



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1506 OF 2024

GRIFFINS WEKESA.....COMPLAINANT

-VERSUS-

MY BODA LIMITEDRESPONDENT

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 complaint concerns the allegation that the Respondent has been sending the Complainant promotional messages yet he has never given the Respondent his contacts or allowed his contacts to receive messages from the Respondent.

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 26th September, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by 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 24th October 2024 referenced ODPC/CONF/1/5 VOL II (268). In the notification of the complaint, the Respondent was among other things 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) The standard contract between the Complainant and the Respondent, if any;
 - e) Details of how they obtain, store and process personal data, and whether the Complainant consented to processing of their personal data;
 - f) A statement outlining an opt-out mechanism as provided for by Regulation 16 of the Data Protection (General) Regulations, 2021;
 - g) An elaborate representation of how data subjects can exercise their data protection rights.

- h) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant and to ensure such occurrences do not recur.
 - i) Any other information that it may wish the Office to consider.
8. As at the date of this determination, the Respondent failed, refused, or neglected to respond to the Notification of Complaint.
9. This determination is therefore pursuant to Regulation 11(2) of the Enforcement Regulations which provides that where a Respondent does not take any action as contemplated under sub-regulation the Data Commissioner shall proceed to determine the complaint in accordance with the Act and these Regulations

D. NATURE OF THE COMPLAINT

10. The complaint concerns the allegation that the Respondent has been sending the Complainant promotional messages yet he has never given the Respondent his contacts or allowed his contacts to receive messages from the Respondent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i) THE COMPLAINANT'S CASE

11. It was the Complainant's case that he has been receiving promotional messages from the Respondent but he has never given the Respondent his contact. He further stated that he has never been to any of the Respondent's office or enquired anything online about the Respondent.
12. The Complainant further contended that he tried reaching out to the Respondent but they just ignored his calls.

ii) THE RESPONDENT'S CASE

13. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it. Therefore, the allegations levelled against it remain uncontroverted.

F. ISSUES FOR DETERMINATION

14. In light of the above, the following issues fall for determination by this Office:
- i. Whether the Complainant's personal data was lawfully processed; and

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- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE COMPLAINANT'S PERSONAL DATA WAS LAWFULLY PROCESSED

15. From the allegations put forth by the Complainant, it is evident that the complaint relates to the processing of his personal data wherein the Complainant alleges that he has been receiving promotion messages from the Respondent yet he has never given the Respondent his contacts or allowed his contacts to receive messages from the Respondent.

16. This Office will thus consider whether the processing of the Complainant's personal data was lawful. Section 30 of the Data Protection Act provides the lawful bases for processing personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless
(a) the data subject consents to the processing for one or more specified purposes;
or

(b) the processing is necessary-

(i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;

(ii) for compliance with any legal obligation to which the controller is subject;

(iii) in order to protect the vital interests of the data subject or another natural person;

(iv) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(v) the performance of any task carried out by a public authority;

(vi) for the exercise, by any person in the public interest, of any other functions of a public nature;

(vii) for the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the

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harm and prejudice to the rights and freedoms or legitimate interests of the data subject; or

(viii) for the purpose of historical, statistical, journalistic, literature and art or scientific research.

(2).....

17. The above-stated are the lawful bases upon which the data controller, the Respondent herein, should have processed the Complainant's personal data.
18. Despite being given an opportunity to respond to the Complaint, the Respondent did not file a response to the allegations brought by the Complainant. As stated above in paragraph 7 the Respondent was duly notified of the complaint and was required to respond to the allegations against it within the prescribed timelines contained in the notification letter. As such, the Complainant's allegations remain uncontroverted.
19. This Office therefore finds that in as far as issue no. (i) is concerned the Respondent have failed to establish the lawful basis for processing the Complainant's personal data.

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

20. 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.
21. As his relief, the Complainant sought that his personal information/ data contained by the Respondent be erased from their system permanently.
22. From the evidence adduced, the Complainant tried to reach out to the Respondent to no avail. As such, the Respondent **is hereby ordered to delete the Complainant's personal data from its systems, stop contacting him, and avail proof thereof to this Office within 7 days from the date of this determination.**

23. 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.

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

G. FINAL DETERMINATION

25. The Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is hereby ordered to delete the Complainant's personal data from its systems, stop contacting him and avail proof thereof to this Office within 7 days from the date of this determination.
- iii. An Enforcement Notice is hereby issued to the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 18th day of December 2024



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**