



## OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 869 OF 2024

DR. MAXWEL OKOTH.....COMPLAINANT

-VERSUS-

AZURA CREDIT 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 filed a complaint on 18<sup>th</sup> June, 2024 alleging that he has been receiving insistent calls from the Respondent, informing him to pay for a loan taken by one its customers, that he had no prior knowledge of.

#### **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 as '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 (hereinafter as '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 18<sup>th</sup> June 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an 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 17<sup>th</sup> July 2024 and referenced ODPC/CONF/1/5 VOL II(41). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions 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 the response;
  - c. Confirmation whether the mobile number 071\*\*\*\*\*13 belongs to it or its agents;
  - d. The legal basis relied upon to process and engage with the Complainant's personal data;
  - e. Proof of consent from the Complainant to contact him *via* phone calls;
  - f. A detailed description of how it fulfills the rights of a data subject;

- g. 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 does not take place again; and
  - h. Any other relevant information it wishes the Office to consider.
8. The Respondent responded to the Notification of Complaint letter *via* a letter dated 6<sup>th</sup> August, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

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

10. The Complainant alleged that he was contacted by the Respondent regarding a loan that he was unaware of.

#### **E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED**

##### **i. THE COMPLAINANT'S CASE**

11. The Complainant alleged that he has been receiving incessant calls from the Respondent, who informed him that they got his contact from a customer who owes them money. The Respondent demanded that the Complainant repays the loan, despite him having no prior knowledge of it. The Respondent provided screenshots of his call logs as proof.
12. The Complainant stated that the Respondent contacted him using mobile number 071\*\*\*\*\*13.
13. Further, the Complainant stated that the Respondent was insistent on him paying the loan or risk being listed as a defaulter with the Credit Reference Bureau.
14. In conclusion, the Complainant prayed for damages for breach of data.

##### **ii. THE RESPONDENT'S RESPONSE**

15. The Respondent stated that it operates its business in line with the law and based on the industry best practices for data security and privacy. Further, it

complies with all the relevant data protection regulations and strives to maintain the highest standards in privacy and communication practices.

16. The Respondent averred that it does not intentionally or systematically call persons with no loans and that the allegations about harassment of a client via mobile phone calls are new to it.
17. The Respondent stated that it does not contact any person who has never borrowed a loan from them since they do not have any of their information. Further, the Respondent stated that it only obtains client's information during the registration process, which is the only way for it to obtain anyone's information. Once a client settles their pending loan, its collection system is designed in a manner that automatically removes them from the collector's portfolio. It is, therefore, not possible for the Respondent to call or send messages to a customer who has cleared their loan in full with it.
18. The Respondent stated that the only permissible time that they can contact a client is when the client is in default of their loan repayment. They also do not disclose the client's private data to third parties. Their terms and Conditions clearly state that the client's personal data obtained during the debt application process will not be disclosed or communicated to any third party.
19. The Respondent averred that it has policies in place on deletion of the referee's details upon request from the client. Upon receipt of the request, it ensures that the request is genuine, and then the client is taken through the steps of lodging a formal request. Once the Respondent confirms the request for the changes, the client's details are updated. In line with this, the Respondent reached out to the complainant and his data has been deleted.
20. The Respondent confirmed that the mobile phone number 0717\*\*\*\*13 belongs to it and was used by its agent. Further, it conducted investigations and found that its agent called the customer who had a loan with it. The Respondent emphasized that it doesn't call customers who don't have an outstanding loan with it.

21. According to the Respondent, they rely on consent as one of the legal bases for processing of personal data. It stated that all users are required to read and accept the Terms and Conditions of its products before obtaining a loan.

22. The Respondent also stated that it relies on performance of a contract as a legal basis for processing of personal data. Access to personal data is permitted solely for the performance of a contract to which the data subject is a party or to take necessary steps at the request of the data subject before entering into a contract.

#### **F. INVESTIGATIONS UNDERTAKEN**

23. The Office analysed the complaint as lodged, reviewed the response submitted by the Respondent and analysed all documents submitted by the parties as evidence.

24. The Office also conducted a site visit at the Respondent's premises on 30<sup>th</sup> August 2024 to carry out further investigations into the matter.

25. The Respondent despite having been notified of the impending site visit, derailed and hindered the investigations by claiming that the ICT personnel with access to the backend of its database was not available to facilitate an examination of the Respondent's loan application. This act amounts to obstruction of the Data Commissioner contrary to Section 61 of the Act.

#### **G. ISSUES FOR DETERMINATION**

26. It is not in contention that the Respondent contacted the Complainant.

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

- i. Whether there was a violation of the Complainant's rights under the Act;
- ii. Whether the Respondent had obligations to fulfil under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

**I. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT**

28. The Complainant alleged that he has been receiving incessant calls regarding a loan that he is not party to. He provided screenshots as proof.

29. The Respondent on the other hand confirmed that the number that contacted the complainant belonged to it. However, it stated that it only contacts clients who have a loan with it and once a client settles their loan, its collection system automatically removes them from the collector's portfolio. It averred that it is therefore not possible for it to call or send text messages to a customer who has cleared their loan in full. The Respondent did not provide evidence to prove that the Complainant had a loan with it.

30. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent, by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed. The Respondent collected the mobile phone number of the Complainant from its customer and did not inform the Complainant that his personal data was being collected. The Respondent did not also inform the Complainant that his mobile phone number was being collected for the purpose of being enlisted as a referee/emergency contact to its customer and did not give the Complainant an opportunity to consent to the enlisting.

31. From the above, this Office finds that the Complainant's right under Sections 26(a) of the Act was violated by the Respondent.

**II. WHETHER THE RESPONDENT HAD OBLIGATIONS TO FULFIL UNDER THE ACT**

32. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, amongst others: -

- i. processed in accordance with their right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the data subjects;

- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

33. In collecting personal data, the Respondent is mandated by Section 28(1) of the Act to collect the data directly from the data subject. Section 28(2) sets out instances where personal data may be collected indirectly. The Respondent collected the Complainant's personal data from a third party and did not demonstrate that any of the conditions set out in Section 28(2) were relevant in this matter.

34. Further, Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, inter alia;

- i. rights specified under Section 26;
- ii. the fact that personal data is being collected;
- iii. the purpose of collection of their personal data;
- iv. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

35. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that his mobile phone number was being collected for purposes of enlisting him as a referee/emergency contact to a loanee, and the measures it has in place to ensure the safety of his personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

36. Section 30 of the Act states that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes. The Respondent processed the Complainant's personal data without obtaining consent from the Complainant.

37. From the above, this Office finds that the Respondent did not fulfil its obligations provided for under the Act.

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

38. 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.

39. Section 61(a) & (b) of the Act provides for the offence of obstruction of the Data Commissioner and states that,

***"a person who, in relation to the exercise of a power conferred by Section 9 – obstructs or impedes the Data Commissioner in the exercise of her powers; fails to provide assistance or information requested by the Data Commissioner; commits an offence and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both."***

40. The Respondent by **intentionally** not availing a representative from its ICT team to facilitate the examination of the backend of its loan application obstructed the Data Commissioner in the exercise of her powers.

41. From the above, **a recommendation for prosecution is hereby made to the Director(s) of the Respondent's Company**, for obstruction of the Data Commissioner contrary to Section 61 of the Act.

42. Having found that the Respondent violated the Complainant's right to be informed, and that it did not fulfill its obligations provided for under the Act, the **Office hereby orders for an enforcement notice to be issued against the Respondent.**

43. Further, and having found the Respondent liable for violating the Complainant's right to be informed under Section 26(a) of the Act, the Respondent is hereby **ordered to pay the Complainant Kenya Shillings two hundred and fifty thousand (KES 250,000) as compensation.**

## H. FINAL DETERMINATION

44. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is hereby found liable for violating the Complainant's right to be informed of the use to which his personal data is to be put.
- ii. A recommendation for prosecution is hereby made against the Director(s) of the Respondent's Company for obstruction of the Data Commissioner contrary to Section 61 of the Act.
- iii. An enforcement notice to hereby be issued to the Respondent.
- iv. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings two hundred and fifty thousand (KES 250,000)** as compensation.
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 15<sup>th</sup> day of September 2024.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**

