



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1910 OF 2024

MARGARET NZULACOMPLAINANT

-VERSUS-

UNITED WINNERS DT SACCO1ST RESPONDENT

SHIRIKA DT SACCO2ND RESPONDENT

DETERMINATION

Under 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. On 19th December 2024, the Complainant herein lodged a complaint against Respondents, alleging that the 1st Respondent, her former employer, unlawfully disclosed adverse information about her to the 2nd Respondent without her consent while she was on probation. As a result, she lost a job opportunity and was denied access to the said information.

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 19th December 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 19th December 2024 and referenced ODPC/CONF/1/5 /VOL II (377) and the notice to enjoin the 2nd Respondent Pursuant to Regulation 12 of the Enforcement Regulation was issued on 23rd December 2024 referenced ODPC/CONF/1/5 /VOL II (395). 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 Respondents were asked to provide this Office with the following: -
 - a. A response to the allegations made against it by the Complainant;

- b. A contact person who can provide further details as regards the complaint.
 - c. Provide any relevant materials or evidence in support of your response.
 - d. The Contractual agreement between yourselves and the Complainant
 - e. Whether the Complainant was notified of sharing of the reports third parties
 - f. Whether the Complainant consented to sharing of her personal data to third parties.
 - g. The lawful basis upon to deny the Complainant the right to access to the reports containing her personal data.
 - h. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any:
 - i. Demonstration (by way of a written statement) of your level of compliance with the requirements under the Act and the Regulations. In Particular representation of how data subject can exercise their rights in relation to data protection.
 - j. Any other relevant information it wishes the Office to consider.
8. The 1st Respondent, through its advocate, responded to the complaint by filing a Notice of Preliminary Objection and a Replying Affidavit. The 2nd Respondent submitted a response via a letter dated 16th January 2025.
9. This determination is therefore a result of analysis of the complaint as received, the response by the Respondents and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The complaint primarily concerns the alleged denial of access to prejudicial information conveyed by the 1st Respondent to the 2nd Respondent without the Complainant's consent, which allegedly resulted in the loss of a job opportunity.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant contends that she worked for the 1st Respondent (formerly Umoja Wendani Sacco) for 7 years (from January 2017 to October 2023).
12. She avers that during her tenure there was notable growth of the Sacco as evident in their financials for the 7 years.
13. The Complainant states that vide letters dated 22nd November 2023 and 23rd October 2023 she was given a very good recommendation upon her contract coming to an end 31st October 2023.
14. The Complainant purports that in January 2024 she got a job opportunity at with the 2nd Respondent as the Finance Manager on probation basis that was to last for six months.
15. Further, the Complainant alleges that upon the expiry of the six months she received another letter from the 2nd Respondent dated 18th January 2024 extending her probation period on allegation they wanted to do a background check by engaging her former employer the 1st Respondent.
16. The Complainant asserts that the 1st Respondent issued adverse information about her vide letters dated UWS/SHRK/01/2024 dated 11th July 2024 and Ref: UWS/SHRK/02/2024 dated 19th August 2024.
17. The Complainant contends that above referenced letters were issued to the 2nd Respondent without her consent which is against the Data Protection Act 2019, and the Respondent policy.
18. The Complainant states that she has tried to request the letters in vain in vide letters dated 25th October 2024 and reminder dated 19th November 2024.
19. The Complainant categorically states that's a result of the adverse information, she was not confirmed by 2nd Respondent as a finance manager as well as losing a job opportunity as a CEO at Utabibu Sacco and that she is apprehensive that she is in danger of potential loss of future job opportunities.
20. The Complainant prays for the following remedies.

- i. The Office to assist her access the two letters containing the adverse information.
- ii. Compensation for the two lost job opportunities.
- iii. Compensation for the distress suffered.
- iv. Compensation for sharing adverse information without (written) as per the Data Protection Act and the Sacco Policies.
- v. Compensation for the violation of her data protection rights.

21. The Complainant provided the following documents to support her complaint:

- i. Copy of the recommendation letter that she received from United Winners Sacco.
- ii. A letter dated 2nd September 2024 addressed to Shirika Sacco requesting for the adverse letters received from United Winners Sacco.
- iii. A letter dated 22nd October 2024 from Shirika Sacco in response to her request.
- iv. A letter dated 19th November 2024 to United Winners Sacco, reminding them of her request to access the two adverse letters that were issued to Shirika DT Sacco.

22. The 1st Respondent, through its advocate, responded to the notification of complaint by filing a Notice of Preliminary Objection and a Replying Affidavit. The 2nd Respondent submitted a response via a letter dated 16th January 2025.

ii. THE 1st RESPONDENT'S RESPONSE

23. In the response, the 1st Respondent avers that the Complainant worked for the 1st Respondent in various capacities in Kenya from 2017 until 31/10/2023 when her contract lapsed through effluxion of time and was not renewed. This fact is not denied and the Complainant has alluded to it in her Complaint and Letter dated 19/11/2024.

24. The 1st Respondent asserts that they deliberately chose not to renew the Complainant's contract due to suspicious activities but had no way of verifying the same until a proper audit was conducted to verify the suspicions and put the matter to rest.

25. Additionally, the 1st Respondent states that they are not privy to the Complainant's work history after she left employment with them and it is proper to reiterate that they managed to conduct an audit of the SACCO's transactions between 2018 to 2023 after her departure. The said audit revealed the Complainant's culpability and/or omissions that caused conclusions that were highlighted in the letters dated 11/7/2024 and 19/8/2024.
26. The 1st Respondent contends that they were requested by the Complainant's then employer, Shirika SACCO Ltd to provide a confidential reference, which they believe was in line with the Sacco Societies Regulatory Authority (SASRA), requirements to provide background references to new employees.
27. It is presumed that the Complainant provided the consent for the reference to be given in any circumstance they had indicated in her Recommendation Letter dated 22/11/2023 that any potential employers are free to request further clarification and/or information from the Respondent on a need-to know basis regarding finer details of the Complainant's employment history and competency.
28. The 1st Respondent also notes that, once the Complainant presented the Recommendation Letter to a potential employer, she consented to them releasing the information to the said potential employer upon request. Additionally, once contacted the Respondent had a legal obligation to act in good faith to the request. Consequently, a letter dated 11/7/2024 and another dated 19/8/2024 authored detailing the circumstances and employment records of the Claimant.
29. The contents of the two letters do not disclose any of the Complainant's personal data and as such the complaint is frivolous as will be indicated by a preliminary objection to the Data Commissioner's jurisdiction to handle any complaints regarding the said letter.
30. That any issues regarding confidential reference letters should be handled by the Employment and Labour Relations Court enacted under Section 12 of the Employment and Labour Relations Court Act No. 20 of 2011.

31. The 1st Respondent has not divulged or breached the Complainant's right to privacy and has only provided a confidential reference to a potential employer, a task that is well within the practice of the Employment Act, and the Sacco Societies Regulatory Authority (SASRA) Regulations together with the best practices of institutions within the financial services industry.
32. The 1st Respondent has not acted in any way contrary to the provisions of the Data Protection Act. No. 24 of 2019 and they do not know anything about the letter dated 19/8/2024 that is alleged to have been authored by us regarding the Complainant.
33. The Complainant has not shown, by evidence or otherwise, that the references given, meet the threshold for investigation by the Office of the Data Protection Commissioner and the claim is not only frivolous but bad in law and abuse of the law, and prayed the Complaint be dismissed in its entirety.
34. The 1st Respondent provided the following documents as evidence:
- i. A letter from Shirika requesting for an employment background check of the Complainant;
 - ii. Copies of the letters to Shirika dated 11th July 2024 and 19th August 2024
 - iii. **THE 2nd RESPONDENT'S RESPONSE**
35. The 2nd Respondent, through its advocate, submitted a Preliminary Objection and a Replying Affidavit, stating as follows:
36. The 2nd Respondent contends that the complaint Submission Form erroneously names United Winners Sacco as the Respondent, not Shirika DT Sacco Society Limited. The Respondent purports that no complaint has been properly lodged against them in this matter.
37. The 2nd Respondent depones that the Complainant was their former employee whose probationary engagement was not confirmed.
38. The Respondent contends that they have not released or disclosed the Complainant's personal data to any third party.

39. The 2nd Respondent purports that as a financial institution regulated by the Sacco Societies Regulatory Authority (SASRA), they are required to conduct background checks on prospective employees.
40. The 2nd Respondent asserts that the Complainant was retained on probation, having signed an appointment Letter which specified that positive reference letters from previous employers would be required for confirmation.
41. The 2nd Respondent contends that they had tacit consent from the Complainant to seek confidential reference letters, as clearly stated in the Sacco's Terms and Conditions of Service, section 7.4.5, which is available to all employees upon appointment.
42. The 2nd Respondent admits having contacted the Complainant's previous employer to seek a confidential reference, thereby accessing information about the Complainant.
43. The 2nd Respondent depones that the lawful basis for this access is: a) The Complainant's tacit consent, as an employee on probation fully aware that confirmation was subject to receipt of positive reference letters b) Necessity for deciding whether to confirm the employment contract c) Regulatory obligation under SASRA to conduct background checks d) Protection of the interests of other data subjects - members of the public who deposit money with the Sacco in a fiduciary relationship.
44. The 2nd Respondent contends that confidential reference letters are sought in confidence and maintains that no complaint has been made against them regarding denial of access to the Complainant.

F. ISSUES FOR DETERMINATION

45. It is not in contention that the 2nd Respondent conducted a background check and as a result sought for information from the 2nd Respondent which it provided. The issue for determination is whether the 1st Respondent unlawfully disclosed adverse information about the Complainant to the 2nd Respondent without her consent during her probation, leading to the loss of a job opportunity and denial of access to the said information.

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46. 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.
 - ii. 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

47. Section 26(b) of the Act read together with regulation 9 of the (Data Protection General regulations), 2021 provides for the right to access personal data in custody of a data controller or data processor. Regulation (9) (1) clearly states that *"A data subject has a right to obtain from the data controller or data processor confirmation as to whether or not personal data concerning them is being processed, and, where that is the case, access to the personal data and the information as to among others*
- (a) the purposes of the processing;*
 - (b) the categories of personal data concerned;*
 - (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, including recipients in other countries or territories";*
48. The Complainant exercised her right by requesting for the information relating to her personal data shared between the 1st Respondents vide letters dated 25th October 2024 and a reminder of the same on 19th November 2024.
49. Subsequently regulation Regulation 9(4) of the Data Protection (General) Regulations 2021, stipulates that "A data controller or a data processor shall comply with a request by a data subject to access their personal data within seven days of the of the request. The 1st Respondents did not furnish the Complainant with the background check reports within the prescribed timeline.
50. On the other hand, the Office finds that the 2nd Respondent had consent from the Complainant to seek confidential reference letters, as clearly stated in the Sacco's Terms and Conditions of Service, section 7.4.5, which is available to all employees upon appointment including the Complainant.

51. Moreover, the 2nd Respondent being a financial institution regulated by the Sacco Societies Regulatory Authority (SASRA), is are required to conduct background checks on prospective employees thereby establishing the legal basis of processing personal data.

52. From the foregoing, this Office finds that the Complainant's right to access her personal data under Section 26(b) of the Act was violated by the 1st Respondent.

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

53. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the Complainant is entitled. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

54. The Complainant requested this Office for the following remedies:

- i. The Office to assist her access the two letters containing the adverse information.
- ii. Compensation for the two lost job opportunities.
- iii. Compensation for the distress suffered.
- iv. Compensation for sharing adverse information without consent as per the Data Protection Act and the Sacco Policies.
- v. Compensation for the violation of her data protection rights.

55. The Office determines that Act does not expressly provide for compensation for economic losses such as lost job opportunities. Compensation under Section 65 is primarily limited to violations of data protection rights, unlawful processing of personal data rather than employment-related claims. Any claim for economic loss resulting from adverse employment decisions would typically fall under employment law, and the appropriate forum for redress would be the Employment and Labour Relations Court (ELRC).

56. Notably the Complainant prays for compensation for the sharing information without written consent. The Office finds that the processing of the Complainants data was for a legitimate purpose hence the Office can not issue compensation on the same.

57. The Complainant prays for compensation for distress suffered and compensation of violation of Rights. The Office finds that Section 65 of the Act provides 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. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

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

59. In considering whether to issue compensation, this Office takes into consideration the fact that the Complainant's right under Section 26 (b) were infringed upon by the 1st Respondent. The 1st Respondent denied the Complainant access to her personal data.

60. In this context, the 1st Respondent is hereby ordered to pay the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000)** for the infringement of her rights under the Act.

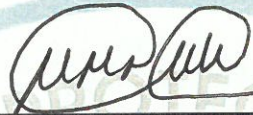
G. FINAL DETERMINATION

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

- i. The 1st Respondent is hereby found liable for infringement of the Complainant's rights right to access under Section 26(b) of the Act.
- ii. The 1st Respondent is hereby directed to send to the Complainant the requested letters referenced **UWS/SHRK/01/2024** dated 11th July 2024 and **UWS/SHRK/02/2024** dated 19th August 2024 within **14 (Fourteen)** days from the date hereof and notify this Office of the same.
- iii. In the event of failure to adhere to **(ii)** above, an Enforcement Notice to issue against the 1st Respondent.
- iv. The 1st Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** as compensation.

- v. The Complaint against the 2nd Respondent is dismissed.
- vi. 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 March . 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

