



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1903 OF 2024

BENSON ODIWUOR OTIENO.....COMPLAINANT

-VERSUS-

DIGITAL REGENESYS 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 complaint concerns the allegation that the Respondent has been sending the Complainant unsolicited promotional messages without his knowledge and/ or consent. The Complainant contended that this has been happening despite his explicit and repeated objections including a formal cease and desist notice to 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

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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 20th November, 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 6th January 2025 referenced ODPC/CONF/1/5 VOL II (376). 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) A contact person who can provide further details as regards to the complaint;
 - c) Details on how the Respondent obtained the Complainant's personal data;

- d) The contractual agreement with the Complainant;
- e) Whether the Complainant was notified and gave express consent for the use of his personal data for commercial purposes pursuant to section 37 of the Act;
- f) Provide any relevant materials or evidence in support of the response;
- g) A detailed procedure on how data subjects can exercise their data protection rights;
- h) The Respondent's data protection policy;
- i) Mitigation measures adopted or being adopted to address the dispute to the satisfaction of the Complainant and to ensure such occurrences do not recur.
- j) 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 in law, 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 unsolicited promotional messages without his knowledge and/ or consent. The Complainant contended that this has been happening despite his explicit and repeated objections including a formal cease and desist notice to 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 persistently been receiving unsolicited promotional and/or marketing messages from the Respondent despite his explicit and repeated objections including a formal cease and desist notice.
12. The complainant contended that on 28th October 2024, he received an unsolicited promotional WhatsApp message from the Respondent advertising course fees and urging early enrollment. He stated that he replied to the message with "STOP," unequivocally signalling his desire to unsubscribe from the Respondent's marketing services.
13. The Complainant further stated that on 29th October 2024, he received yet another unsolicited promotional message regarding the Respondent's Artificial Intelligence course and payment options.
14. The Complainant further stated that afterwards, he formally wrote a cease-and-desist notice, reiterating that he had not consented to receiving such communications and requesting an immediate withdrawal of any purported consent. To the Respondent, despite these clear instructions, on 19th November 2024, the Respondent sent yet another unsolicited promotional message.

ii) THE RESPONDENT'S CASE

15. 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

16. 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

- 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

17. 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 accepted to receive messages from the Respondent. To the Complainant, this continued incessantly despite him issuing a cease and desist letter to the Respondent to stop sending him the promotional messages.

18. 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 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).....

19. The above-stated are the lawful bases upon which the data controller, the Respondent herein, should have processed the Complainant's personal data.

20. 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.

21. 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.

22. 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.

23. As his relief, the Complainant sought that he be compensated and that his personal information/ data contained by the Respondent be erased from their system(s) permanently. The Respondent did not respond to these prayers of relief.
24. 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.**
25. 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.
26. This Office is guided accordingly and an Enforcement Notice hereby ensues as against the Respondent.
27. 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.
28. 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.

29. Having found that the Respondent processed the Complainant's personal data unlawfully, the Respondent is hereby directed to compensate the Complainant **KES 200,000/- (Two Hundred Thousand Shillings Only)**.

G. FINAL DETERMINATION

30. 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. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings Two hundred thousand (KES. 200,000/=)** as compensation; and
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 17th day of February 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**