



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1673 OF 2024

PHILIP BOLLO.....COMPLAINANT

-VERSUS-

PLATINUM CREDIT 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 Complainant lodged a complaint on 22nd October, 2024 alleging that the Respondent has constantly been sending him unsolicited text messages and calls, promoting its loan products, without obtaining 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 as '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 (hereinafter as '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 22nd October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an 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 25th October, 2024 and referenced ODPC/CONF/1/5 VOL II (276). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions of the Act. Further, the Respondent was asked to provide this Office with the following: -
 - a. A response to the allegations made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The lawful basis relied upon to process and engage with the Complainant's personal data;
 - d. A detailed procedure on how data subjects can exercise their data protection rights;
 - e. Its data protection policy;

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- f. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - g. Any other relevant information it wishes the Office to consider.
8. The Respondent submitted its response to the Notification of Complaint letter *via* a letter dated 14th November, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to the alleged contacting of the Complainant *via* text messages and phone calls by the Respondent, promoting its loan products, without obtaining consent from the Complainant.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that he has been receiving unsolicited text messages and phone calls from the Respondent's agents. He provided screenshots of the text messages received and his call logs as proof.
12. The Complainant averred that he sent emails to the Respondent requesting it to stop contacting him but they elicited no change of attitude in abuse of his personal data as the Respondent kept on calling and sending text messages to him. He provided screenshots of emails sent to the Respondent as proof.
13. Additionally, the Complainant stated that he has made calls requesting the Respondent to delete his number from its database.
14. The Complainant in his rejoinder response stated that he had noted with concern that the Respondent is suspiciously quiet on its contacts who called him and apologized. The various numbers provided were for people who identified themselves as working for the Respondent.

15. Further, despite making a formal complaint to this Office, the Complainant still received several calls and messages from 074*****56 who identified herself as M***** M***** working in the Respondent's sales department. The Complainant provided a copy of her business card as proof.
16. In conclusion, the Complainant prayed for Kshs. 1,000,000/= as compensation for the stress caused by the Respondent.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent stated that upon thorough investigation, it confirmed that the Complainant has never been a customer of its company and thus it does not have his information or data stored in its database.
18. The Respondent averred that in response to data breach complaints, it conducts comprehensive internal investigations to identify the source of the communications if any. In this instance; the Complainant submitted multiple complaints, and each was independently reviewed. Its investigations established that the phone numbers provided by him as allegedly contacting him are neither associated with its agents nor registered to its employees. These numbers are not affiliated with its company and any communication emanating from them should not be attributed to them. It therefore rejects these claims and put the Complainant to strict proof.
19. The Respondent asserted that it does not send unsolicited texts messages nor contact people to market its products without their express consent. All communications conducted by its agents are in full compliance with Data Protection laws.
20. Additionally, any contact made by its representatives was strictly made by the Customer Care team in response to the Complainant's complaints which the Complainant submitted to its customer service email.
21. The Respondent stated that it has also informed the Complainant in prior communications that the numbers he submitted do not belong to its agents or employees.

22. The Respondent stated that it is committed to complying with the Act and confirmed that it has implemented technical and organizational measures to this effect.

F. INVESTIGATIONS UNDERTAKEN

23. The Office analysed the complaint as lodged, the Respondent's response and the documents submitted by both parties as evidence.

24. The Office conducted a site visit at the Respondent's premises on 16th December, 2024 to conduct further investigations into the matter.

25. During the said site visit, the Respondent stated that there are people masquerading as its employees, and some former staff who left with ill motives that are damaging the Company's reputation.

26. The Respondent denied having sent promotional messages to the Complainant and insisted that it only contacted the Complainant through the Customer Care number in an attempt to resolve the Complaint.

27. Investigation Officers conducted a search on the Respondent's database and did not find the Complainant's name and mobile number, as well as the names and mobile numbers of the Respondent's agents that allegedly contacted the Complainant. However, the Respondent submitted copies of emails sent internally within its Company regarding the complaint. A perusal of the emails reveals an admission from the Regional Sales Manager – Upper Eastern, indicating that the Complainant was indeed contacted by an agent named M***** M****.

28. Further, the emails contained an apology from the Respondent's Mbooni Branch Team apologizing on behalf of one of its agents for the mess caused by one of the agents stationed there and confirming that an awareness of data protection was done on 28th October, 2024.

29. The Respondent also furnished this Office with a copy on an email sent to the Complainant dated 3rd December, 2024. The Respondent stated verbatim, "... upon further investigation using the names you shared, we identified the agent in question, who had been registered with a different phone number in our

system. The agent has since been terminated...Our position is that the agent acted outside the scope of her duties, in violation of the Data Protection Act, 2019 and the Company's policy. As such, the agent is fully liable and should take responsibility for their actions...We apologize for any discomfort or inconvenience caused by the calls and appreciate you bringing this matter to our attention."

30. Additionally, the Complainant also furnished this Office with an email dated 3rd December 2024 sent from the Regional Manager at the Respondent's Upper South Rift Region, one Mr. B***** A**** L*****, wherein he apologized for the message received from their agent, B**** and assured the Complainant that the agent was terminated and that his number was removed from their database.

31. The Office established that the Complainant indeed received promotional messages from the Respondent's agents promoting its loan products.

32. The Office also established that the Respondent continued to send promotional messages to the Complainant despite the fact that he had requested them to stop sending promotional messages to him.

G. ISSUES FOR DETERMINATION

33. In light of the above, the following issues fall for determination by this Office:

- i. Whether the Respondent fulfilled its obligations under the Act;
- ii. Whether there was a violation of the Complainant's rights under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

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

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35. The Complainant alleged that he has been receiving unsolicited promotional messages and calls from the Respondent, promoting its loan products, without obtaining his consent.
36. Investigations conducted by the Office revealed that the Complainant indeed received promotional messages from the Respondent's agents.
37. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data and states that, "*a data controller or processor shall not process 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).*"
38. The conditions of consent are provided under Section 32 of the Act which provides that a data controller shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.
39. Section 37(1) of the Act provides that personal data obtained under the Act **cannot be used for commercial purposes without obtaining express consent from the data subject.**
40. 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.
41. It was upon the Respondent to demonstrate that it obtained express consent from the Complainant before sending promotional messages to him. This burden was not discharged by the Respondent as it failed to prove that it had obtained express consent from the Complainant to send promotional messages to him.

42. A cursory perusal of the messages sent to the Complainant reveal that no opt out mechanism was provided for the Complainant to request not to receive the marketing messages contrary to Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021.

43. The Respondent in its email dated 3rd December, 2024 addressed to the Complainant stated that its agent acted outside the scope of her duties and as such, is fully liable and should take responsibility for her actions.

44. Section 42(2), (3) & (4) of the Act provides as follows -

(2) Where a data controller is using the services of a data processor—

(a) the data controller shall opt for a data processor who provides sufficient guarantees in respect of organisational measures for the purpose of complying with section 41(1); and

(b) the data controller and the data processor shall enter into a written contract which shall provide that the data processor shall act only on instructions received from the data controller and shall be bound by obligations of the data controller.

(3) Where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed to be a data controller in respect of that processing.

(4) A data controller or data processor shall take all reasonable steps to ensure that any person employed by or acting under the authority of the data controller or data processor, complies with the relevant security measures.

45. The particulars of the contract envisaged between the Data Controller and the Processor are outlined in Regulation 24(2) of the Data Protection (General) Regulations.

46. The Respondent failed to provide evidence to demonstrate that it entered into a data processing agreement with the Sales Agent authorizing the processing of personal data under its specific instructions. As such it could not be proven that the agent acted outside the instructions given by the Respondent. Therefore, liability attaches on the Respondent and not its agent.

47. From the foregoing, this Office finds that the Respondent failed to fulfill its obligations under the Act.

II. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

48. Section 26(c) of the Act provides for the right to object to processing of personal data. The Complainant objected to the further processing of his personal data via email on 23rd and 24th September 2024.

49. On 14th October 2024 and 29th October 2024, the Complainant received promotional messages from the Respondent even after objecting to the same.

50. The right to object to processing is an **absolute right** where processing is for direct marketing purposes.

51. The Respondent ought to have complied with the Complainant's request within fourteen days of the request as provided for under Regulation 8(3) of the Data Protection (General) Regulations, 2021 and stopped processing his personal data. The Respondent intentionally or negligently ignored the Complainant's objection request and continued sending marketing messages to him even after the 14-day period provided for under the above regulation had lapsed.

52. Section 40(1)(b) of the Act provides for the right of erasure and states that, "*a data subject may request a data controller or data processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.*"

53. The Complainant exercised his right of erasure via emails dated 23rd and 24th September 2024. The Respondent did not act on the request for erasure and continued sending promotional messages to the Complainant.

54. Regulation 12(3) of the Data Protection (General) Regulations, 2021 states that ***"a data controller or a data processor shall respond to a request for erasure within fourteen days of the request."*** The Respondent intentionally or negligently ignored the Complainant's request for erasure and continued sending marketing messages to the Complainant even after the 14-day period provided for under the above regulation had lapsed.

55. From the foregoing, this Office finds that the Complainant's right to object and his right of erasure were violated by the Respondent.

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

56. Pursuant to 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.

57. The Complainant prayed to be compensated Kshs. 1,000,000/= for the stress caused by the Respondent.

58. Section 65 of the Act provides for compensation to data subjects and states, *"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."*

59. Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*

60. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

61. In considering whether to issue compensation, this Office takes into consideration the fact that the complaint is in respect of the use of personal data for commercial purposes without consent from the data subject.

62. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainant's right to object to the processing of his personal data and his right of erasure of personal data.

63. The Respondent is hereby found liable for using the Complainant's personal data for commercial purposes without obtaining express consent and for violating the Complainant's right to object and his right of erasure. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings nine hundred thousand (KES. 900,000/=)** as compensation.

H. FINAL DETERMINATION

64. The Data Commissioner therefore makes the following final determination: -

- i. The Respondent is hereby found liable for violating the Complainant's right to object to the processing of his personal data, violating his right of erasure and for using his personal data for commercial purposes without obtaining express consent;
- ii. An Enforcement Notice to hereby be issued to the Respondent;
- iii. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings nine hundred thousand (KES. 900,000/=)** as compensation; and
- iv. 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 January, 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

