



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1512 OF 2024

JEREMIAH MASENGELI.....COMPLAINANT

-VERSUS-

AZURA CREDIT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Sections 8(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 alleged that the Respondent processed his personal data without a lawful basis by repeatedly sending him spam emails through various agents concerning a defaulted loan by an unknown loanee, who is a client of the Respondent, despite the Complainant having no prior knowledge of the matter or transactions.

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 27th September 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 30th October, 2024 referenced ODPC/CONF/1/5 VOL II (280). 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 can provide further details as regards this complaint;
 - c) Any relevant materials or evidence in support of their response above;

- d) The lawful basis relied upon to process the Complainant's personal contact;
- e) Evidence as to whether the Complainant consented to be contacted for purposes of the loan repayment;
- f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
- g) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again, if any;
- h) Any other information you wish the Office to consider.

D. NATURE OF THE COMPLAINTS

8. The Complainant alleged that the Respondent violated his right to privacy by unlawfully processing his personal data without his consent. He claimed that the Respondent repeatedly contacted him *via* email, demanding that he engage with an unknown individual regarding an unpaid loan allegedly issued by the Respondent, despite having no prior knowledge of or involvement with the loan in question.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

9. The Complainant stated that the Respondent sent spam emails of continuous harassment from 24th September 2024 to 25th September 2024 using different agents and emails with the subject "SUSPECTED FRAUDSTER" for an individual, L*****s P****n C*****e, whom the Complainant has no relationship with.
10. The Complainant states that the Respondent refused to stop sending emails even after he warned them to stop as he was not associated with the said person.
11. The Complainant wants the Respondent to be held accountable for how they accessed and used his email contacts without his knowledge or understanding causing what appeared to be intentional harassment and mail spamming that disrupted his peaceful working environment at work.

12. As evidence, the Complainant adduced screenshots of email correspondence from the Respondent and a demand letter by the Respondent to the Complainant.

ii. RESPONDENT'S RESPONSE

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. the following issues fall for determination by this Office:

- i. Whether the Respondent fulfilled its obligations under the Act; and
- ii. Whether the Complainant is entitled to the remedies under the Act and the attendant Regulations.

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

15. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

16. The Respondent did not collect the Complainant's email directly from him as required by Section 28(1) of the Act which requires a data controller or data processor to collect personal data directly from the data subject.

17. 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 was being collected;
- iii. the purpose of collection of their personal data;
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

18. The Respondent had a duty to notify the Complainant of his rights under the Act, prior to the collection and processing of his personal data. It was also the Respondent's duty to notify the Complainant of the fact that it intended to use his personal data for third-party debt recovery and accord the Complainant an opportunity to consent or deny consent to such use and/or processing.
19. The Respondent failed to demonstrate that they had fulfilled this obligation prior to processing the Complainant's personal data.
20. In addition, Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It 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 or the processing is necessary for the reasons given in subsection (b).*"
21. The Respondent failed to provide proof of having obtained consent to process the Complainants' personal data for purposes of third-party loan recovery. Further, the Respondent did not prove that it satisfied the reasons outlined in Section 30(1)(b) that allow for the processing of personal data without obtaining consent from the data subject.
22. From the foregoing, this Office finds that the Respondent did not fulfil the above obligations as set out in Sections 28, 29 and 30 of the Act.

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

23. In accordance with Regulation 14(2) of the Enforcement Regulations, the determination must clearly specify the remedy to which the complainant is entitled. The available remedies are further enumerated in Regulation 14(3) of the Enforcement Regulations.
24. 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.

25. Having found that the Respondent failed to fulfil its obligations under the Act, an enforcement notice will be issued to the Respondent in accordance with the statutory requirements.

26. The Complainant has requested that this Office orders the Respondent to immediately cease any further violations of the Complainant's right to privacy. Specifically, the Complainant seeks an order to stop the Respondent from collecting or processing personal data without the Complainant's explicit consent or any other lawful basis for such processing.

27. 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.**

G. FINAL DETERMINATION

28. The Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. An enforcement notice to hereby issue against the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 19th day of December 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER