



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1931 OF 2024

DENNIS CALEB OWUOR.....COMPLAINANT

-VERSUS-

WHITEPATH COMPANY.....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 with the office on 24th November 2024, alleging that he received multiple calls from the Respondent's agent with regards to a loan he had been listed as a guarantor without his 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 24th 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 an aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against them *vide* a letter dated 7th January, 2025 and referenced ODPC/CONF/1/5 VOL II (379). In the Notification of the Complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, the Respondents were 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 this complaint
 - c. Any relevant materials or evidence in support of your response above
 - d. Confirmation whether the phone number belongs to yourselves/your agents
 - e. Details of how you obtain, store, and process personal data, and whether the Complainant consented to the process of their personal data for loan repayment purposes,

- f. The legal basis relied upon to process and engage with complainants' personal data,
 - g. An elaborate representation of how data subject can exercise their rights in relation to data protection,
 - h. 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
 - i. Any other relevant information they wish the Office to consider.
8. The Respondent was non-responsive and did not submit a response to the Notification of Complaint. Regulation 11(2) of the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 states that, "*where a respondent does not take any action as contemplated in the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Enforcement Regulations.*"
9. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to, alleged unwarranted calls by the Respondent regarding a loan he had been listed as a guarantor without his consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant avers that he received an unsolicited call on Saturday 23rd November 2024 from telephone number 020****40.
12. The Complainant asserts that the caller identified himself as a debt collector from Whitepath limited and that he addressed the Complainant by his first name at the onset of the conversation.
13. The Complainant states that he inquired how the agent had obtained his name and contact information, the agent disclosed that the Complainant had been listed as a guarantor of a defaulting loanee.

14. The Complainant contends that he questioned the agent as to why he was not notified during the loan application process to seek his consent before his personal data could be processed.
15. The Complainant avers that the agent failed to provide any response to the question but instead he instructed the Complainant to contact the defaulting loanee to pay a loan from their product known as Zuri cash.
16. The Complainant further purports that, he insisted on knowing why they processed his personal data without his consent to the extent that the caller knew his name, and that the agent had the audacity to tell him that he would call again after three hours.
17. The Complainant contends that he expressly warned the agent that it would be in their company's best interest not to call again and informed them that he would lodge a complaint with the Office if they made subsequent calls and that the call lasted for 9 minutes and 27 seconds.
18. The Complainant states that despite the explicit warning, the agent contacted the Complainant again at 2.14p.m with the call lasting approximately 27 seconds.
19. The Complainant further contends that he further received a phone call from a number he did not know. Upon saying hello and asking the identity of the caller and the purpose of his call, the caller did not respond and disconnected the call.
20. The Complainant asserts that upon checking his calls later on, he confirmed that the second call originated from the same number 020*****40.
21. The Complainant avers that he is distressed by the fact that the Respondent has access to his name and contact information and that they may also possess knowledge of his residence and other personal details.
22. The Complainant sought the following remedies from this Office:
 - i) Compensation from the Respondent for unlawfully processing the Complainant's data without his consent and causing him emotional distress.
 - ii) A fine be imposed against the Respondent company.

- iii) A permanent injunction restraining the Respondent, its agent and servants from unlawfully processing the Complainants data,
- iv) An order be issued compelling the Respondent to expunge all of the Complainants data from their system and furnish proof of such deletion.

23. The Complainant provided a screenshot of the call log in support his complaint.

ii. THE RESPONDENTS' RESPONSE

24. The Respondents were non-responsive and did not submit a response to the Notification of Complaint. Therefore, the allegations made in the Complaint remain undisputed.

F. ISSUES FOR DETERMINATION

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

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

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

26. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent ought to have informed the Complainant that his data would be processed as a guarantor. The Respondent failed to comply with Section 26(a) which requires informing the data subject of the intended purpose of data processing. The Respondent by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed.

27. From the foregoing, this Office finds that the Respondents violated the Complainant's right to be informed under Section 26(a) of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

28. In addressing this issue, the Office will address the following two fundamental questions –

- a. Did the Respondent establish a lawful basis for processing the Complainant's personal data?
- b. Did the Respondent fulfil its duty to notify?

Did the Respondent establish a lawful basis for processing the Complainant's personal data?

29. The Respondent violated key data protection principles under Section 25 (a) and (b) by not processing data in accordance with the right to privacy and unlawfully without transparency processing the Complainant's personal data for an unauthorized purpose, which is listing the Complainant as guarantor without his prior knowledge.

30. Section 25 (a) requires data controller and data processor to process data in accordance to right to privacy, the Complainant was identified as guarantor without being informed, exposing his personal data to unauthorized use additionally,

31. Section 25 (b) requires a data controller or data processor to ensure data is processed lawfully, fairly and in a transparent manner, in this instance the Respondent unlawfully processed the Complainant data in which it was used in relations to a third-party loan application, without any legal basis, prior approval nor his consent.

32. Section 30 of the Act stipulate 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. The Respondents processed the Complainant's personal data without obtaining consent from the Complainant. The Respondent failed to obtain valid consent as required under Section 32 of the Act, rendering the processing of the Complainant's data illegal.

33. The Respondent failed to establish any lawful basis for processing the Complainant's data as he had not consented to be a guarantor, making the whole processing unlawful.

34. The Office therefore finds that the Respondent did not establish a lawful basis for processing the Complainant's personal data.

Did the Respondent fulfil the duty to notify?

35. 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. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.
- vi. The data being collected pursuant to any law and whether such collection is voluntary or mandatory,

36. It is evident that, the Respondent failed to fulfil its obligation under Section 29 of the Act by, failing to inform the Complainant that his data is being processed to be used as an alternative contact as a guarantor for loan processing activity, the intended use of his personal data as an emergency contact, that the Complainant personal data would be used as guarantor for loan.

37. From the above, this Office finds that the Respondent did not fulfil its obligations provided for under the Act.

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

38. 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.
39. The Complainant prays for permanent injunction restraining the Respondents from ever unlawfully processing his data. The Office finds that a permanent injunction is not contemplated under Regulation 14(3) of the Enforcement Regulations hence the office does not have powers to grant the same.
40. The Complainant prays for Compensation from the Respondent for processing his data without his consent and causing him emotional distress.
41. With regards to the award of compensation, 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."* Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*
42. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
43. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondents either intentionally or negligently violated the Complainant's right to be informed and the unlawful processing of his personal data.
44. The Respondent is hereby found liable for processing the Complainant's personal data for without a lawful basis and for denying him an opportunity to exercise his right to be informed before processing of his personal data. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000/=)** as compensation.
45. The Complainant further prayed for an order be issued compelling the Respondent to expunge all of the Complainants data from their system and furnish proof of such deletion.

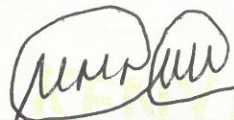
46. Having found that the Respondent failed to fulfill its obligations under the Act and attendant regulations, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations to compel the Respondent to erase all data relating to the Complainant and furnish proof of the same.
47. Consequently, the Respondent's unauthorized disclosure of the Complainant's personal data constitutes an offence under the Act.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for processing the Complainant's personal data without a lawful basis and listing him as a guarantor without his consent.
- ii. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings Two Hundred and Fifty thousand (KES. 250,000/=)** as compensation;
- iii. An **enforcement notice** to hereby be 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 21st day of February 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

