



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0577 OF 2024

**MOSES ATELA OTIENDE..... COMPLAINANT
(LEGAL GUARDIAN OF AEA MINOR)**

-VERSUS-

**DMI EDUCATION SERVICES LTD OPERATING AS ST. JOSEPH
INTERNATIONAL SCIENCE SCHOOL 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 a complaint on 15th April 2024 alleging that the Respondent used the minor’s images for advertisement on a mini bill board without the Complainant’s 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 Complainants' advocates on 15th April 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant on behalf of 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 27th May 2024 referenced ODPC/CONF/1/5 VOL 1 (975). The Office in its Notification of Complaint dated 27th May 2024 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) The legal basis relied upon to process and engage with the complainants' personal data;
 - e) A detailed description of how it fulfils the rights of data
 - f) Details of how it obtains, stores, and processes personal data;

- g) Evidence as to whether the complainant consented to processing of their personal data;
 - h) 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 on 18th June 2024.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that the Respondent, without proper and/ or justifiable cause, used the minor's image for advertisement on a mini billboard without his consent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainants lodged the complaint through their advocates pursuant to Regulation 4 (3) of the Enforcement Regulations which state that a complaint may be lodged by a person acting on behalf of the Complainant.
12. It was the Complainant's contention that the Respondent used the minor's images for advertisement on a mini-board without the Complainant's consent.
13. The Complainant stated that the Respondent having taken management of the school at around December 2022 in a bid to enhance its outreach and expand student population embarked on an advertisement. It is against this backdrop that the Respondent used the minor's image on a mini billboard without the consent of the Complainant.

14. That sometime in March 2024 while using public transport accompanied by the minor, the Complainant's attention was drawn to the said mini billboard by the minor who pointed out that it was him in the said image. Upon further inquiry, the minor indicated that they were approached by the Respondent and given uniforms to wear whereby the Respondent had pictures taken of him for the purpose of the mini board.
15. The Complainant further contended that the minor is enrolled in a different school and is not one of the students in the Respondent's school.
16. The Complainant further stated that upon further inquiry, the Complainant established from the minor that the said images were taken on or about December 2022 and that the actions by the Respondent violated the minor's rights to privacy and his rights under the act.
17. In its response to the Respondent's response dated 4th July 2024, the Complainant further contended that the minor does not appear in any of the photos that were adduced to this Office by the Respondent and as such it confirms that the minor was not involved in any of the Respondent's activities.
18. The Complainant further stated that he does not stay in the Respondent's premises. He stated that he stays at the adjacent SOS village which belongs to another entity.
19. As part of his evidence, the Complainant adduced:-
- a) The Minor's Birth Certificate
 - b) The Minor's Photograph
 - c) A photograph of the impugned mini billboard where the minor's photograph appeared
 - d) Current images of the Complainant;
 - e) ETR receipt for payment of rent at SOS house quarters

ii. THE RESPONDENT'S RESPONSE

20. The Respondent in its response received by this Office on 18th June 2024 stated that Mr. Moses Atela Otiende, the Minor's guardian, was the Respondent's teacher

at the time the alleged photograph was taken and that his employment was terminated allegedly due to his poor performance.

21. The Respondent contended that Mr. Otiende omitted to indicate in his complaint that he was in charge of organizing the event that led to his son's photograph being taken and as the organizer, he offered to have his son wear the school uniform and take photographs so that they could be used to introduce the Respondent's new school uniforms. This was particularly necessitated by the fact that Mr. Otiende lived within the school compound and at the time, there were no other pupils around who could take part in the photo-shooting exercise.
22. The Respondent contended that the onus of proof of consent in the circumstances above is on the Complainant to explain with precision the circumstances under which he preferred to have his son be the face of the new school uniform without prior authorization by it.
23. The Respondent stated that the Complainant had on several occasions offered his son to participate in various school activities without the Respondent's consent as he was then their teacher and lived within the school compound.
24. The Respondent also contended that the Complainant knew and was aware of the existence of the school banner where his son's photograph was allegedly contained for a period of two years from 2022 to 2024 as he worked as a teacher within the school before his termination.
25. The Respondent also avers that Mr. Otiende, the minor's guardian never lodged any complaint with them relating to the issues he is raising in the complaint herein while still working at the school.
26. The Respondent further stated that since the notification of the complaint, the banner and all images with the aggrieved minor have been pulled down.
27. In addition to the response to the Complaint, the Respondent adduced:-
 - a) A CD player containing school trips video depicting the school activities that the Complainant had brought the minor to participate without the Respondent's consent.
 - b) Photographs of the students and the minor during school trips

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- c) Employment Contract between the Respondent and Mr. Otiende
- d) Warning letters
- e) Employment termination letter
- f) Mr. Otiende's application for Contract renewal letter dated 30th November 2023
- g) Respondents reply to Mr. Otiende's application for Contract renewal letter dated 2nd January 2024.

F. INVESTIGATIONS UNDERTAKEN

28. Owing to the Respondent's response, it was necessary to conduct further investigations to this complaint prompting this Office to summon the Complainant to our offices to interrogate him further. The Complainant honoured the summons and appeared before this Office on 8th July 2024.

29. From the summons:-

- a) The office established that the minor is not a student at the Respondent's school. A bonafide letter and Report forms of the school where the minor goes and or attends were produced.
- b) The Complainant confirmed that he does not stay at the Respondent's premises but at a nearby estate adjacent to the Respondent's premises. The Respondent produced the Rent payment receipts to that effect.
- c) The circumstances surrounding the taking of the minor's photograph were explained and or established. The minor's picture was taken to advertise the new school uniforms the Respondent intended to adopt.

G. ISSUES FOR DETERMINATION

30. The undisputed facts in this case are:-

- a) that the Respondent while introducing new school uniforms took the minor's photograph dressed in the new school uniforms and placed it on a banner and or mini-board to showcase/ advertise the new uniform to the school population.

b) The banner/ mini bill board has since been pulled down by the school.

31. Before outlining the issues for determination, we would like to reiterate that the mandate of this Office is restricted to personal data issues as outlined in paragraph 3 above. While investigating this complaint, the parties raised some employment-related issues which this Office will steer clear of. We will remain true to our mandate.

32. That being said the following issues fall for determination by this Office:

- i. Whether the Respondent obtained express consent from the Complainant to process the minor's personal data for commercial purposes; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT OBTAINED EXPRESS CONSENT FROM THE COMPLAINANT TO PROCESS THE MINOR'S PERSONAL DATA FOR COMMERCIAL PURPOSES.

33. It was the Complainant's position that the minor's photograph was taken and used for advertisement without his consent. On the other hand, it was the Respondents position that it did it in good faith and it is the duty of the Complainant to explain to this Office the actual circumstances surrounding the photoshoot.

34. The Black's Law Dictionary, 10th Edition, defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

35. Section 2 of the Act defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.

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36. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. This certainty requires more than just a confirmation that they have read and understood the terms and conditions. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented

37. Section 30 (1) (a) 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.

38. The Act goes further to state the conditions of consent. It states as follows with regard to the conditions of consent:-

32. Conditions of consent

(1) 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.

(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.

(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.

(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)

39. Section 33 of the Act provides for processing of personal data relating to a child. It provides that every data controller or data processor shall not process personal data relating to a child unless:

- a. Consent is given by the child's parent or guardian; and
- b. The processing is in such a manner that protects and advances the rights and best interests of the child.

40. From the evidence adduced to this Office, it is evident that at all material times when the Respondent was processing the minor's personal data, it required the Complainant's consent and the burden of proof of consent rests upon the Respondent as stated under Section 32 (1) of the Act.
41. The Respondent has not discharged this burden of proof as it has not adduced and/or produced evidence of the consent that it relied upon to use the minor's image for advertising the new school uniforms.
42. On the issue of commercial use of personal data, the Act provides under Section 37 (1) (a) 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.
43. Regulation 14 (1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that for the purposes of Section 37 (1) of the Act, a data controller or data 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.
44. The Complainants adduced evidence to demonstrate that the Respondent used the minor's image on a mini-board to advertise the school and the new uniform.
45. It was the Respondent's position that the Complainant's active and voluntary participation in the photo session whose purposes of introducing a new school uniform were disclosed and understood by a teacher from the Respondent's school amounted to consent in such circumstances. The Respondent maintained that as it can be seen on the CD of the recorded photo session, the Complainant's conduct before, during, and after the photo session depicted that he voluntarily yielded consent to have the image of his child taken and be used by the school to advertise and or showcase the new school uniform.

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46. Express consent requires a clear written statement confirming the granting of consent. It may take such forms as clicking an opt-in button or link, appending a signature, responding to an email requesting consent, selecting from yes or no options, *et cetera*. Where consent has been obtained orally, the same must be reduced into writing or recorded electronically, and a record of the script thereof be kept. That way, the consent can be proven by the Respondent as the burden of proof establishing a data subject's consent to the processing of their personal data for a specified purpose rests upon the data controller and or processor.

47. From the above, the Respondent's contentions fall short of what express consent entails as per the Act. In no circumstance is an implied consent inferred through actions as argued by the Respondent be deemed to be express, even if the said actions are apparent enough, to the Respondent.

48. That being said, it therefore follows that the Respondent has not discharged its burden of proof to demonstrate that the Complainant expressly consented to the use of the minor's image for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

49. This Office therefore finds that as far as issue no (i) is concerned, the Respondent did not obtain express consent from the Complainant to process the minor's personal data for commercial purposes.

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

50. 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.

51. Having considered the merits of the Complaint, the evidence adduced by both the Complainant and the Respondent, and having found that the Respondent processed the Minor's data without his guardian's consent, it therefore, follows that there has been a violation of the Act by the Respondent to that extent. The

Respondent did not process the minor's personal data in accordance with Sections 30 (1) (a), 32 (1) and 33 of the Act.

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 claimed for the remedy of compensation against the Respondent. The Respondent did not respond to this prayer for the remedy of compensation. It blanketly sought for the dismissal of the complaint.

55. Having found that the Respondent did not obtain express consent for use of the minor's image from the Complainant, the Respondent is hereby directed to compensate the Complainant the amount of **Kshs. 700,000/= (Seven Hundred Thousand Shillings Only) for processing of the minor's personal data for commercial purposes without express consent.**

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for use of the minor's personal data for commercial purposes without express consent.
- ii. The Respondent is ordered to Compensate the Complainants **KES 700,000/= (Seven Hundred Thousand Kenya Shillings Only)** for the unlawful processing of the Minor's personal data.

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- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 13th day of July 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

