



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1080 OF 2024

ALLAN CHACHACOMPLAINANT

-VERSUS-

THE COUNTY ASSEMBLY OF

MIGORI.....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 alleges that the Respondent has disclosed and continues to disclose his personal data contained in his *curriculum vitae* on its public website without the Complainant’s express consent, authority, or any lawful basis.

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 18th July 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 1st August, 2024 referenced ODPC/CONF/1/5 VOL II (74). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was asked to provide this Office with the following:
 - a) A response to the allegations made against them by the Complainant;
 - b) A contact person who would provide further details regarding the complaint
 - c) Any relevant materials or evidence in support of their response;
 - d) The lawful basis relied upon to process the Complainant's personal data;
 - e) The contractual obligation between Migori County Assembly and the Complainant, if any;

- f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any, and
 - g) Any other information they wished the Office to consider.
8. The Respondent responded to the allegations made against it *vide* a letter dated 28th August, 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent processed and continues to process his personal data in violation of data protection laws.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

10. The Complainant, submitted his *curriculum vitae* to the Migori County Government as part of his application for the position of Speaker of the Migori County Assembly.
11. Without the Complainant's express consent and/or any authority whatsoever, the Respondent published the Complainant's *curriculum vitae* on its Official website, making it publicly accessible.
12. The Complainant alleges that the publication is unauthorized and has exposed personal and confidential information to the public which has resulted to a violation of his right to privacy.
13. Additionally, the Complainant states that the confidential information of the individuals listed as referees in the *curriculum vitae* has also been compromised.
14. The Complainant further avers that the violation in question pertains to the unauthorized processing of his personal and sensitive personal data without express consent.
15. As evidence, the Complainant adduced the following: -
- i. Pictures/ screenshots of the Respondent's website
 - ii. An official link to the Respondent's website
 - iii. A copy of the curriculum vitae displayed on the Respondent's website.

ii. THE RESPONDENT'S RESPONSE

16. The Respondent maintained that it had a lawful basis for processing the Complainant's personal data.
17. The Respondent stated that the Complainant herein by applying to be elected as the speaker of County Assembly of Migori subjected himself to the provisions envisaged for election of the Speaker and as per Section 9A(1) of the County Government Act, 2012 which states that, "The Speaker of a County Government Assembly shall be elected, in accordance with standing orders of the Respective County Assemblies, from among persons who are eligible to be elected as members of a County Assembly but are not such members"
18. The Respondent alleged at the Complainant accepted to be governed by standing orders of County Assembly of Migori, with emphasis on Standing Order 5(5) which states, "Immediately upon the close of the nomination period provided for in paragraph (2), the clerk shall publicize and make available to all members, a list showing all qualified candidate; and make available to all members, copies of the curriculum vitae of the qualified candidates."
19. In conclusion, the Respondent stated that Section 51(2)(c) of the Act exempts the processing where disclosure is required by or under any written law
20. The Respondent pleaded that at all times it acted accordingly and did not occasion an infringement on the Complainant or any other applicant thereof.
21. As evidence, the Respondent adduced the Migori County Assembly Standing Orders.

F. INVESTIGATIONS UNDERTAKEN

22. In exercising its investigative mandate as provided for in the Act, this Office analyzed the adduced evidence on record and the law, and made the below observations.
23. A preview of the Complainant's *curriculum vitae* published on the Respondent's website shows that his personal data including full names, identification number, phone number, and information about individuals listed as referees is contained

therein. The Complainant's sensitive personal data including his religious beliefs and marital status are also contained in his *curriculum vitae*.

24. Order 5 (5) of the Migori County Assembly Standing Orders states as follows;

Immediately upon the close of the nomination period provided for in paragraph (2), the Clerk shall-

(a) publicize and make available to all Members, a list showing all qualified candidates; and

(b) make available to all Members, copies of the curriculum vitae of the qualified candidates.

25. From the above extract of the Standing Order, it is clear that the list of all the shortlisted candidates for the position of Speaker was supposed to be made public. However, the *curriculum vitae* of the shortlisted candidates was only meant to be made available to the Members of the County Assembly of Migori.

26. This provision of the election of a speaker is consistent with the National Assembly Standing Orders and all the other 46 Counties Assemblies Standing Orders.

27. A spot-check of other websites belonging to County Assemblies across Kenya reveals that only a list of the shortlisted candidates is published without corresponding CVs.

G. ISSUES FOR DETERMINATION

28. It is undisputed that the Respondent processed the Complainant's personal data on its public website.

29. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

i. Whether the Respondent processed the Complainant's personal data in accordance with the principles of personal data;

ii. Whether the Respondent had a lawful basis for processing the Complainant's personal data; and

iii. Whether the Complainant is entitled to any remedies under the Act.

I. WHETHER THE RESPONDENT PROCESSED THE COMPLAINANT'S PERSONAL DATA IN ACCORDANCE WITH THE PRINCIPLES OF PERSONAL DATA

30. Section 25 of the Act provides for the principles and obligations of personal data protection. Section 25(a) provides 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.

31. Section 25(c) of the Act provides that every data controller or data processor shall ensure that personal data is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

32. The Respondent's position is that the Complainant's *curriculum vitae* containing his personal data was published in the Respondent's website pursuant to Order 5(5) of the County Assembly of Migori Standing Orders.

33. Order 5(5)(a) of the County Assembly of Migori Standing Orders provides that immediately after the close of the nomination period, the Clerk must publicize and provide to all members a list of all qualified candidates. However, Order 5(5)(b) requires the Clerk to make available the *curriculum vitae* of the qualified candidates to all members. Order 5(5)(a) mandates the publicizing of the list of qualified candidates, while Order 5(5)(b) requires the sharing of their curriculum vitae only with the members of the county assembly.

34. The Respondent publicized and made available both the list of qualified candidates and the candidates corresponding *curriculum vitae*, contrary to Order 5(5)(b) of its governing standing orders.

35. The purpose of processing the Complainant's personal data as contained in his *curriculum vitae* as provided in Order 5(5)(b) of the governing standing order was limited to making the same available to the members of the County Assembly of Migori and not to the public.

36. The Respondent's action of making public the Complainant's *curriculum vitae* on its website was contrary to the purpose limitation principle of data protection and the Complainant's right to privacy as set out hereinbefore.

37. Based on the foregoing, the Respondent is found to have violated Sections 25(a) and (c) of the Act.

II. WHETHER THE RESPONDENT HAD A LAWFUL BASIS FOR PROCESSING THE COMPLAINANT'S PERSONAL DATA

38. Section 30 of the Act provides 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 or the processing is necessary for the purposes set out in Section 30(1)(b) of the Act.

39. In its response to the Office, the Respondent averred that it did not occasion nor infringe on the Complainant's right to privacy on the basis that it relied on its standing Orders to process the Complainant's personal data, thus it had a lawful basis for processing of the personal data.

40. Standing orders are the rules or procedures governing the operation of a legislative body. They provide guidelines for how meetings are conducted, how business is transacted, and how specific issues should be handled.

41. Section 5(5)(a) of the County Assembly of Migori standing orders provides that a list showing all qualified candidates should be publicized and shared with the members while Section 5(5)(b) provides that the curriculum vitae of the qualified candidates should be shared with the members.

42. Section 2(1)(a) defines the term member as, a member of the County Assembly of Migori elected or nominated in accordance with Article 177(1) of the Constitution.

43. According to the Respondent, the above provision provided the legal basis for the publication of the Complainant's *curriculum vitae* on its website.



44. As stated hereinbefore, only the list of all the shortlisted candidates for the position of Speaker was supposed to be made public. However, the *curriculum vitae* of the shortlisted candidates was only meant to be made available to the Members of the County Assembly of Migori.
45. The County Assembly of Migori did not therefore have a lawful basis for publishing the Complainant's *curriculum vitae* on its website and making it available to persons who are not members of the County Assembly of Migori.
46. Further, the Complainant's *curriculum vitae* contained the Complainant's personal data and sensitive personal data as well as the personal data of third parties who had not applied for or been shortlisted for the position of Speaker of the National Assembly. There was therefore no lawful basis to publish the third parties' personal data as well.
47. Given that the governing Standing Orders provide clear rules for conducting the recruitment process, there is no lawful basis for publicly disclosing the personal data contained in the Complainant's *curriculum vitae*.
48. Additionally, the Complainant's *curriculum vitae* contained his sensitive personal data including his religious beliefs and marital status. The processing of sensitive personal data is governed by Sections 44 and 45 of the Act. Section 44 of the Act provides that no category of sensitive personal data shall be processed unless Section 25 of the Act (set out hereinbefore) applies to that processing.
49. Moreover, the Respondents have failed to demonstrate that the processing of the Complainant's sensitive personal data fell within the permitted grounds of processing sensitive personal data set out in Section 45 of the Act.
50. Based on the foregoing, this Office finds that the Respondent did not have a lawful basis for processing the Complainant's personal data and sensitive personal data.

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

51. Regulation 14 (2) of the Enforcement Regulations provides that a determination shall state the remedy to which the Complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.
52. 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.
53. 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.
54. The Complainant sought various remedies, including general damages for the breach of privacy, removal of the curriculum vitae from the Respondent's website and an order prohibiting such acts from being carried out in the future.
55. The Respondent did not provide a statement regarding the Complainant's request for compensation. Instead, the Respondent reiterated its position that the complaint was not made in good faith.
56. Having found that the Respondent processed the Complainant's personal data in a manner contrary to the principles of data protection set out in Sections 25(a) and (d) of the Act, and that the Respondent processed the Complainant's personal data and sensitive personal data unlawfully, it then follows that the Complainant is entitled to compensation. The Respondent is hereby directed to compensate the Complainant **KES 900,000 (Nine Hundred Thousand Kenya Shillings)**.
57. In so doing, this Office takes into account the nature of the personal data exposed being sensitive personal data, the fact that it was published in a publicly available website and that the same is still published as at the date of this determination.
58. In addition, Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement)

Regulations, 2021 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.

59. As demonstrated hereinbefore, the Respondent has failed to comply with its obligations Sections 25 and 30 of the Act. On that note, this Office is guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.

H. FINAL DETERMINATION

61. In the ultimate, the Data Commissioner makes the following final determination;
- i. The Respondent is hereby found liable.
 - ii. The Respondent is hereby ordered to delete all *curriculum vitae* (CVs) published on its website **within 7 days** of the date of this determination.
 - iii. An Enforcement Notice is hereby issued to the Respondent herein.
 - iv. The Respondent is ordered to compensate the Complainant **KES 900,000**.
 - v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 14th day of October 2024



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**