged that indeed during the period within which the Complainants alleged they received the marketing messages, the STOP functionality had some operational challenges due to a technical error on the part of its systems provider.

64. Section 26 (c) of the Act outlines the rights of a data subject to object to the processing of all or part of their personal data.

65. Section 36 of the Act further provides, *inter alia*, that a data subject has a right 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.

66. Regulation 8 (4) and 8 (5) of the General Regulations provide for objection to direct marketing messages as is the case in the complaints herein. The two regulations provide that the right to object to processing applies as an absolute right where the processing is for direct marketing purposes which includes profiling to the extent that it is related to such direct marketing. Where the data subject objects to processing for direct marketing purposes, the personal data shall not be processed for such purposes. [Emphasis supplied]

67. On this issue, by the Respondent's own admission, it is evident that the Complainants were not granted their rights in as much as they sought for the same on numerous occasions.

68. This Office therefore finds that as far as issue no (ii) is concerned, the Respondent contravened the Complainants' rights to object to the processing of their personal data.

III. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

69. Under 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.

70. Having considered the merits of the Complaint, the evidence adduced by both the Complainants and the Respondent, and having found that the Respondent did not fulfil its obligations as required by the Act, it therefore, follows that there has been a violation of the Act by the Respondent to that extent.

71. Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto.

72. This Office is guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.

73. 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.

74. 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.

75. The Complainants claimed for the remedy of compensation against the Respondent. The Respondent responded to this prayer for the remedy of compensation stating that the amounts requested by the Complainants were exorbitant.

76. Having found that the Respondent violated the Complainants' right to object to processing of their personal data, the Respondent is hereby directed to compensate the Complainants a total of **KES 500,000/- (Five Hundred Thousand Shillings Only)** as follows:-

- **1st Complainant – KES 250,000**
- **2nd Complainant – KES 250,000**

G. FINAL DETERMINATION

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

- The Respondent is hereby found liable.
- The Respondent is ordered to Compensate the Complainants a total of **KES 500,000/= (Four Hundred Thousand Kenya Shillings Only)** as follows:-
 - **1st Complainant – KES 250,000**
 - **2nd Complainant – KES 250,000**
- An Enforcement Notice is hereby issued to the Respondent;
- Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 6th day of September 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**